

**LEGAL PLURALISM AND DISCRIMINATORY APPLICATION OF
PROGRESSIVE LAWS TO WOMEN SUBJECT TO CUSTOMARY LAW IN
BOTSWANA**

By

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ABSTRACT

Women have always borne the brunt of an unjust and unfair society. After colonization, African countries were determined to restore and preserve their culture. Striking the delicate balance between preservation of culture and protection of women's human rights has proved to be tricky. This paper explores the challenges posed by exceptions to the prohibition against discrimination within the Constitution of Botswana, particularly in newly drafted legislations, which give effect to international standards..

Through the research conducted it became apparent that, the approach taken in Botswana with regards to culture and women's rights leaves women subject to customary marital law vulnerable. Customary law under the Constitution of Botswana is exempt from the prohibition against discrimination. This exemption makes unjust and unfair customary practices unchallengeable before courts of law. Furthermore protection contained in newly drafted laws, which seek to improve the status of women in Botswana, does not extend to women subject to customary law, because of the exemption contained in the constitution. As a consequence of the exemption contained in the constitution attainment of equality and non-discrimination is thwarted. A comprehensive reform of the Constitution is necessary to ensure adequate protection for all women.

Keywords: *legal pluralism, constitutional supremacy, common law, statutory law, customary law, human rights based approach*

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Bechuanaland Revised Edition of Laws 1959

Constitution of Botswana

Constitution of the Republic of South Africa

Customary Law Act Cap. 16:01

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Matrimonial Causes Act Cap. 29:07

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TABLE OF INTERNATIONAL CONVENTIONS AND TREATIES

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International Convention on Civil and Political Rights (ICCPR)

African Charter on Human and People's Rights (ACHPR)

Protocol to the African Charter on Human and People's Rights on Women's Rights
(ACHPWR)

South African Development Community Protocol on Gender and Development

Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)

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CHAPTER ONE

INTRODUCTION AND BACKGROUND TO THE STUDY

1.1 Introduction

Challenges posed by a multiplicity of legal orders within a single legal system make it difficult for many countries to give effect to provisions of several international conventions. Botswana also experiences these challenges. This paper seeks to identify the root cause of these challenges particularly in Botswana, how the approach adopted perpetuates discrimination and identifies possible solutions by undertaking a comparative analysis with South Africa.

Chapters one and two give a background to the research study and an overview of the research approach. Chapter three is titled Brief Legal History of Botswana. This chapter endeavors to trace the evolution of Botswana's pluralistic legal system. This includes periods before and after colonization to the present state. A section of the chapter specifically discusses the nature of the Botswana legal system and how it manifests plurality.

Chapter four focuses on Legal Pluralism and the Realization of Women's Rights in Botswana. This chapter starts by defining legal pluralism. It also describes common features of pluralistic legal systems. Further more a brief amount of is dedicated to discussing the challenges that women face when trying to claim their rights within pluralistic legal systems.

Chapter five explores Equality and Non Discrimination in Botswana and Botswana's Obligation under the Constitution. This chapter contains several parts (a) Part one examines a number of international conventions ratified by Botswana and the obligations they impose on her to ensure non-discrimination and engender equality. Part (b) considers whether the Botswana legal system guarantees enjoyment of basic fundamental rights equally to all in society. This part also discusses the impact of legal pluralism on women in Botswana, especially women subject to customary law. It explores the challenges faced by these women. The challenges are illustrated with case law and newly drafted laws. Part of this section is dedicated to determining whether the provisions of the Customary Courts Act are adequate to protect women subject to customary law.

Chapter six is Comparative Constitutional Impact on Customary Law; The South African Experience. This chapter takes a comparative analysis of how Customary law has been treated under the South African Constitution of 1996. From this comparative analysis lessons on how Botswana's Constitution can be reformed are drawn. A careful consideration of the equality clause, the Bill of Rights and provisions on the right to culture is also made.

Chapter seven contains conclusion and recommendations. Customary law under the Constitution of Botswana is exempt from the prohibition against discrimination. This exemption makes unjust and unfair customary practices unchallengeable before courts of law. Furthermore protection contained in newly drafted laws, which seek to improve the status of women in Botswana, does not extend to women subject to customary law, because of the exemption contained in the constitution. As a consequence of the exemption contained in the constitution attainment of equality and non-discrimination is thwarted. It is recommended that all laws which, discriminate against women be reformed especially the Constitution. A bottom up approach should be adopted in the fight against discrimination and inequality. This is possible if community leaders are capacitated and in turn they cascade their knowledge to their communities. It is necessary to set up institutions dedicated to the protection and preservation of human rights like an independent Human Rights Commission and a Law Reform Commission. Proper institutions will also enhance access to justice.

1.2 Statement Of Purpose

The objective of the study is to illustrate that in order for all Batswana to enjoy the benefits of good laws drafted in line with internationally agreed standards, the main law, in this instance the Constitution, should be drafted carefully. Respect for customs and traditions should not be allowed to override Constitutional guarantees and international obligations, which Botswana entered into. As the *grundnorm* for the Republic of Botswana all laws derive their legality from the Constitution. If therefore the Constitution allows for discrimination, all subsequent laws that are promulgated will also allow for discrimination and this discrimination regardless of its gross effects will be viewed as legal.

