IN THE HIGH COURT OF BOTSWANA HELD AT GABORONE

MAHLB-000836-10

In the matter between:

Edith M Mmusi	**1st Applicant**
Bakhani Moima	**2nd Applicant**
Jane Lekoko	**3rd Applicant**
Mercy K. Ntshekisang	**4th Applicant**

and

Molefi S. Ramantele	**1stRespondent**
The Presiding Officer	
Customary Court of Appeal	**2nd Respondent**
(herein represented by the Attorney General of Botswana)	

Mr. T Rantao (with Ms K. Kewagamang and Ms N. Mupfuti) – for the Applicants
Mr. T Tafila – for the 1st Respondent

J U D G M E N T

DINGAKE J:

Introduction

1. The question that falls for determination in this matter is whether the Ngwaketse Customary law, to the extent that it denies the applicants the right to inherit the family residence intestate, solely on the basis of their sex,

violates their constitutional right to equality under Section 3(a) of the Constitution of Botswana.

2. It is a question of grave constitutional importance, which I approach with trepidation, extreme care and sensitivity.

3. It is common cause that the applicants no longer contend that the Ngwaketse Customary law ought to be invalidated on the basis that it violates Section 15 of the Constitution of Botswana.

4. The matter comes before me by way of a stated case in terms of Order 35 Rule 1 of the rules of this Court. The parties pray the court to give its opinion on the questions captured in the stated case notice filed with this Court on the 23rd of March, 2012.

5. Although the notice referred to above raised about three (3) questions for determination, essentially what the applicants seek is an order that the customary law of inheritance which permits only males to succeed in intestate succession violates Section 3 (a) of the Constitution of Botswana, more specifically that the practice/customary law rule violates women's rights to equal protection under the above mentioned section.

6. At this juncture, a brief synopsis of the facts that underpin this *lis* would be

in order.

Factual Background

7. On or about the 15th May 2007, the lower Customary Court, heard and determined, in favour of the 1st respondent, a dispute concerning the inheritance of the estate of the parents of the applicants. At this stage, the dispute was between the 1st applicant and the 1st respondent.

8. The 1st applicant was ordered to vacate the home in issue within thirty days of the Order. She appealed to Kgosi Lotlaamoreng's court which, on the 4th November, 2008, ordered that the elders convene a meeting with all concerned parties and identify the one child who will take care of the home.

9. The judgment of Kgosi-kgolo Lotlaamoreng was overturned by the Customary Court of Appeal on the basis that, in Sengwaketse culture and traditions, "*if the inheritance is distributed, the family home is given to the last born child*".

10. It is clear from reading the record of the Customary Court of Appeal that the Court took the view that in terms of the Sengwaketse culture, (customary law of inheritance) the family residence is inherited by the last born son.

11. In consequence of the above position, the 1st applicant was ordered to vacate

the family home within three months of the Order and same was granted to the 1st respondent.

12. The applicants then launched the current application wherein they argued that the said rule of Customary Law is unconstitutional on the basis that it violates the right to equal protection of the law or equality in terms of Section 3(a) of the Constitution of Botswana.

13. The above facts are common cause.

Primogeniture

14. In my mind, the issue is not whether the principle of primogeniture, as applied in Ngwaketse Customary Law of inheritance, offends against Section 3(a) of the Constitution. As Mr. Tafila, learned Counsel for the 1st respondent correctly submitted, male primogeniture refers to the common law right of the first born son to inherit the family's estate. This rule is traceable to the feudal system of Medieval Europe.

15. In terms of the principle of primogeniture, the eldest male son inherits all the assets of the deceased to the exclusion of all his siblings, irrespective of gender or sex. Under this rule, females are totally excluded from inheriting. If there are no male descendants or male relatives of the deceased, his estate

is inherited by the Paramount Chief of the Family's tribe. In cases of married persons, the wife is prohibited from inheriting from the husband. **(See Joubert, et al, The Law of South Africa, Volume 32 at page 148)**

16. It seems to me that whilst there is some similarity between the impugned customary rule and the common law right of primogeniture, the two rules do not necessarily mean the same thing, although their effect is the same in that both exclude women from inheriting.

17. In order to appreciate the arguments of the parties herein, it is necessary to outline their submissions briefly.

The applicants' submissions

18. Mr. Rantao, learned counsel for the applicants, contends that the Customary Court of Appeal judgment, wherein it applied the Ngwaketse Customary law, as indicated above, to the extent that it denies applicants the right to inherit intestate, solely on the basis of the applicants' sex, violates their constitutional right to equality under Section 3(a) of the Constitution of Botswana.

19. The applicants' counsel contends that Section 3(a) provides for the right to equal protection and treatment under the law. He argues that Section 3(a) is a substantive section, conferring rights on the individual.

20. In support of the above submission, the applicants rely on the case of **Attorney General v. Dow 1992 BLR 119**, (hereinafter referred as the **Dow** case) where the Court of Appeal stated that Section 3 (a) conferred the right to equal protection of the law on individuals, likening the language with the 14th Amendment of the United States Constitution, which forbids the state to "deny to any person within its jurisdiction the equal protection of the laws."

21. Mr. Rantao also relies on the case of **Kamanakao I v. Attorney General 2001 (2) BLR 54** where the court held that Section 3 (a) mandated that laws must treat all people equally.

22. The applicants concede that international law, though not binding, is persuasive and can offer useful guidance on the nature and scope of existing constitutional rights. To this extent, the applicants place some reliance on a number of International legal instruments, declarations and reports. In particular, they place reliance on the African Charter on Human and Peoples Rights and International Covenant on Civil and Political Rights (ICCPR). Both instruments have been ratified by Botswana; the African Charter on Human and People Rights in 1986 and the ICCPR in 2000.

23. Mr. Rantao submits that the Human Rights Committee ("HRC"), tasked with monitoring country compliance with the ICCPR and with elaborating on the rights enshrined in the ICCPR, has interpreted the right to equal protection

as not only providing for equality before the law and equal protection, but also a guarantee *"to all persons equal and effective protection against discrimination on any of the enumerated grounds,"* including sex.

24. The applicants argue that the effect of the Ngwaketse Customary law on inheritance of the family residence, as articulated and applied by the Customary Court of Appeal, is that women regardless of where they are in the birth order, would be denied intestate inheritance as opposed to their brothers.

25. According to Mr. Rantao, the rights and freedoms enshrined in Section 3 (a) are subject to two limitations: where the rights and freedoms at issue prejudice the rights and freedoms of others and on the grounds of public interest. He argues that holding that women are equally entitled to inherit serves to broaden the rights of others, and cannot be said to be prejudicial to anybody and against public interest.

26. The applicants' point out that the Botswana government has expressed its concern that unequal inheritance rights often leave women vulnerable financially. To this extent, they refer to a report to the **Committee on the Elimination of All Forms of Discrimination Against Women**, wherein the Botswana Government is recorded as having stated: "*In the traditional setup women have limited inheritance rights as evidenced by the application of*

Customary Law....Daughters generally have no rights to inherit....In this regard the law tends to treat men and women differently. It is more pronounced in circumstances of un-married women living in their parent's homestead. Upon the death of their parents unmarried women are likely to be evicted by the heir." **(See Reports submitted by States parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women, Combined Initial, Second and Third Periodic Reports of States Parties (Botswana) CEDAW/CBOT3 (20 October 2008).**

27. The above constitutes in summary form the submissions of the applicants.

The first respondent's submissions

28. Mr. Tafila, learned counsel for the 1st respondent, kicked off his submission with a caution, which in my view, is quite appropriate. He submitted that the right to equality is the most difficult right, a right that often promises more than it can deliver and tends to trouble the boundary between the judiciary, the legislature and the executive.

29. Mr. Tafila argued that even though Constitutions of different jurisdictions provide for the right to equality in phrases that are similar, importing the interpretation of this right as applied in those jurisdictions, without any

modifications, would result in according such a right a distorted meaning, totally removed from the circumstances obtaining in Botswana.

30. The 1st respondent argues that the meaning of equality in any jurisdiction is influenced by historical, socio-political and legal conditions of the society concerned.