It is also the intention of this study to illustrate that there is need to bring the existing laws that is Customary law and common law to a point where they complement each other rather than having them operate as two parallel systems as is currently the situation. Furthermore; to lead to positive results it should be upheld within a carefully crafted legal framework that takes into consideration all sections of society in which it is to apply.

1.3 Literature Review

Athaliah Losiba Molokomme, in her paper Disseminating Family Law Reforms,

Lessons from Botswana,¹ points out that although the law on inheritance in Botswana had been amended to give spouses a share in the estate of a deceased spouse, a claim that they did not have initially under Common Law, the down side of the issue was that the law did not apply to estates which fell under Customary law. This implies that a vast majority of Batswana whose family providers fell under customary law could not benefit from its provisions.

Another scholar Dr. Rekha Kumar posits that the Constitution of Botswana places a prominent status on custom in a range of contexts. She highlighted personal law as an area where customary law was applied significantly.² She notes that although customary law should be compatible with written law and that it should not be contrary to morality humanity and natural justice, the attitudes and methods adopted by customary courts in its ascertainment led to distortions. This is a very pertinent point, which still rings very true today. She made this observation in 2009 and the just recently concluded case of *Mmusi and Others v Ramantele and Others*³ further augments her assertion. She then goes on to illustrate how within the customary law context, abuse of women is widespread but continues to receive little attention. She also notes that under Customary law women continue to be treated as minors and husbands may even administer corporal punishment on their wives as a form of discipline. She illustrates that this is the prevailing situation within customary law despite the recent enactment of the Abolition of Marital Power Act which sought to place women in marriage on equal footing with their husbands.

Although this observation made was very true and reflective of the complexities inherent in the duality of the Botswana legal system at the time, not much has changed, as a majority of Batswana do not write wills. Where one dies without a will, the Wills Act will not be applicable to the deceased's estate. The customary law of the tribe to which the deceased belonged will be used for the devolution of their estate. The problem posed by this arrangement emanates from the fact that customary law generally favors men. In her study, Molokomme did not go further to suggest how the problem could be resolved and this is where the current study will augment her paper.

¹ Molokomme, A. L.; (1990-1991); Disseminating Family Law Reforms, some Lessons from Botswana. *Journal of Legal Pluralism*, Volume 30-31. The paper was presented to the Conference on Social Change and Legal Reform in East, Central and Southern Africa, held in Zimbabwe.

² Kumar, R. A. (Dr) (2009), "*Customary law and Human Rights in Botswana; Human Rights and Human Welfare Working Papers*- accessed at <http://www.du.edu/korbes/hrhw/working/2009/52-kumar-2009.pdf>

³ MAHLB-000836-10

In their work Tazeen Hasan and Ziona Tanzer (Policy Research Working Paper 6690),⁴ give accolades to the impact, which women's networks can have on driving legislative change. They focus on several cases, which were successful before the courts in Botswana as a result of advocacy by women's organizations. Their discussion includes the *Mmusi v Ramantele* case, which is extensively discussed in this paper. Their discussion of the case falls short of considering the Court of Appeal judgment, which quashed the High Court Judgment which they praise.

Fombad C. M.: 2004⁵ also took opportunity to consider how the Constitution of Botswana while trying to reconcile maintain public order with protecting human rights, did not eliminate discrimination. He considers the exception to the prohibition against discrimination as contained in section 15(4)(c) and (d) as "a glaring anomaly and anachronism, which is difficult to reconcile with the spirit and purport of the Bill of Rights."⁶ He goes on to assert that the government has not done enough to remove the things that inhibit women from attaining equal status to men.⁷ He continues to posit that the "constitution is extremely complicated and archaic and does not address the delicate balance between protection of women's rights and discrimination";⁸ that law and practice in the country is incompatible with international and regional human rights instruments that the country has signed and ratified.⁹

1.4 Limitations Of Study

The time allocated for the conduct of the research and the writing part was very limited. In addition to time constraints, the author had wanted to rely on experiences and situations she encountered due to her office. However as a public servant the author is bound

⁴ Tazeen Hasan et. al., (2013), *Women's Movements, Plural Legal Systems and The Botswana Constitution- How Reform Happens*, World Bank Gender and Development Unit

⁵ Fombad, C. M. (2004) "The Constitutional Protection Against Discrimination in Botswana", *International Comparative Law Quarterly*, Vol. 53 pages 139-170

⁶ *Ibid.* at page 153

⁷ *Ibid.*

⁸ *Ibid.* at page 169

⁹ *Supra.* note 48 at page 169

by a Code of Conduct not to divulge any information she acquired by virtue of her office without prior approval. She attempted to seek approval from the Attorney General but she never got a response.

CHAPTER TWO

OVERVIEW OF THE RESEARCH APPROACH

2.1 Research Methodology

In conducting the research for this thesis, the author employed the qualitative research methodology. Research was mainly desktop research, where by the author undertook a doctrinal analysis of legal fact. The author also employed the comparative analysis scholarship. The comparative analysis scholarship enabled the author to analyze how culture and women's rights were treated within the South African legal system. The analysis was conducted using legislation, case law and scholarly articles. South Africa was selected as the country of comparative study because it has traditional and cultural practices similar to those found in Botswana and at the same time operates a constitutional democracy just like Botswana.

2.2 Research Questions

- Whether, when critically analyzing the nature of the Botswana legal system, the enjoyment of basic fundamental rights is equally guaranteed to all society including women subject to customary law.

- ❖ Whether section 10 of the Customary Law Act, could be regarded as an avenue through which people subject to Customary law could use to enjoy rights accorded under statutory law.

- Whether there is a need to do away with and the possibility of doing away with plurality in the Botswana legal system.

- ❖ How people subject to customary law can be empowered to enjoy their statutory and constitutional rights.

2.3 Key Definitions

Constitutional Supremacy is defined as a system of government in which the law-making freedom of parliamentary supremacy cedes to the requirements of a Constitution.¹⁰

¹⁰ <http://www.duhaime.org/LegalDictionary/C/ConstitutionalSupremacy.aspx>

Legal pluralism in this study refers to the existence of more than one legal system in a single country.¹¹

Dual legal system refers to a situation whereby statutory law operates side by side with Customary law in Botswana.

Customary law refers to rules and norms applicable to any particular tribe or tribal community.

Common law in the context of this paper refers to Roman-Dutch law as received through proclamations from the Colony of the Cape of Good Hope (present day South Africa).¹²

Statutory law in the context of this paper refers to written law as contained in enactments that is Acts and Regulations.

Human rights based approach refers to a conceptual framework for the process of human development that is based on international human rights standards and operatively directed to promoting human rights.¹³

¹¹ John Griffiths,(1986), What is Legal Pluralism? Available at http://www.jus.uio.no/smr/english/research/areas/diversity/Docs/griffiths_what-is-legal-pluralism-1986.pdf

¹² Fombad, C. M. & Quansah, E. K., (2006),The Botswana Legal System. Durban, Lexis Nexis Butterworths.

¹³ *Infra.* note 193

CHAPTER THREE:

3.1 A Brief Legal History Of Botswana

In 1885, Britain declared Botswana at the time known as “Bechuanaland”, a protectorate.¹⁴ According to Pain¹⁵, “the British government assumed jurisdiction over Bechuanaland in order to prevent expansion of the Boers.”. In 1891 an Order in Council established a formal administration of the protectorate.¹⁶ The Order provided in part “...the High Commissioner may, amongst other things, from time to time by Proclamation provide for the administration of justice...”.¹⁷ The Order in Council was a significant precursor to the reception of English Common Law and Roman Dutch Common law in Botswana. The High Commissioner in accordance with the powers vested on him by the Order in Council passed a Proclamation titled “General Administration” which provided for a comprehensive system of administration into Bechuanaland.¹⁸ The Preamble of the Proclamation read, “To establish an Administration to provide for the administration of justice and to make provision for the raising of revenue and generally for the peace, order and good government of the Territory.”. The Proclamation provided in part that, “...the law to be administered shall, as nearly as the circumstances of the country will permit, be the same as the law for the time being in force in the Colony of the Cape of Good Hope...”.

The above-mentioned Proclamation did not specify a date for which particular laws were to be administered in Bechuanaland. This was in contrast to reception clauses of other African

¹⁴ Proclamation No. 1 of 1885 made on September 30th 1885; accessed at the Botswana National Archives.

¹⁵ Pain, J. H. (1978). “The Reception of English and Roman Dutch Law in Africa with reference to Botswana, Lesotho and Swaziland”, *CILSA Vol. II* 137 at page 163.

¹⁶ Bechuanaland Protectorate General Administration Order in Council May 9th 1981; accessed at the Botswana National Archives.

¹⁷ *Ibid.* at section 4.

¹⁸ Proclamation of June 10th 1891 contained in Laws of Bechuanaland Protectorate (1948) Volume 1 at page 252.

countries like Sierra Leone where reception clauses specified the date for the laws in force in Britain, which were to be applicable. For example the reception clause for Sierra Leone read in part "...the Common law, the doctrines of equity, and the statutes of general application in force in England on the 1st day of January 1880..."¹⁹.

Lack of a specific date caused uncertainty and in 1909 a new Proclamation was passed which repealed section 19 of the 1981 proclamation. The preamble of the new proclamation read "To remove any doubt as to the effect of Section 19 of the High Commissioner's Proclamation of the 10th day of June, 1891."²⁰ Section 2 of the same provides –

"Subject to the provisions of any Order in Council, in force in the Bechuanaland protectorate at the date of the taking effect of this Proclamation, and to the provisions of any proclamation or regulation in force in the said Protectorate at such date (not including the provisions of the section hereby repealed) the laws in force in the Colony of the Cape of Good Hope on the 10th day of June, 1891, shall mutatis mutandis and so far as not inapplicable be the laws in force and to be observed in the said protectorate, but no Statute of the Colony of the Cape of Good Hope, promulgated after the 10th day of June, 1891, shall be deemed to apply, or to have applied, to the said Protectorate unless specially applied thereto by Proclamation."²¹

The law in force in the Colony of Cape of Good Hope was generally referred to as Roman Dutch common law.²² Early European settlers brought in Roman Dutch law to the Colony of Cape of Good Hope from the Dutch Republic of Holland in 1652²³. In 1814 the Cape was ceded to Britain, the law thereafter was influenced and substantially modified by

¹⁹ For further discussion on the issue please refer to Allot A. N. (1970) *New Essays in African Law*.

²⁰ Proclamation No. 36 of 22 December 1909 contained in *Laws of Bechuanaland Protectorate* (1948) Volume 1 at page 251.