31. Mr. Tafila, learned counsel for the 1st respondent, suggested that although gender inequalities are still visible in our society, this court must be slow to upset entrenched custom as the one under consideration.

32. According to the 1st respondent, the legislature has put women's right to inheritance in respect to the distributable part of the deceased's estate almost on par with that of men. The 1st respondent argues that where there are inequalities, these are justifiable, adding that a differentiation between individuals does not automatically mean that Section 3(a) has been violated because that differentiation might be justifiable as provided for under the Constitution.

33. The 1st respondent submitted that in terms of Ngwaketse culture and traditions, the family home is inherited by the last born male child of the deceased. The rest of the inheritance is distributed among his siblings.

34. Mr. Tafila sought to persuade the court that the Customary Court of Appeal did not apply the principle of male primogeniture in awarding the family home to the last born descendant of the deceased, but applied Ngwaketse Customary Law, which applies different principles from those applied under the principle of male primogeniture in the context of customary law of inheritance.

35. With respect to the main question whether the content and the application of the customary law of inheritance violates provisions of Section 3 (a) of the Botswana Constitution, Mr. Tafila argued that although the applicants have abandoned the argument that Ngwaketse Customary law of inheritance is discriminatory, having regard to Section 15 of the Constitution, it is important to highlight the connection between Section 3 and 15 of the Constitution.

36. He argued that any differentiation between individuals on the grounds stated in Section 15 of the Constitution amounts to discrimination and should be dealt with as such under the same section.

37. Mr. Tafila argued that in terms of Ngwaketse culture and traditions, the family home does not form part of the distributable estate but is specifically reserved for inheritance by the last born male unless where otherwise the deceased did not leave any male issue, in which case the family home shall form part of the distributable estate.

38. Everything else being said, Mr. Tafila had a concession to make. He conceded that on the face of it, the family home inheritance, in terms of Ngwaketse Customary law, is based on gender and position of birth and amounts to differentiation. It was Mr. Tafila's contention that the differentiation was justifiable.

39. Mr. Tafila further argued that the family home is inherited by the last born male, but in terms of custom, it is still available for use by the other siblings for hosting certain functions, such as family gathering, weddings and funerals.

40. According to the 1st respondent, it is in the public interest that members of the family should at all times, irrespective of their gender, have a place where they can host public events of importance such as funerals and weddings.

41. Having regard to the above, the 1st respondent submitted that the rights of inheritance of the last born male are less favourable than those of the other siblings, bearing in mind that the property that he is entitled to inherit comes attached with a condition that such property should be used in certain circumstances by any one of his siblings.

42. Mr. Tafila concluded his address to the court by praying that the court should confirm the decision of the Customary Court of Appeal as correct and that it does not in any way violate the Constitution.

The second's respondent submissions

43. The learned Attorney General submitted very brief heads of arguments. She made it clear that she shall refer to the Ngwaketse Customary law sought to be impugned as primogeniture for the sake of convenience, since the practice, although similar to primogeniture, is not the same, and that primogeniture gives the first born son the family's real estate.

44. Essentially, the learned Attorney General contends that protection of the rights contained in Section 3 (a) of the Constitution are subject to the limitations contained in Section 3, viz that the enjoyment of such rights should not prejudice the rights and freedoms of others or the public interest.

45. According to the learned Attorney General, public interest therefore always has to be a factor of consideration of legislation, particularly where such legislation reflected a public concern. In making a decision, so the argument went, parliament must inevitably take a moral position in tune with what it perceived to be the public mood.

46. It was the 2nd respondent's contention that Botswana being a "culturally inclined nation", the time has not come, to cosign the impugned Ngwaketse Customary law to the dustbin of history.

47. The Attorney General cited the case of **Kanane v The State 2003 (2) BLR 67 CA** to persuade the court that the time may not have arrived to abolish the Ngwaketse Customary law of inheritance where the family residence is given to the last born son.

48. In the case of **Kanane,** the court held that there was no evidence that the approach and attitude of society in Botswana to the question of homosexuality and to homosexual practice by gay men and women required a decriminalization of those practices, even to the extent of consensual acts by adult males in private.

49. In the above case, the appellant sought to have the charge of committing indecent practices with another male contrary to Section 167, as read with Section 33 of the Penal Code (Cap 08:01) and alternatively with committing an unnatural offence contrary to Section 164 (c) of the Penal Code declared ultra-vires Section 3 of the Constitution.

50. The 2nd respondent contended that although the Constitution of Botswana contains a provision on non-discrimination, under clause 15 (4) (c) the prohibition does not apply to: "*adoption, marriage, divorce, burial, devolution*

of property on death or other matters of personal law". It was therefore submitted that the customary law sought to be impugned, being part of personal law, enjoys the protection captured under Section 15 (4) (c) and (d).

51. The Attorney General contended that the Constitution of the Republic of Botswana as it stands today is not the same as it was a decade ago at the time of the **Dow** case; that it has undergone amendments, some noteworthy, such as the inclusion of the word **"sex"** in Section 15 (3).

52. It was the submission of the Attorney General that for one to allege an act of discrimination, the proper Section to move the Court is Section 15, which is more specific, and not Section 3. It was argued that since the word "sex" now appears in both Section 3 and Section 15 (3), the court is duty bound to apply the exceptions captured under Section 15 (4) (c) and (d).

53. It was the 2nd respondent's position that as much as one might appreciate the fact that international law is against any form of discrimination, it is not always the case that such a position will be adopted by every state that has ratified the treaty or convention embodying such.

54. It was further argued, by the learned Attorney General, that before a Convention, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEAFDAW), can be legally binding in a particular state, there are two systems to be looked at and one of the two is

to be applied to a state depending on the system in place. Those two systems are monism and dualism. It was argued that in a dualist state such as Botswana, international law is not directly applicable domestically.

55. The 2nd respondent argued that international law as such can confer no rights cognizable in the municipal courts, because it is only when the rules of international law are recognized as included in the rules of municipal law that they are allowed in municipal courts to give rights and obligations.

56. Relying on the case of **Good v The Attorney General 2003 (2) BLR 67 CA**, the Attorney General argued that international treaties to which Botswana is a signatory do not have the force of law until incorporated in the domestic law, and further that according to Section 24 (1) of the Interpretation Act (Cap 01:04) such international conventions and treaties, as far as they have not been incorporated into domestic law, may be used as an aid to construction of the Constitution and of Statutes.

57. Lastly, it was the position of the Attorney General that 91% of the population of Botswana, being the descendants of Tswana and Kalanga speaking tribes that practice Tswana and Kalanga culture, for which the rule sought to be impugned is a part, it would be absurd to expect our courts to shy away from recognizing such practices.

58. Having summarized the submissions of the parties, and in order to make it easy to understand the legal reasoning that informs this judgment, I intend to start with the theoretical and conceptual framework that underpins this judgment.

59. The theoretical and conceptual framework shall be followed by a restatement of the principles to be taken into account in interpreting a Constitution. The discussion on the principles governing the interpretation of the Constitution will be followed by a consideration of the legal framework. Under the framework, I will discuss the definition of customary law and deal with various provisions of the Constitution which the rule sought to be impugned can be read against.

60. A comparative analysis of how other countries have dealt with the same issue will also be made, and reference shall also be made to international legal instruments which Botswana has signed and or ratified.

61. In my considered opinion, gone are the days, if ever they were, when decisions of other countries in any common law countries are to be frowned upon as irrelevant. It is of course trite that the decisions of those courts are only persuasive, given that they may have been rendered under circumstances then prevailing in those countries. Those decisions may give the most needed guidance and the wisdom to be derived from them must always be understood in the proper context.

Theoretical and Conceptual Framework – Interrogating the concept of equality

62. The theoretical premise upon which this judgment is anchored recognises that equality is better understood and applied not in the abstract, but in its proper context. It recognises, in the words of the renowned American Judge, Oliver Wendell Holmes, that general prepositions of law do not solve concrete cases (**Lochner v New York 198 US 45, 76 (1905) (Holmes J dissenting)**) The theoretical premise further recognises that human wrongs are the source of human rights and that inequalities in a particular society, rather than in an imagined society, are the appropriate foundation of a better understanding of equality provisions in national Constitutions.