²¹ *Ibid.*

²² *General Law (Cape Statutes) Revision Proclamation, No. 2 of 1959* (1959 Revised Edition of Laws, Cap. 36 at section 3(d)).

²³ Hahlo H. R and Kahn E.; (1968), *'The South African Legal System and its Background'*, Juta.

English law.²⁴ Furthermore the General Law (Cape Statutes) Revision Proclamation²⁵ expressly stated Roman Dutch Common law as the law applicable to Bechuanaland. The Proclamation listed three categories of Cape statutes, which were to be applicable in Botswana. The three categories of statutes listed in the Schedule were; 36 specific pre-1891 statutes, some Acts enacted before 1891 and some enacted after 1891.

Prior to 1885 there already existed traditional forms of administration through the *Kgosi*.²⁶ *Dikgosi* administered customary rules, which they enforced through the *Kgotla*²⁷ system. A vital piece of legislation responsible for creating legal dualism that was based on the social and economic dualism was the Native Administration Act of 1927. The Act provided for uniform approach to the recognition of customary law and the creation of separate courts to settle disputes between Africans.²⁸ Section 11 of the Act accorded customary law full recognition in the chief's courts and in the Commissioner's courts. The application of customary law was to be within the discretion of the commissioner provided that it had not been repealed or modified and that it was not contrary to natural justice or public policy.²⁹

After the establishment of Bechuanaland Protectorate this indigenous system of law was left unchanged. As noted (Pain:1978), "The declaration of Protectorates...did not involve the assumption of any jurisdiction over indigenous inhabitants or responsibility for the

²⁴ Schreiner O. D. (1967), *English law and the Rule of Law in South Africa*; Hamlyn Lectures

²⁵ *Ibid.* note 9.

²⁶ *Kgosi* refers to Paramount Chief

²⁷ *Kgotla* refers to court

²⁸ Bennett; T. W. and Peart N. S. (1991). *A Sourcebook of African Customary Law for Southern Africa*. Juta

²⁹ *Supra.* note 15 at page 115

internal administration of the territory by the local rulers.”³⁰ The *Kgosi* continued to exercise judicial authority over his subjects.

In 1942 a proclamation called Native Courts Proclamation was passed which sought “to make provision for the recognition, constitution, powers and jurisdiction of Native Courts and generally for the administration of justice in cases recognizable by Native Courts.”³¹ The proclamation defined native law and custom to mean general law or custom of a particular tribe or community in any tribal area as long as they were compatible with the due exercise of His Majesty’s power and jurisdiction and not repugnant to morality, humanity, natural justice or injurious to the welfare of the natives.³² This proclamation served as a formal recognition of the important role played by the traditional authorities. Commenting on the effect of this Proclamation, it was noted-

“The arrival of European colonial powers wrought a fundamental revolution in African legal arrangements, the result of which are with us to this day. The nature of the revolution varied somewhat, with different colonial powers, but in general each power first introduced its own legal system or some variant of it as the fundamental and general law of its territories, and, second permitted the regulated continuance of traditional African laws and judicial institutions except where they ran counter to the demands of colonial administration or were thought repugnant to ‘civilized’ ideas of justice and humanity.”. (Allot: 1965) 33

In 1966 Botswana gained independence and became a Republic and since then legislation for the country is made by Parliament. Acts, Proclamations and Orders in Council, which were in force before independence have now been repealed. However to this day Customary Law and Statutory law continue to operate side by side.

³⁰ Pain, J. H. (1978), “The Reception of English and Roman Dutch Law in Africa with reference to Botswana, Lesotho and Swaziland”, *CILSA II* page 137.

³¹ Native Courts Proclamation No. 13 of 1942 accessed in Laws of Bechuanaland Protectorate (1948) Volume 1 at page 89.

³² *Ibid.* at section 2

³³ Allot, A., (1965), “The Future of African Law: Adaptation and Development”, (Edited by Tracy Higgins, Jeanmarrie Fenrich and Paolo Galizzi,) Cambridge University Press.

3.2 Pluralism In Botswana

In 1966 Botswana adopted a Constitution, which served as the main law of the land. Legal pluralism in Botswana emanates from provisions of the Constitution³⁴, which recognize the application of religious and customary law alongside statutory law. Three particular sections make reference to other laws existing within the Botswana legal system. First section 10 of the Constitution provides for secure protection of the law and it uses the words “customary law”.³⁵ The second provision is section 15 which provides for protection from discrimination, acknowledges the existence of other laws which preceded the Constitution.³⁶ The third provision that makes reference to customary law is section 88. The section lays down the procedure to be followed when making laws. It requires any Bill which has the potential of affecting amongst others the content, ascertainment or recording of customary law to be referred to the *Ntlo ya Dikgosi* before adoption³⁷. The Constitution of Botswana makes involvement of traditional leaders mandatory during law making. This emanates from the recognition of the central role played by traditional structures in shaping Botswana legal system.

In addition to these provisions the courts have also made various pronouncements that indicate the elevated position which customary law holds within the Botswana legal system. The Court of Appeal held –

“...it may be fairly said that it is the broad adherence to the norms of customary law that provided a firm foundation for all subsequent laws, and for the Constitution itself, to be fashioned in a stable and peaceful Botswana.”³⁸

³⁴ Constitution of Botswana, Chapter 1.

³⁵ *Ibid.* section 10, (12) (b) and (e).

³⁶ *Ibid.* section 15, ss(4)(d), ss(9)(a) and (b).

³⁷ *Ibid.* section 88, subsection (2).

³⁸ *Ramantele v Mmusi and Others*, CACGB-104-12, paragraph 25 at page 17.

The same court referred to the judgment of the Constitutional Court of South Africa in the case - *Alexkor Limited & Another v The Richtersveld Community and Others*.³⁹

In the case the court held –

“Customary law must be recognized as an integral part of the law, and an independent source of norms within the legal system...through out its history it has evolved and developed to meet the changing needs of the community. And it will continue to evolve within the context of its norms and values consistent with the Constitution.”. (para. 51)

The above-cited pronouncement of the Constitutional Court of South Africa was held to be true also in the context of Botswana.⁴⁰

Due to the recognition of the pluralistic nature of the legal system of Botswana, Parliament has adopted measures, which are meant to acknowledge and harmonize the existence of different legal orders within a single system. One of the measures; which is the area of concern in the context of this paper; is section 15 of the Constitution which deals with discrimination. The section will be discussed in detail in the next part.

CHAPTER FOUR

4.1 Legal Pluralism and the Realization of Women’s Rights in Botswana

The adoption of the United Nations Convention on the Elimination of all forms of Discrimination against Women (CEDAW) has seen efforts by nations to improve the status and situations of women in the world. Countries have and are constantly changing their Constitutions and legal frameworks in an effort to incorporate the principles of equity and non-discrimination as embraced in the Convention. These efforts have led to institutional and

³⁹ 2003 (5A) SA 460 CC.

⁴⁰ *Supra*. note 25 at page 18.

legislative reforms all over the world. It must be noted however that challenges posed by legal pluralism make it difficult to give effect to the provisions of the Convention and other human rights instruments adopted by countries.

Legal pluralism has been defined as “the presence in a social field of more than one legal order.”⁴¹ In most countries customary law, religious law and statutory law operate side by side, this is true of all African countries.⁴² Some authors have decided to term the situation “legal pluralities” as opposed to legal pluralism. The reason behind the use of the term “legal pluralities” is premised on the argument that legal pluralities depict the “the fluid, multilayered, contradictory and transnational forms of legal ordering that shape women’s life prospects today.”⁴³ Most African countries are characterized by multiple, overlapping and competing legal and normative orders, including codified statutory law, transnational norms and procedures and various forms of informal norms and rules, many of which are often highly ambiguous and difficult to ascertain.⁴⁴ The presence of two or more legal orders in a single legal system often leads to conflict. It was noted that new nations often experience tension and sometimes contradiction between human rights standards and state law and policies:

“The challenge for many new nations has been how to strike the delicate balance between the individual human rights standards guaranteed by the state, and group claims to cultural rights. Implicit in this is the tension and sometimes contradiction between the national policies on one hand, and the objective socio-cultural orientations of peoples on

⁴¹ Griffiths, John, (1986); *Legal Pluralism; Journal of Legal Pluralism* (1984). Volume 24

⁴² Odinkula, C. A. “Pluralism and the Fulfillment of Justice Needs in Africa”, 2005. Open Society Institute, Africa Governance Monitoring and Advocacy Project (AfriMap).

⁴³ Sieder R., and John-Andrew McNeish, (2013), “Introduction to Gender Justice”, (pp.1-30).

In Heidensohn, F. (2013). *Gender Justice* (1st ed.). Hoboken: Taylor and Francis.

⁴⁴ *Supra.* note 30 at page 1.

the other. One instance of this is the apparent conflict between the guarantees of gender equality and non-discrimination in national constitutions and the traditional status of women in many cultures.”.(Bonny Ibhawdh:2001) ⁴⁵

The conflict is more pronounced on issues affecting women particularly women who are subject to customary and religious law. In most countries women’s rights, in issues relating to personal matters, under customary and religious law are subservient to men’s rights. Positioning of women’s rights as subservient to men’s rights often trumps their human rights. Indigenous and traditional customs are uncodified and their operation is influenced by patrimonialism characterized by male power and patronage.

Additionally, the relationship between customary law and statutory law allows for gaps in implementing, monitoring and enforcement that do not recognize women’s equal rights to tenure. These gaps are exacerbated by women’s lack of awareness of their rights and by national practice in family and civil codes and administrative regulations contrary to women’s interest.

It has been observed that many women face evictions or exclusion from land.⁴⁶ As a result of the evictions from land, women face extreme poverty. The UN Women report stated;

“Throughout the world, gender inequality when it comes to land and other productive resources is intimately linked to women’s poverty and exclusion. Barriers which prevent women’s access to, control and use of land or other productive resources are linked to inadequate legal standards...as well as discriminatory cultural attitudes and practices at the institutional and community level.” ⁴⁷

Banda: 2005 augments and reiterates the above quoted sentiments by noting that it has been realized that women are not benefitting from development initiatives primarily because

⁴⁵ Bonny Ibhawdh, (2001) “Cultural Tradition and National Human Rights Standards in Conflict” at p86, accessed in Hastrup, K. (ed.) (2001) “*Legal Cultures and Human Rights: The Challenges of Diversity*”. Kluwer Law International, Great Britain pp 85-102