63. Equality is one of the philosophical foundations of human rights and it is intimately connected to the concept of justice. The concept may be as expansive as the Kalahari desert, but at its core, it speaks the language of the Universal Declaration of Human Rights (UDHR) of 1948, which stipulates that: "All are equal before the law and are entitled without any discrimination to equal protection of the law." Students of constitutional law would affirm that, in the context of Botswana, the UDHR and European Convention of Human Rights that was signed in 1950 inspired Chapter 2 (Bill of Rights) of the Constitution of Botswana. The concept of non-discrimination is closely linked to equality but is best viewed as a means to

achieve equality (See **J Cooper "Applying equality and non-discrimination rights through the Human Rights Act, in G Moon (ed) Race discrimination: Development and using a new legal framework (2000) 39**)

64. Equality is a problematic concept ridden with controversy. At its core, it communicates the idea that people who are similarly situated in relevant ways should be treated similarly.

65. A distinction must be drawn between formal and substantive equality. Formal equality simply means sameness of treatment. It asserts that the law must treat individuals in like circumstances alike. Substantive equality on the other hand requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal.

66. Simply put, formal equality requires that all persons are equal bearers of rights. Formal equality does not take actual social and economic disparities between groups and individuals into account. Substantive equality requires an examination of the actual social and economic conditions of individuals in order to determine whether the right to equality has been violated.

67. The above distinction, especially the emphasis on substantive equality, requires a thorough understanding of the impact of the discriminatory

action upon a particular category of people concerned, in order to determine whether its overall impact is one which furthers the constitutional goal of equality or not. It follows therefore that a classification which is unfair in one context may not necessarily be unfair in a different context.

68. It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.

69. The jurisprudence on discrimination suggests that law or conduct which promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose.

70. The rationality requirement is intended to prevent arbitrary differentiation. The authorities on equality suggest that the right to equality does not prohibit discrimination but unfair discrimination. The question that often arises is what makes the discrimination unfair.

71. The determining factor is the impact of the discrimination on its victims. Unfair discrimination principally means treating people differently in a way which impairs their fundamental dignity as human beings. The value of dignity is thus of critical importance to understanding unfair discrimination.

Unfair discrimination is differential treatment that is demeaning. This happens when law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.

72. The principle of equality attempts to make sure that no member of society should be made to feel that they are not deserving of equal concern, respect and consideration and that the law is likely to be used against them more harshly than others who belong to other groups.

73. I turn now to principles governing constitutional interpretations.

Principles governing the interpretation of the Constitution

74. There are in theory several models of constitutional interpretation, namely doctrinal (based on judicial precedents), textual (based on the provisions of the Constitution), prudential (based on cost-benefit analysis). Depending on the models used, interpretation may result in the expansion or contraction of the meaning of constitutional provisions.

75. It is trite law that in interpreting the constitutional guarantees of human rights and freedoms, the court must adopt a generous approach to constitutional construction. **(See Petrus v. The State 1984 BLR 14)**

76. In the course of his judgment in the above case, Aguda J. A in dealing with the approach of courts to constitutional construction, relied on the case of **Attorney General for New South Wales v. Brewery Employees Union of New South Wales** *(1908)* 6 C.L.R 469 at pp.661-612 and **Rafiu Rabiu v. The State** (1981) 2 N.C.L.R. 293 at p.326 where the court observed that:

> *"[The Constitution is] 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..,"*

77. In the case of **Smith v. Attorney General, Bophuthatswana** 1984 (1) S.A 196 at p. 199H Hiemstra C.J said:

> *"The bill of Right is a declaration of values and a statement of the nation's concept of the society it hopes to achieve. It is the duty of the Court to make it identifiable as such."*

78. In the case of **James v. Commonwealth of Australia** [1936] A.C. 578 Lord Wright stated at p.614 that:

> *"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 illustrates and illuminate the full import of that meaning..."*

79. The Constitution is not an inert and stagnant document; it has its own inner dynamism that the Judges must connect to without waivering.

80. In the leading Namibian case of **Ex-Parte Attorney General: In re Corporal Punishment by Organs of State 1991 NR 189,** Mahomed AJA stated the principles of constitutional interpretation as follows: *"The questions as to whether (a certain act) can properly be said to (violate the Constitution) is however a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution and further having regard to the emerging consensus of values in the civilised international community which Namibians share."*

81. It is also well established that in interpreting a Constitution, the courts would prefer and adopt an interpretation that gives effect to the values of the Constitution than to an interpretation that does not.

82. The above principle was stated quite admirably by Ngcobo J in the case of **Matatiele Municipality and Others v President of South Africa and Others 2007 (6) SA 477 (CC)** as follows at page 488:

"The process of constitutional interpretation must therefore be context-sensitive. In construing the provisions of the Constitution it is not sufficient to focus only on the ordinary or textual meaning of the phrase. The proper approach to constitutional interpretation involves a combination of textual approach and structural approach. Any construction of a provision in a constitution must be consistent with the structure or scheme of the Constitution."

83. The value-oriented and generous interpretation model is frequently employed by our courts and has become the norm. The justices of this court view the Constitution as "the mirror reflecting the national soul". The justices of this court have shunned the apologetic value-oriented model that derives its substance from the moral choices of the majority or the public mood/opinion.

84. In the case of **Dow**, Aguda J.A. stated that: *"the courts must continue to breathe life into [the Constitution] from time to time as the occasion may arise to ensure the healthy growth and development of the State through it ... We must not shy away from the 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 later age...To hold otherwise would be to stultify the living Constitution in its growth."*

85. I turn now to the legal framework.

(a) **Statutory Definition of Customary Law**

86. In terms of the Customary Law Act CAP 16: 01, customary law "*means, in relation to any particular tribe or tribal community, the customary law of that tribe or community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice.*"

87. It is clear from the above definition that, the Customary Act preserves customary law that is not repugnant to the written law, morality, humanity or natural justice. My research did not unearth any judicial guidance over the meaning of "morality" and "humanity". On the contrary there are countless authorities that state that natural justice is broadly understood as basic fairness.

88. From the above definition, the question that arises is whether in light of the definition of customary law above; the rule sought to be impugned, which permits only male last born to inherit intestate, to the exclusion of female siblings is compatible with provisions of written law; specifically the Constitution of Botswana, and moreover, principles of morality, humanity and natural justice. I will answer this question in due course.

89. Having considered the definition of customary law, it seems logical to consider the provisions of Section 3 of the Constitution.

(b) **Understanding Section 3 of the Constitution**

90. Section 3 of the Constitution of Botswana provides as follows:

> *"Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, 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 or her 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, 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.*

91. In its literal reading, Section 3 of the Constitution guarantees every person in Botswana fundamental rights and freedoms without distinction as to their race, place of origin, political opinions, colour, creed or sex.

92. Two landmark decisions by the Court of Appeal are of some relevance in understanding the full import of Section 3 of the Constitution. These are the cases of **Attorney General v. Dow 1992 BLR 119** and **The Student's Representative Council of Molepolole College of Education v. Attorney General 1995 BLR 178.** For completeness, I state the facts of the aforesaid stated cases below:

Attorney General v Dow 1992 BLR 119

93. The respondent was a citizen of Botswana. In 1984 she married an American who had been resident in Botswana for a decade or more. At the time of their marriage, the couple had a daughter who was four and a half years old, having been born in November 1979. After the marriage the couple had two more children, one in March 1985 and another in November 1987.

94. In terms of the law that prevailed at the time, when the eldest child was born, the child, even though her father was an alien, became a Motswana. But in March 1984 the law changed and, in terms of Section 4 of the Citizenship Act of 1984 ('the Act'), the two younger children, born in wedlock, were aliens. Section 4 of the Citizenship Act provided that a 'person born in Botswana shall be a citizen of Botswana by birth and decent if, at the time of his birth, his father was a citizen of Botswana'. Although the respondent's husband had been a resident in Botswana for some 15 years at that stage, he was not a citizen of Botswana. The effect was that the two younger children were precluded from the benefits of Botswana citizenship such as residential security, freedom of movement in and out of the country. The upshot of this was that these two children were only able to remain in the country as residents on their father's residence permit, which had to be renewed every two years. What this further meant was that if the

father were to leave the country, they would also have to leave; if the whole family left the country to visit the United States, for instance, the two younger children could not return with their mother on her own. These legal consequences had the effect of inhibiting the respondent's freedom of movement.

95. In terms of Section 15 of the Constitution of Botswana, it was not permissible to discriminate on the grounds listed therein such as race, place of origin, political opinions, colour or creed. The word sex was not included then.

96. The High Court upheld the respondent complaint, and declared both Section 4 and 5 of the Citizenship Act *ultra-vires* the Constitution. In the course of his judgment, Horwitz J stated that:

> *"I do not think that I would be losing sight of my functions or exceeding them sitting as a judge in the High Court, if I say that the time that women were treated as chattels or were there to obey the whims and wishes of males is long past and it would be offensive to modern thinking and the spirit of the Constitution to find that the Constitution was framed deliberately to permit discrimination on the grounds of sex." (**Dow v Attorney General 1991, BLR 233, p244, para H-A**)*

97. The appellant was aggrieved by the decision of the High Court and lodged an appeal with the Court of Appeal.

98. The Court of Appeal rejected the argument of the Attorney General that the framers of the Constitution deliberately left the word 'sex' in Section 15 in

order to accommodate the patrilineal structure of Botswana society. On the question of the patrilineal nature of Botswana society, the court held that custom and tradition are never static; they have always yielded to express legislation and the pre-eminence of the Constitution.

Student's Representative Council of Molepolole College of Education v. The Attorney General 1995 BLR 178

99. On the 8th of October, 1993 the Student Representative Council of Molepolole College of Education made an application to the High Court for an order declaring regulation 6 (and the sub-regulations thereunder) of Molepolole College of Education Regulations, ultra-vires Section 3 of the Constitution of Botswana by reason of their discriminatory effect against female students.

100. The alleged offensive provisions in the college provisions bears quoting in full: *"Any student whose conception date is confirmed to have occurred between December and April will leave college immediately and will re-join the college in the next academic year. A person who becomes pregnant for the second time whilst at college and is likely to break the continuity of her studies for the second time will be required to withdraw permanently..."*

101. It was the appellant's case that the college regulations were discriminatory in that, on the ground sex, students were treated differently and that such

discrimination was not justifiable in a democratic society. This discrimination was magnified by the fact that male students who were responsible for the same conduct were not visited with the same punishment.

102. The Attorney General defended the constitutionality of the regulations. It was argued that the regulations were not discriminatory in that they were formulated for reasons of health and the well-being of the mother and the baby. Consequently, it was further argued that the regulations were reasonably justifiable in a democratic society. It was denied that the regulations were designed to punish female students, because in addition to reasons advanced above, the regulations were meant to afford an expectant mother as well as the child planned maternity leave.

103. The Court of Appeal held that Regulation 6 of the Molepolole College of Education was discriminatory and therefore offended against the provisions of the Constitution. The regulations were declared null and void and of no force and effect. The Court reiterated what it said in the case of **Dow** when it held that the framers of the Constitution could not have intended that women must be treated differently from men and that had they so intended they could have said so in clear and unambiguous terms.

104. At the theoretical plane, it is quite clear that the effect of the aforesaid regulations was to perpetuate male domination in society, by throwing out of

the educational system female students, while their male colleagues, guilty of the same conduct were left to advance their education.

105. The Court of Appeal in the **Attorney-General v. Dow** cited supra, (per Amissah J.P.) said at p. 135 H, in relation to Section 3 that:

> *"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."*

106. This view was echoed in **Kamanakao I and Others v AG and Another (2002(1) BLR 110 (HC)** where the High Court stated "....*the rights declared in section 3 of the Constitution inhere in every person in Botswana without exception or discrimination*".

107. In the case **Muzila v. The Attorney General (2003 (1) BLR 471 at 478)** Marumo J (as he was then) in reference to the above quotation by Amissah J.P stated that "...*these words, emanating as they do from the highest court in this land, establish conclusively that unequal treatment by the law is a species of discrimination.*" The learned judge continued to say:

> *"In my view therefore, the principle of non-discrimination by the law, which can also be expressed as the principle of equality before the law, or, regard being had to the ipsissima verba of s 3 of the Constitution, as 'the protection of the law', requires inter alia that all persons, regardless of*

their social and economic rankings, or personal antecedents, or their prominence or obscurity in society are entitled to be treated no better nor worse than any other, unless there be an ascertainable valid and legitimate reason for differential treatment. (at p.479)

108. And at p. 480-481, the Judge, after reviewing persuasive authorities from United Kingdom and South Africa, says:

"The clear message emerging from the authorities, both local and from elsewhere, is that mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason is a most reprehensible phenomenon. It is founded on the morally depraved and thoroughly repugnant notion that some within a society are of superior standing and are deserving of a privileged status reserved only for themselves and a few others. It is a standpoint at direct odds with the establishment and promotion of an egalitarian society in which all are secure and content in the knowledge that both the law and the exercise of public authority recognize them as human beings equally deserving of respect, regard and consideration. History teaches us that the most callous and brutal of human excesses, the most immoral and degenerate of legal orders and the most wicked and dissolute of authorities have been founded on various versions of the notion of superiority and distinction on the part of those in a position to influence the course of events. Such debauched attitudes must never be permitted to take root in our society, and those of us who find ourselves in a position to influence, in whatever small way, public discourse and opinion must be firm and unapologetic in our denunciation of them and their adherents."

109. In **Good v. The Attorney General (2) 2005(2) BLR 337 at 365**, Lord Coulsfield JA, defined the right to protection of the law as:

"Protection of the law' means at least, that any penalty or disadvantage inflicted on a person in Botswana by any organ of the state must be in accordance with or capable of being justified in terms of the domestic laws of Botswana."

110. Further, in a recent ruling by Lesetedi J (as he then was) in **Tidimalo Jokase v Gaelebale Mpho Seakgosing (MAHLB-000661-10)**, the learned judge said at para 10 that a customary rule that completely disregards this right of equality and equal protection of the law runs foul of this protection under Section 3 (a) as it gives a male child favourable treatment on inheritance by virtue of his sex.

111. In light of these authorities, it seems clear that the right to the protection of the law contained in Section 3 of the Constitution, leads to the principle that all laws must treat all people equally save as may legitimately be excepted by the Constitution. Consequently, the conclusion seems inescapable that to the extent that the rule sought to be impugned denies the rights of females to inherit intestate solely on the basis of their sex, violates their constitutional right to equality (protection of the law) under Section 3.

112. The authorities referred to above are clear that **Section 3** of the Constitution is a stand-alone substantive provision from Section 15.

113. In **Dow**, the Court of Appeal said:

> *"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 II 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 II itself, which is constituted by section 3 of the Constitution." ***(At p.133)***

114. It is trite law that the domestic law must be interpreted in a manner that does not conflict with the international obligations of Botswana.

115. In the **Dow** case, Amissah JP, who delivered the main judgment, said at p 154E;

> *"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 ..."*

Case Law in Comparative Jurisdictions

116. I turn now to consider how disputes similar to the present have been dealt with in other countries. The value of comparative law is that it can offer much richer range of model solutions. This is so because the different systems of the world can offer greater variety of solutions than can be thought up in a life time by even the most erudite of jurists. Comparative law makes it unnecessary to attempt to reinvent the wheel of justice over and over again.

Ghana

117. The 1992 Constitution of Ghana recognises Customary law as part of the laws of Ghana. Article 11(1) of the Constitution provides that the laws of Ghana shall comprise of, *inter alia,* the common law.

118. The common law of Ghana comprises the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the *rules of customary law* including those determined by the Superior Court of Judicature **(Article 11 (2) of the 1992 Constitution)**. Customary law is applicable to only members of a particular community **(See Section 54 of the Courts Act, 1993 (Act 459)**. Thus, the Constitution defines customary law to mean 'the rules of law which by custom are applicable to particular communities in Ghana.' **(Article 11 (3)**.