⁴⁶ UN Women, “*The Future Women Want- A Vision of Sustainable Development for All*” RIO + 20 United Nations Conference on Sustainable Development accessed at <http://www.unwomen.org/~media/Headquarters/Media/Publications/en/TheFutureWomenWant.pdf>

⁴⁷ *Supra.* note 30 at page 2.

the “development initiatives ignored existing socio-structural inequalities and, in particular, inequalities between sexes.”⁴⁸ In order to address these challenges it was suggested at the Conference on Sustainable Development “systematic and scalable solutions are needed to address the systematic issues of sustainable development and place poverty reduction and gender equality at the core of interventions”.⁴⁹ Legal and regulatory reforms were identified as some of the good practices, which can drive transformation. If the challenge faced by women in owning and controlling land due to the African value system around land were to be eliminated, women’s opportunities would improve.⁵⁰

Although Botswana has been an exception in the African continent for its peace, democracy and economic prosperity it has not made head way in eliminating gender inequality and discrimination against women. In fact, in its concluding observations the CEDAW Committee noted with concern that “widespread poverty among women and poor socio-economic conditions are among the causes of discrimination against women and violation of women’s human rights.”⁵¹ The situation of rural women and women heads of households was specially highlighted particularly “their precarious living conditions, lack of access to justice, ownership of land, inheritance, education and credit facilities....”.⁵² The Committee further noted Botswana’s efforts to develop poverty eradication strategies and promotion of income generating activities but regretted that the said efforts did not focus on women particularly rural women. In addition the said strategies indirectly discriminated

⁴⁸ Banda, Fareda (2005); *Women, Law and Human Rights- An African Perspective*, Hart Publishing, Oxford-Portland Oregon at page 269

⁴⁹ *Supra.* note 30 at page 12

⁵⁰ UN WOMEN (2013), ‘*Realizing Women’s Rights to Land and other Productive Resources*’ United Nations Human Rights –Office of the Commissioner accessed at <http://www.unwomen.org/co/digital-library/publications/2013/11/realizing-womens-right-to-land>

⁵¹ Concluding Observations of the Committee on the Elimination of Discrimination against Women (CEDAW/C/BOT/CO/3), para. 39 at page 10 accessed at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/292/82/PDF/N1029282.pdf?OpenElement>

⁵² *Ibid.*

against women.⁵³ Botswana was urged “to make the promotion of gender equality an explicit component of its national development plans and policies, in particular those aimed at poverty alleviation and sustainable development.”⁵⁴

The government attributed its failure to address poverty and discrimination against women as emanating from the pluralistic nature of the legal system. The application of customary laws and practices were specially mentioned in the report submitted before the CEDAW Committee. In his statement before the CEDAW Committee on behalf of the Government of Botswana, His Excellency Boonetswe Mokgothu decried the challenges encountered in the effort to attain gender equality, “we note nevertheless that some customary laws and practices impaired gender equality related to marriage, property, inheritance, civil actions, dissolution of marriage and rights of the child...”⁵⁵ His Excellency’s statement indicated the difficulties faced in giving effect to section 15 of the Constitution of Botswana because of the exception contained therein in reference to customary law and practices. The Committee urged Botswana to repeal section 15(4) of the Constitution in order to enable all laws to apply to customary and religious practices.⁵⁶

In order to understand the treatment of customary law within the Botswana legal system the next part of this chapter will consider the law which governs the application of customary law.

4.2 Customary Law in the Botswana Legal System

⁵³ *Ibid.*

⁵⁴ *Ibid.* para 40 at page 10.

⁵⁵ Statement by His Excellency Boonetswe Mokgothu; the Ambassador and Permanent Representative of the Republic of Botswana to the UN-Geneva during the 45th Session of the CEDAW Committee in January 2010 accessed at http://www2.ohchr.org/English/bodies/cedaw/statement_Botswana45.pdf

⁵⁶ *Supra.* note 38, para. 42 at page 11

Customary law in Botswana is first and foremost recognized in the Constitution. Section 15 alludes to customary law in the exception to the discrimination provision.⁵⁷ The most comprehensive law that regulates customary law is the Customary Law Act.⁵⁸ The Act defines customary law in the following terms-

“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.”⁵⁹

The Act was enacted in order to “provide for the application of customary law in certain actions before the courts of Botswana, to facilitate the ascertainment of customary law and to provide for matters ancillary thereto.”⁶⁰ By virtue of the Act all courts in Botswana are empowered; subject to their jurisdiction; to apply customary law in cases where it is necessary to do so.⁶¹ The Act makes provision for the application of customary law in some civil cases or where an agreement necessitates.⁶² The Act also places the welfare of a child in matters of custody as the paramount consideration.⁶³ In matters of intestate succession, the Act provides; “customary law shall be applicable in determining intestate heirs of a tribesman and the nature and extent of their inheritance.”⁶⁴ The Act reiterates that the original position that customary law governs legal capacity of tribesmen.⁶⁵ Section 10 provides situations where conflicts may arise. It provides; in inheritance cases; that customary law to which a deceased was subject shall be the applicable law.⁶⁶ It then provides that if the customary law cannot be ascertained then principles of justice, equity and good conscience must be applied.

⁵⁷ *Infra*.

⁵⁸ Laws of Botswana, Cap. 16:01

⁵⁹ *Ibid.* at section 2.