Equality and freedom from discrimination

119. Article 17 of the Constitution prohibits discrimination and affords equal protection to all persons irrespective of their sex. It specifically provides that *"[a] person shall not be discriminated against on grounds of* ***gender****, race, colour, ethnic origin, religion, creed or social or economic status."* **(Article 17 (2).**

120. To discriminate under the Constitution "means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, **gender**, occupation, religion or creed, **whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description (Article 17 (3).**"

121. The Constitution of Ghana, however, gives Parliament the power to enact laws that are reasonably necessary to provide for *inter alia* matters relating to devolution of property on death or other matters of personal law **(Article 17 (4) (b)**.

122. The Supreme Court of Ghana has indicated its willingness to uphold the right to equality between man and women. In the case of **Fianko vs. Aggrey (2007-2008) SC. GLR 1135 at page 1145;** the court stated that: *"the children of a deceased person both male and female have a right to inherit their deceased mother's property; this is regardless of whether the woman came from a matrilineal or patrilineal family".*

123. Before the promulgation of the 1992 Constitution, the courts in Ghana had already indicated their unwillingness to sanction the customary law rule of primogeniture in the few cases in which it was an issue.

124. In 1962 Ollennu J (as he then was) had the opportunity to pronounce on the legitimacy or otherwise of the customary law rule of primogeniture in Ghana in the case of **Nartey v Nartey and Another [1962] 1 GLR 184**. The plaintiff claimed in the local court for the recovery of real and personal properties alleged to be the self-acquired property of his deceased father, on the grounds that by customary law, he and other children of his father were, as of right, successors to their father's estate and that the defendant, their deceased father's sister, being a woman was not entitled to succeed to the deceased and was only entrusted with the estate of their deceased father because of their minority at that time. He further contended that the co-defendant, being the mother of the deceased, had no interest in the estate of her said son as theirs was a patrilineal family society.

125. The local court ordered that since Prampram (a community in Ghana) was a patrilineal society, the defendant alone could not administer the estate "because her sons must inherit their father" and appointed a brother of the deceased jointly with the defendant as administrators of the estate, real and personal and directed them to distribute the properties in a certain manner.

126. The plaintiff appealed to the High Court presided over by Ollenu J. His Lordship held:

(1) Succession is a matter of election or appointment by the family and there is no rule of customary law that a male must be appointed to succeed to a male. Although the deceased was survived by his brother, the family was therefore within its rights in appointing the defendant; whom it considered the most suitable person;

(2) the only course open to the local court therefore was to dismiss the plaintiff's claim and enter judgment for the defendant and co-defendant. Having failed to do this, the orders and directions made were ultra vires and should be declared null and void and judgment entered for the defendant and co-defendant.

127. The learned judge thus dispelled the misgivings the local magistrate had about the appointment of a woman to inherit when there were men available.

128. In **Akrofi v. Akrofi [1965] GLR 13** the plaintiff, a native of Buem state, brought an action against the defendant, her paternal uncle, for a declaration that she was entitled to succeed to her late father's properties. The plaintiff contended that succession in the state was patrilineal and that females, could, in the absence of males, succeed to the self-acquired

properties of their father. Since she was the only child of her father, she submitted that she was the rightful person to succeed to his properties.

129. The defendant, though admitting that succession in the state was patrilineal, denied that a female was entitled to succeed to her father's properties. He maintained that he had been appointed a successor to the properties by the family.

130. The court (per Sowah J) (as he then was) found on the evidence before the court that succession to property in Buem state is patrilineal and male children take preference to female, but where there are no male children, female children are not excluded but are within the range of persons entitled to succeed.

131. The court held that the plaintiff was equally qualified to be appointed a successor to inherit her father's estate. The court did not mince words in condemning the customary law rule of primogeniture which the paramount chief of the Buem people sought to render as the applicable customary rule.

132. In the words of the court, a *"custom which discriminates against a person solely on the basis of sex has outlived its usefulness and is not in conformity with public policy; if customs are to survive they must change with the times."*

Kenya

133. In the case **Re Wachokire, Succession Cause No. 192 of 2000 discussed in The Role of the Judiciary in Promoting Gender Justice in Africa (UNDP, 2008) 19** the court had occasion to deal with a customary law rule denying women inheritance rights due to the expectation that they would eventually get married. The Court rejected the justification that women would marry and thus did not require equal inheritance rights, holding that denying women equal rights to inheritance under Kikuyu customary law violated Section 82 (1) of the Kenyan Constitution, which prohibited discrimination on the basis of sex, and articles 15 (1) – 15 (3) of CEDAW.

India

Constitutional provisions

134. Article 14, the umbrella equality provision of the Indian Constitution, proscribes the State from denying to any person equality before the law or the equal protection of laws in India.

135. In terms of the Constitution, the State is prohibited from discriminating against citizens on the grounds of religion, race, caste, sex or place of birth under Article 15. Article 300A frames the constitutional right to property conferred upon all persons in negative terms.

136. Indian laws of succession are based on religious personal laws. The question that has often troubled the courts is whether customary and personal laws in existence prior to the Constitution, are required to comply with the right to equality and other constitutional provisions. The courts have not been consistent in answering this question. Some courts have insisted on equality between men and women and others have not.

Case law

137. In **Madhu Kishwar v. State of Bihar** (**AIR 1996 SC 1864**), the Supreme Court of India observed that the danger of fragmentation of land holdings is a misconceived and unjust rationale for denying equal rights of succession to males and females.

138. Similarly, in **Cracknell v. State of Uttar Prades** (**AIR 1952 AK 746**), the petitioner challenged the constitutionality of a statute that allowed the Court of Wards to assume the superintendence of the estate of persons disqualified from managing their own property. The constitutional challenge under Articles 14 and 15 was based on the argument that the Act discriminated against females. The Allahabad High Court upheld the challenge, finding that the discrimination was constitutionally impermissible.

Nigeria

139. In Nigeria, the Court of Appeal in **Mojekwu v Mojekwu**, cited in the South African case of **Bhe** discussed below, also addressed a customary law rule of male primogeniture. The Court held that the rule was unconstitutional and contrary to democratic values. The Court held that *"[a]ny form of societal discrimination on the ground of sex, apart from being unconstitutional, is [the] antithesis to a society built on the tenets of democracy which we have freely chosen as a people ...Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God Himself."* (See **the case of Bhe below at para 194**)

South Africa

Equal protection and non-discrimination in the South African Constitution

140. Section 9 of the South African Constitution sets out the right to equality, and provides as follows:

(1)Everyone is equal before the law and has the right to ***equal protection and benefit of the law***

(2)Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3)The state ***may not unfairly discriminate*** *directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual*

orientation, age, disability, religion, conscience, belief, culture, language and birth.

***(4)** No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*

***(5)** Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*

Striking down the customary law rule of male primogeniture

141. The South African Constitutional Court, in **Bhe v Magistrate, Khayelitsha, and Others**, **(2005 (1) SA 580 (CC)** specifically considered the relationship between s9 of the Constitution, (Constitution of the Republic of South Africa, 1996) and customary law – more specifically, the rule of male primogeniture. By way of background, it is important to note that the South African Constitution recognises customary law as part of South African law; however, it is only applicable insofar as it is consistent with the Constitution and other legislation dealing with customary law.

142. Section 211 (3) of the South African Constitution provides that courts must apply customary law where it is applicable – subject to the Constitution and any other legislation that deals with customary law. Further, Section 39 (2) provides that, when developing customary law, a court is obliged to promote the spirit, purport and objects of Bill of Rights. Finally, Section 39 (3) provides that the Bill of Rights does not deny the existence of other rights or

freedoms conferred by customary law as long as they are consistent with the Bill of Rights.

143. Thus, the South African Constitution – like the Botswana Constitution, specifically provides that customary law is applicable only insofar as it is consistent with the Constitution.

Bhe v Magistrate, Khayelitsha, and Others 2005 (1) SA 580

Facts

144. In this case, the applicant had approached the court on behalf of her two minor daughters for an order declaring the rule of primogeniture unconstitutional in order to enable the daughters to inherit. The applicant further challenged this rule in the public interest, in the interest of female descendants, descendants other than the eldest descendants and extra-marital children.

145. The applicant's daughters were born of a relationship between herself and their deceased father, who had died intestate. The magistrate of the Khayelitsha Magistrate's Court had, after the death of the deceased, appointed the father of the deceased as the sole heir of his estate, in accordance with s23 of the Black Administration Act. The deceased's father indicated that he intended to sell the deceased's immovable property, on

which the applicant and the minor children lived, in order to pay the funeral expenses incurred as a result of the deceased's death.

146. Under the system of intestate succession, flowing from s23 and the regulations, in particular Regulation 2(e), the two minor children did not qualify to be the heirs of the intestate estate of their deceased father's. According to these provisions, the estate of the deceased fell to be distributed according to black law and custom. The issue to be determined was whether or not these provisions were consistent with the Constitution.

Equality analysis

147. The court stated that to the extent that the primogeniture rule prevents all female children from inheriting, it was discriminatory. In the illuminating words of Deputy Chief Justice Langa (as he then was):

> *"The exclusion of women from inheritance on the grounds of gender is a clear violation of section 9 (3) of the Constitution. It is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group, exacerbated by old notions of patriarchy and male domination incompatible with the guarantee of equality under this constitutional order." (Paragraph 91)*

148. The learned judge went on to say:

> *"In denying extra-marital children the right to inherit from their deceased fathers, it also unfairly discriminates against them and infringes their right to dignity as well. The result is that the limitation it imposes on the rights of those subject to it is not reasonable and justifiable in an open and democratic society founded on the value of equality, human dignity and freedom...In conclusion, the official system of customary law of succession*

is incompatible with the Bill of Rights. It cannot, in its present form, survive constitutional scrutiny." (Paragraph 95)

149. The Constitutional Court recognised that the manner in which customary law operates must be seen in context:

> *"The rules...were part of a system which fitted in with the community's way of life. The system had its own safeguards to ensure fairness in the context of entitlements, duties and responsibilities. It was designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community... Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. [He] acquired the duty to maintain and support all the members of the family who were assured of his protection and enjoyed the benefit of the heir's maintenance and support. (Paragraph 75)*

150. However, the court found that the context in which the rule of primogeniture operated had changed and stated that:

> *"Most urban communities and families are structured and organised differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased's estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependants and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased's responsibilities."*

151. In conclusion, the Constitutional Court found that Section 23 of the Black Administration Act was unconstitutional and Regulation 2 (e) had to fall

away. The Constitutional Court found further that the application of the rule of primogeniture to intestate succession was not consistent with the equality protection under the Constitution.

152. The Constitutional Court, as part of its order, declared the applicant's daughters the sole heirs of their deceased father's estate; ordered that the deceased's father sign all documents and take all reasonable steps required of him to transfer the entire residue of the said estate to the daughters and that the Magistrate, Khayelitsha, do everything required to give effect to the provisions of the judgment.

Application to Botswana

153. Both the South African law and Botswana law provide that customary law may only be applied in so far as it is consistent with the Constitution. However, an important textual difference that must be noted is that, while Botswana's Constitution specifically provides that discrimination, through application of customary law is acceptable, the South African Constitution has no such provision. Thus, in the **Bhe** case, there was clearly discrimination against women that was not justifiable in terms of the South African Constitution. However, as the applicants possibly realised, it may not possible to reach a similar conclusion on the basis of s15 of Botswana's Constitution, given the saving clause. This may explain the applicants focus on Section 3 (a) of the Constitution.

154. What the applicants now rely on is s3 (a) of the Constitution of Botswana – the right to equal protection before the law – rather than the prohibition on discrimination. Thus, from a comparative perspective, it is perhaps more useful to focus on jurisprudence surrounding the right to equal protection of the law, as opposed to the prohibition on unfair discrimination. The South African Constitution, like Botswana's Constitution, provides for the right to equal protection of law independently of its discrimination provisions. Thus, it is useful to look more closely at how this right has been interpreted in South Africa.

Equal protection of the law

155. Section 9 (1) provides for the right to equal protection and benefit of the law, whereas subsections (3) and (4) prohibit unfair discrimination. Thus, like the Botswana Constitution, there are two separate provisions dealing with equal protection of the law and non-discrimination. However, in the South African Constitution, both of these rights are contained in a single section, whereas Botswana's Constitution separates them into two distinct sections.

156. In the case of **Harksen v Lane NO 1998 (1) SA 300 (CC)** at paragraph 53, the Constitutional Court of South Africa formulated the stages of an enquiry into a violation of the equality clause as follows:

a. Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of Section 9(1).

b. Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'. If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the

impact of the discrimination on the complainant and others in his her situation.

(iii) If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of Section 9 (3) and (4).

c. If the discrimination is found to be unfair, then a determination will have to be made as to whether the provision can be justified under the limitation clause.

157. In the case of **National Coalition for Gay & Lesbian Equality v. Minister of Justice 1999 (1) SA 6 (CC)** the Constitutional Court held that one need not 'inevitably' perform both stages of the enquiry. It held the rational basis inquiry would be clearly unnecessary if a court were to hold that the discrimination is unfair and vice versa.

158. It is patently clear from the above discussion that not every differentiation can amount to unequal treatment. It is therefore necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. It is also clear that differentiation will not be invalid if there is a rational connection between the differentiation and a legitimate purpose (**Prinsloo v Van der Linde 1997 (3) SA 1012 (CC)**)

159. With respect to the requirement of rationality, it has been stated that there must be a rational relationship between the legislative scheme Parliament adopts and the achievement of a legitimate government purpose **(New National Party of South Africa v Government of the Republic of South Africa 1999 (3) SA 191 (CC) para 19)** and that the exercise of other forms of state power must be rationally related to the purpose for which the power was given **(Pharmaceutical Manufactures of SA; In re: ex parte application of the President of the RSA 2000 (2) SA 674 (CC) para 84)**.

160. In the South African case of **Prinsloo,** cited supra, the South African Constitutional Court identified three sets of factors to be taken into account in determining whether discrimination has an unfair impact. The first consideration is the position of the complainant, namely, is the complainant a member of a group of people that have been victims of past patterns of discrimination. Differentiation that burdens people in a disadvantaged position is more likely to be unfair than burdens placed on those that are historically not disadvantaged.

161. The second consideration is the nature of the discriminating law or conduct and the purpose sought to be achieved by it. An important consideration would be whether the primary purpose of the law or conduct is to achieve a worthy and important societal goal.

162. The third consideration is the extent to which the rights of the complainant have been impaired and whether there has been an infringement of his/her right to human dignity.

Tanzania

163. In the case **Ephraim v Pastory (2001) AHRLR 236** the Tanzanian High Court found that the rule of the Haya customary law, according to which daughters had no power to sell inherited land, was inconsistent with the Bill of Rights and international and regional law. The High Court furthermore stated that *"the principles enunciated in the [Constitution and relevant international and regional treaties] are a standard below which any civilised nation will be ashamed to fall. It is clear...that the customary law under discussion flies in the face of our Bill of Rights as well as the international conventions to which we are signatories."* (**(2001) AHRLR 236 at para 10.**)

United States of America

Brown et al v Board of Education 347 US 483 (1954)

164. Although the above case does not deal with the principle of primogeniture, it is relevant to the extent that it deals with the issue of discrimination and the right to equal protection of the law.

165. The facts of the case make for an interesting reading. I state them briefly below:

166. The appellants were African-American school children who had been denied admission to public schools attended by white children under laws requiring or permitting segregation according to race.

167. The appellants, approached the relevant district courts seeking to invalidate the offending statutes on the grounds that segregation deprived them of their right to equal protection of the law that is guaranteed under the 14thAmendment adopted by Congress in 1868.

168. A number of district courts upheld the validity of the contested provisions and denied the appellants admission to the white schools on the basis of the 'separate but equal' doctrine which had been announced by the Supreme Court of the United States in 1896 in the case of **Plessy v Ferguson (163 US 537 1896).**

169. In their appeal to the Supreme Court of the USA, the appellants contended that the statutes sought to be impugned violated their right to equal protection of the law.