⁶⁰ *Ibid.* long title.

⁶¹ *Ibid.* at section 3.

⁶² *Ibid.* at sections 4 and 5.

⁶³ *Supra.* note 58 at section 6.

⁶⁴ *Supra.* note 44 at section 7.

⁶⁵ *Ibid.* at section 8.

⁶⁶ *Supra.* note 43 at section 10(b).

The Act then provides that ascertainment of customary law shall be done by consulting textbooks, soliciting written or oral opinions, case law and other sources.⁶⁷ The Act concludes by stating that the Act shall not alter the operation of any written law in force immediately prior to its commencement.⁶⁸

Section 10 makes it mandatory to use the principles of justice, equity and good conscience only in instances where the customary rule in question cannot be ascertained. The provision reads thus –

“ (2) If the system of customary law cannot be ascertained in accordance with subsection (1) or if the customary law is not ascertainable, the court shall determine the matter in accordance with the principles of justice, equity and good conscience.”⁶⁹

The question which arises for determination is whether this section can be regarded as an avenue through which women subject to customary law can enjoy rights accorded under statutory law?. In my humble opinion no, the section is not an avenue through which women subject to customary law can enjoy rights accorded under statutory law. The above stated view is held because according to the Act the courts are supposed to take all necessary steps to ascertain the rule in question. Section 11 obliges the courts to consult knowledgeable people on customary law through calling assessors to give oral evidence, textbooks, to seek legal opinions and refer to precedents.⁷⁰ It is humbly submitted that textbooks and all other aids used in ascertainment of the applicable customary law, state the law as is applied by the particular tribes or parts thereof. These laws traditionally reinforce discrimination against, and dispossession and subjugation of women. The court is not empowered to determine the degree of justice or equity as espoused by the particular law after being ascertained. Rather the court is bound to apply the law after ascertainment. The fact that the Act itself does not subject

⁶⁷ *Ibid.* at section 11.

⁶⁸ *Ibid.* at section 13.

⁶⁹ *Ibid.* subsection (2).

⁷⁰ *Supra.* note 43 at proviso to section 11.

customary law to any standard of justice or equity makes the Act inadequate as an avenue for women subject to customary law to claim their rights. Secondly principles of justice, equity and good conscience are resorted to as a last ditch measure where no specific customary law can be said to be applicable. Most cases are resolved at the level of the Customary court where the chief or presiding officer always sits with elders who assist with the ascertainment of customary law. The elders are mostly men who are not sensitive to issues of gender equity between men and women. Issues of ascertainment rarely arise and the *Mmusi* case (which will be discussed in the next chapter of this paper) was one of the rare instances.

In its report before the CEDAW Committee, the Botswana Council of Non-Governmental Organizations (hereinafter BOCONGO) noted that “customary law does not comply with either human rights standards as stated in international instruments, or with national statutes of Botswana.”⁷¹ The report continues to state,

“on the face of it the superior status of common law is seen to protect women and girls...however things are much more complex in real life, especially because often the common law is not given the opportunity to supersede customary law (emphasis is mine).”⁷²

When common law is not given the opportunity to supersede customary law, unjust and unfair traditional practices are effectively given formal recognition. By virtue of this recognition discrimination, patriarchy and gender inequality is institutionalized in Botswana.

As a plural legal system, Botswana, struggles to strike the delicate balance between guaranteeing the right to culture and protecting human rights. Although there is a comprehensive legislation regulating customary law, the law fails to set a standard of justice or equity to which exercise of customary practices may be subject. As a modern nation, which has committed itself to upholding universal human rights, it continues to ignore its

⁷¹ Botswana Council of Non- Governmental Organizations (BOCONGO) Shadow Report to CEDAW: The Implementation of the Convention para. 2.1 at page 17 accessed at http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/bocongo_Botswana45.pdf

⁷² *Ibid.* at page 18

international obligations and discriminate against women subject to customary law.

CHAPTER FIVE

Equality and Non-discrimination in Botswana and Botswana's Obligation under the Constitution

5.1 Botswana's Obligation To Ensure Equality And Non Discrimination

Botswana's obligation to protect its citizens from discrimination emanates from several international and regional instruments that she has ratified as well as her constitution. The various conventions will be discussed in detail below.

Universal Declaration of Human Rights (herein after referred to as the UDHR) is viewed as standard, which all nations must strive to achieve for all peoples and all nations.⁷³ Since 1948 it continues to be the most important source of inspiration for nations in the promotion and protection of human rights and fundamental freedoms.⁷⁴ The UDHR recognizes the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.⁷⁵ The Declaration further provides that everyone is entitled to all rights and freedoms contained in the

⁷³ The International Bill of Rights Fact Sheet No. 2 (Rev.1)

⁷⁴ *Ibid.*

⁷⁵ Preamble to the Universal Declaration of Human Rights accessed at www.un.org/en/documents/udhr/

Declaration without distinction of any kind including sex.⁷⁶ Equality for all is engendered at Article 7, which provides that all are equal before the law, and are entitled to equal protection of the law without discrimination.⁷⁷ Article 16 accords men and women of full age equal rights to marriage, during marriage and at its dissolution. Also makes free and full consent a pre requisite for marriage.⁷⁸