170. The crisp question before the US Supreme Court was whether segregation of children in public schools, solely on the basis of race, deprived the children of the minority of equal educational opportunities.

171. The court answered the question in the affirmative because the policy was interpreted as denoting the inferiority of the "negro group'. The court held that the deprivation of equal educational opportunities created a sense of inferiority, which affected the children's motivation to learn. It was the court's conclusion that separate educational facilities were inherently unequal and therefore deprived the appellants of equal protection of the laws that is guaranteed by the 14th Amendment.

172. The above conclusion was captured in the memorable words of Chief Justice Earl Warren, when he brought down the curtain by saying:

> *"We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does... We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."*

173. With the above words, the Supreme Court of the United States of America, turned the decades old "separate but equal" doctrine on its head and ruled

in favour of the plaintiffs and effected a far reaching transformation with respect to access to public schools in the United States of America.

United Kingdom

174. A case not very dissimilar to the present dispute arose in the United Kingdom in 1978. Although the United Kingdom has no written Constitution, it has a strong human rights culture. It was the case of **Nothman v. Borough of Barnet 1978 1 ALL ER 1243.** The facts were fairly simple. The applicant was a female teacher. Men and women were under their employment contracts, entitled to continue in employment until the age of 65.

175. The applicant, then aged 61, was dismissed. She claimed compensation for unfair dismissal. The Employment Appeal Tribunal held that if she had been a man, she would have been entitled, but since she was a woman she cannot. This was so because the literal words of the relevant statute suggested that women could not benefit.

176. This case was a glaring example of discrimination against women based on sex. The Tribunal came to the conclusion that it is obliged to apply the provisions of the relevant statute however absurd or out of date they may appear.

177. On appeal, Lord Denning, one of the presiding Judges in the matter, repudiated the logic of the Tribunal, in the following memorable words:

> *"It sounds to me like a voice from the past. I heard many such words 25 years ago. It is the voice of the strict constructionist. It is the voice of those who go by the letter. It is those who adopt the strict literal and grammatical construction of the words, heedless of the consequences. Faced with glaring injustice, the judges are, it is said, impotent, incapable and sterile. Not so with us in this court." (p1246 F-G)*

International Law and Botswana Constitution

178. The Botswana Constitution does not contain any provision delineating the role of international law within the national legal order. Instead, Section 24 (1) of the Interpretation Act 1984 provides that:

> *"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 text-book or other work of reference, to the report of any commission of inquiry 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."*

179. Although this provision allows the courts to construe national law by reference to international treaties etc, it does not expressly authorise international law as part of national law. As the learned Attorney General correctly pointed out, Botswana also subscribes to the dualist approach to the relationship between international law and national law.

180. In the case of the **Republic of Angola v Springbok Investments (Pty) Ltd [2005] 2 BLR 159 (HC)** Kirby J (as he then was) stated that:

> *"The position in this country is thus similar to that which obtains in Zimbabwe, where there is also no act to that which obtained in the United Kingdom and South Africa before their acts were introduced. All three countries have moved away from the formal view (the doctrine of transformation) that all aspects of international law require to be introduced by stature, or by specific decisions of judges, or by long-standing custom, before they become part of the law of a country. Instead they have embraced the doctrine of incorporation, which holds that the rules of international law, or the jus gentium, are incorporated automatically into the law of all nations and are considered to be part of the law unless they conflict with statutes or the common law. Under this doctrine the rules of international law may be developed by the courts in line with changes in the world ...I have no doubt that the rules of international law form part of the law of Botswana, as a member of the wider family of nations, save in so far as they conflict with Botswana legislation or common law, and it is the duty of the court to apply them."*

181. The net effect of the above authorities is that International Law, though not binding, is persuasive and can offer useful guidance on the nature and scope of existing constitutional rights.

182. As correctly submitted by Mr. Rantao, learned counsel for the applicants, the Human Rights Committee ("HRC"), tasked with monitoring country compliance with the ICCPR and with elaborating on the rights enshrined in the ICCPR, has interpreted the right to equal protection as not only providing for equality before the law and equal protection, but also guarantees "*to all persons equal and effective protection against discrimination on any of the enumerated grounds*," including sex.

183. Botswana has also ratified regional treaties which similarly provide for the right to equality. Article 2 of the African Charter on Human and Peoples' enshrines the principles of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion.

184. The African Charter on Human and Peoples' Rights ("the Charter") also provides under Article 3 for the equal treatment under law and equal protection. Article 3 states:

> "a. *Every individual shall be equal before the law*
> *b. Every individual be entitled to equal protection of the law"*

185. The African Commission on Human and Peoples' Rights ("African Commission"), tasked with interpreting the scope and application of the rights in the Charter, has defined article 3(2) as meaning "*that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in like circumstances in their lives, liberty, property and in their pursuit of happiness. It simply means that similarly situated persons must receive similar treatment under the law.*"

186. In expanding on the content of Article 3 (2), the African Commission has favorably quoted the US Supreme Court in **Brown v Board of Education, 347 US 483 (1954)**, which held that the 14th Amendment of the US Constitution, which guarantees the equal protection of the law,

encompassed the right of all persons "*to be treated equally by the law courts, both in procedures and in the substance of the law.*"

187. It is axiomatic that by ratifying the above International legal instruments, states parties commit themselves to modify the social and cultural patterns of conduct that adversely affect women through appropriate legislative, institutional and other measures, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

188. I turn now to an analysis of the effect of the Ngwaketse Customary Law sought to be impugned and whether same amounts to an unjustifiable differential treatment.

Analysis of the effect of the Ngwaketse Customary Law on the Applicants

189. In analysing the effect of the customary law sought to be impugned, it seems logical to ask one simple question: Does the customary law discussed earlier differentiate between males and females? The simple answer to the question is yes, it does differentiate. In fact there is no dispute that the law in question differentiates between men and women.

190. It is also plain that the differentiation amounts to discrimination to the extent that it is based on one of the grounds prohibited by Section 3 (a), being sex. The next question that arises is whether the discrimination referred to above is unfair? On the authority of the case of **Harksen**, cited supra, if the discrimination has been found to be on a prohibited specified ground, as in this case, then unfairness is presumed. It follows therefore, on the authority of the aforesaid case, and indeed on the basis of pure logic, that the Ngwaketse Customary law sought to be impugned amounts to unfair discrimination.

191. Having arrived to the above conclusion, the authorities require that the next stage should involve the determination of whether the discrimination is justifiable.

192. The respondents argue that it is justifiable. It seems prudent therefore to consider the justification proffered by the respondents, briefly, since they have been highlighted before.

193. I must confess that this court struggled to grasp the justification for the discrimination proffered by Mr. Tafila, learned counsel for the 1st respondent. The justification, according to Mr. Tafila, was that the family home inherited by the last born male is still available for use by the other siblings for hosting certain functions such as family gathering, weddings and funerals.

194. This court is not persuaded that the 1st respondent proffered any justification that can save the patent discrimination occasioned by the Ngwaketse Customary law in dispute.

195. The 2nd respondent's justification is also difficult to understand. The Attorney General argues that it would be absurd to declare the rule sought to be impugned unconstitutional because such law is recognised or practised by the overwhelming majority of the population of Botswana.

196. It seems to me that the reason proffered by the learned Attorney General cannot be a valid reason to discriminate against the applicants. In my mind, there is no legitimate government purpose to be served by the discriminatory rule; and the fact of the matter is that the rule sought to be impugned is not only irrational but amounts to an unjustifiable assault on the dignity of the applicants and or women generally. The effect of the Ngwaketse Customary law, sought to be impugned, is to "subject women to a status of perpetual minority, placing them automatically under the control of male heirs, simply by virtue of their sex" .I do not think it can be credibly argued that discrimination alluded to above serves any worthy or important societal purpose. It is a matter of record that the government is concerned about this discrimination and its wish to see it ended, if what it proclaims at International forums is anything to go by. Speaking for myself, I am unable

to reconcile the rule under discussion with the equality provisions captured by Section 3 (a) of our Constitution.

197. This court also rejects outright any suggestion, no matter how remote, that the court must take into account the mood of society in determining whether there is violation of constitutional rights as this undermines the very purpose for which the courts were established.

198. In the South African case of **S v Makwanyane 1995 (3) SA 391 (CC)** Chaskalson CJ noted the important role of the court in upholding constitutional principles despite strong public sentiment to the contrary. He stated: *"The question before us, however, is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence.*

Public opinion may have some relevance to the enquiry, but in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution ...The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others

who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected." (Paragraphs 87 – 88)

199. This court associates itself with the above remarks.

200. The adverse effects of the Ngwaketse Customary law, sought to be impugned are plain and obvious to any reasonable and fair minded person. The law is biased against women, with the result that women have limited inheritance rights as compared to men; and the daughters living in their parents' homes are liable to eviction by the heir when the parents die. This is indeed what happened in this case. In this case the Customary Court of Appeal ordered the 1st applicant to vacate the family home. This gross and unjustifiable discrimination cannot be justified on the basis of culture.

201. In our system of government where the Constitution is the supreme law of the land, both statutory and customary law must yield to the constitutional provision's, spirit and value system. It cannot be an acceptable justification to say it is cultural to discriminate against women; and that consequently such discrimination must be allowed to continue. Such an approach would,

with respect, amount to the most glaring betrayal of the express provisions of the Constitution and the values it represents.

202. What is particularly objectionable about the law sought to be impugned is its underlying message, that implies, that women are somehow lesser beings than men, and are in fact inferior to men. The adverse effects of the above status that results in daughters being evicted to pave way for a male heir, communicates the unacceptable and chilling message that men and women are not equal before the law. It is my considered view that the Ngwaketse Customary law has no place in a democratic society that subscribes to the supremacy of the Constitution – a Constitution that entrenches the right to equality.

203. It is in my view plain that the law sought to be impugned violates the right to equality and equal protection of the law as provided for and or contemplated by Section 3 (a) of the Constitution.

204. It would be offensive, in the extreme to find, in this modern era, that such a law has a place in our legal system, having regard to the imperative that constitutional provisions should be interpreted generously, to serve not only this generation, but generations yet to be born, particularly recalling that the Constitution should not be interpreted in a manner that would render it a museum piece.

205. In my mind, the Ngwaketse Customary law is an unacceptable part of the system of male domination that was emphatically rejected in the case of **Dow**. In my view, the exclusion of women from heirship is consistent with the logic of patriarchy which reserves for women positions of subservience and subordination. Such exclusion does not only amount to degrading treatment but constitute an offence against human dignity. Discrimination against women or denying or limiting their equality with men is fundamentally unjust.

206. This court is a creation of the Constitution. It is obliged to apply the constitution in circumstances that may be unique to Botswana. To this extent, the notion that a people without culture are a lost nation resonates with this court. The right to culture, although not finding express provision in our Constitution, is an inalienable right of every person in this country. It is not negotiable. It is God given. The above notwithstanding, culture, changes with time. In the wisdom of the framers of our Constitution, it must yield to the Constitution in the event of a conflict. To this extent, where a court arrives at the conclusion that our culture conflicts with the supreme law of the land, it must not hesitate to so pronounce.

207. As Lord Atkin, once pithily remarked, in the case of **United Australia Ltd v. Barclays Bank Ltd** (1941) AC (1) at 29:

"When those ghosts of the past (meaning forms of action) stand in the path of justice clanking their medieval chains the proper cause for the judges is to pass through them undeterred."

208. The picture of the Constitution being a museum piece may well have its admirers, but in my view, interpreting the Constitution restrictively to take away rights is not an option open to this court as it may lead to grave injustice.

209. It would be tragic to interpret the Constitution in a way as to take away or reduce rights of other human beings solely on the ground of sex.

210. This court firmly believes that it is its function to treat the Constitution as a living organism and to constantly sharpen it so that it becomes a suitable tool to address contemporary challenges.

211. I perceive it to be the function of the justices of this court to keep the law alive, in motion, and to make it progressive for the purposes of rendering justice to all, without being inhibited by those aspects of culture that are no longer relevant, to find every conceivable way of avoiding narrowness that would spell injustice.

212. I am conscious of the argument advanced by the respondents that I must apply Section 15 to the dispute and not Section 3 (a) of the Constitution. I am unable to understand the logic of such argument. Section 3 (a) is a

substantive section that confers rights. It is distinct from Section 15. If a litigant, as in this case, chooses to proceed in terms of Section 3 (a), and succeeds to meet the requirements of the said section, then his/her challenge is entitled to succeed. (See **Stratosphere Investments (Pty) Ltd t/a Club Havanna and Others v Attorney General Case No. MAHLB-000576-08 (HC)**) The applicant in this case has met all the requirements of Section 3 (a). It is also trite learning that the case of **Dow** has clearly established that fundamentals rights conferred by Section 3 of our Constitution could not be abridged by Section 15. (See **Moatswi and Another v Fencing Centre (Pty) Ltd 2002 (1) BLR 262 (IC) para 13.**)

213. The question that arises is whether extending the rights of equality or equal protection of the law to the applicants prejudices anybody or is in any way contrary to public interest. I do not think so. It boggles my mind how the creation of an equal society (in terms of rights) can be prejudicial to anybody or be contrary to public interest.

214. In pursuit of the true and proper meaning of Section 3(a) of the Constitution, recourse should be heard to domestic law, so far as human rights provisions are concerned; the jurisprudence of courts of other countries should be interrogated and if relevant, applied. International law must also be examined. The writing of jurists in International law must be studied and internalized and their knowledge and scholarship utilized to illuminate the burning issues of the moment. This is so because human rights are

universal and can no longer be understood within the straight jacket of domestic law.

215. Having examined all the above, it is clear to me that the differential treatment captured by the Ngwaketse Customary law, does not meet the requirements of Section 3 and is wholly unjustifiable.

216. A large number of the people of this country may not be conscious of their rights. Those who are conscious may lack resources to litigate. If it so happens that they have the fortune to approach the court; and their complaint has merit, then it is the sacred duty of this court to protect their rights at all costs.

217. It seems to me that the time has now arisen for the justices of this court to assume the role of the judicial midwives and assist in the birth of a new world struggling to be born, a world of equality between men and women as envisioned by the framers of the Constitution.

218. In conclusion, I wish to point out that there is an urgent need for parliament to scrap/abolish all laws that are inconsistent with Section 3 (a) so that the right to equality ceases to be an illusion or a mirage, but where parliament is slow to effect the promise of the Constitution, this court, being the fountain of justice and the guardian of the Constitution, would not hesitate to perform its constitutional duty when called upon to do so.

219. In all the circumstances of this case, it seems to me plain that the Ngwaketse Customary law rule sought to be impugned is unjustifiably discriminatory and does not pass constitutional scrutiny. It is *ultra-vires* Section 3 of the Constitution.

220. I have therefore come to the conclusion that the application succeeds.

221. Before making the order, I wish to thank counsels involved, Mr. Rantao (appearing with K. Kewagamang and N. Mupfuti) and Mr. Tafila, the Attorney General for their research and industry. I have benefitted immensely from their output.

222. In the result, I make the following order:

1. The Ngwaketse Customary law rule that provides that only the last born son is qualified as intestate heir to the exclusion of his female siblings is *ultra vires* Section 3 of the Constitution of Botswana, in that it violates the applicants' rights to equal protection of the law.

2. The judgment of the Customary Court of Appeal under Civil Case Number 99 of 2010 and dated 22 September, 2010, to the extent that it applied such rule, is hereby reviewed and set aside.

3. There is no order as to costs.

DELIVERED IN OPEN COURT AT GABORONE ON THE 12th DAY OF OCTOBER, 2012.

OBK DINGAKE
JUDGE

RANTAO KEWAGAMANG ATTORNEYS – APPLICANT'S ATTORNEYS
MINCHIN & KELLY (BOTSWANA) 1ST RESPONDENT'S ATTORNEYS
ATTORNEY GENERAL – 2ND RESPONDENT'S ATTORNEYS