The International Covenant on Civil and Political Rights (hereinafter ICCPR) encourages states to ensure the equal right of men and women in enjoying all civil and political rights.⁷⁹ States are to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.⁸⁰ It goes on to provide for equality before the law without any discrimination. It further enjoins states to ensure that their laws prohibit any discrimination also to guarantee to all persons equal and effective protection against discrimination on any ground including sex or other status.⁸¹ The Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter CEDAW) has been hailed as the main instrument, which provides for women's basic rights. "The most important and comprehensive international treaty promoting women's rights is the Convention on the Elimination of All Forms of Discrimination (CEDAW, 1979) and complemented in 2000 by the Optional Protocol which entered into force on 22nd December 2000. It represents a milestone on the road to gender equality and empowerment of women."⁸² "The spirit of the Convention is rooted in the goals of the United Nations: to reaffirm faith in fundamental human rights, in the dignity and the worth of the human person, in the equal rights of men and

⁷⁶ *Ibid.* at article 2.

⁷⁷ *Ibid.* at article 7.

⁷⁸ Universal Declaration of Human Rights at article 16

⁷⁹ International Convention on Civil and Political Rights at Article 3

⁸⁰ *Ibid.* at Article 23

⁸¹ *Ibid.* at Article 26

⁸² Gender and Economic Empowerment in Africa- A paper presented at the 8th Meeting of the Africa Partnership Forum in Berlin, Germany 22-23 May 2007.

women.”⁸³ It emphasizes that extensive discrimination against women continues to exist and that it “violates the principles of equality of rights and respect for human dignity”.⁸⁴

Following on the provisions of the UDHR and the ICCPR on marriage and family the convention asserts equal rights and obligations of women and men with regard to choice of spouse, personal rights and property issues.⁸⁵ In Article 2 states undertook to condemn discrimination against women in all forms, and to incorporate the principle of equality in their national constitutions or other appropriate legislation. Further to adopt legislative and other measures prohibiting all discrimination against women and to take all appropriate measures including legislation to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.⁸⁶ States are further obliged to ensure that in all fields, be it political, social, economic and even cultural women enjoy full development and advancement for purposes of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.⁸⁷ At article 5 states are supposed to modify social and cultural patterns of conduct of men and women, with a view to eliminating prejudices inherent in customary and other practices based on the notion of patriarchy.⁸⁸ The convention also requires states to accord women the same status as men before the law.⁸⁹ Women are to be accorded equal legal capacity as men in civil matters, the convention requires that women be accorded contractual capacity, and capacity to administer property just like their male counterparts.⁹⁰

⁸³ Convention on the Elimination of all forms of Discrimination Against Women
Preamble

⁸⁴ *Ibid.*

⁸⁵ *Supra.* note 69 at article 16.

⁸⁶ *Ibid.* at article 2.

⁸⁷ *Ibid.* at article 3.

⁸⁸ *Ibid.* at article 5.

⁸⁹ *Ibid.* at article 15.

⁹⁰ *Ibid.*

In addition to the international instruments mentioned above, Botswana is party to regional instruments, which seek to ensure equality for women. The Constitutive Act of the African Union, in its principles enjoins states to “promote gender equality”.⁹¹ The Act also encourages states to “promote and protect human and people’s rights in accordance with the African Charter...”.⁹² The African Charter on Human and People’s Rights (hereinafter ACHPR), was adopted in Nairobi, Kenya in 1981. Botswana ratified the charter on July 17th, 1986.

Part I, titled “Rights and Duties” requires states to adopt legislative or other measures to give effect to rights and duties and freedoms in the Charter.⁹³ The Charter states, “every individual is entitled to the enjoyment of the rights and freedoms guaranteed in the Charter without distinction of any kind for example sex...or other status.”⁹⁴ Under the Charter every one is equal before the law.⁹⁵ The Charter obliges states to ensure elimination of any form of discrimination against women and also ensure the protection of rights of women...as stipulated in international declarations and conventions.⁹⁶ Article 19 then makes all people equal, and states that they shall enjoy the same respect and have the same rights. It continues to state that nothing shall justify the domination of a people by another.

Another instrument which enjoins African member states to protect and promote women rights and ensure equality between males and females is the Protocol to the African Charter on Human and People’s Rights on Women’s Rights (ACHPWR). Botswana however is amongst the eight nations, which have not signed nor ratified the Protocol. The Protocol

⁹¹ Constitutive Act of the African Union at article 4(i).

⁹² *supra*. note 91 at article 3.

⁹³ African Charter on Human and People’s Rights at article 1.

⁹⁴ *Ibid.* at article 2.

⁹⁵ *Ibid.* at article 3.

⁹⁶ *Ibid.* at Article 18.

covers human rights issues and economic rights for women including, the right to equal pay for equal work; the right to paid maternity leave in both private and public sectors;⁹⁷ the right of access to and control over land and other productive resources and to inherit equitable shares of property from their husbands and parents; women's rights to equitable sharing of joint property upon separation, divorce, or annulment of marriage⁹⁸ and recognition of the economic value of women's work in the home.⁹⁹ Most importantly the Protocol makes it mandatory for state parties to combat all forms of discrimination against women through legislative, institutional and other measures.¹⁰⁰ States are to engender equality between men and women firstly by including the principle of equality in their national constitutions. Botswana is party to the SADC Protocol On Gender And Development which is not yet in force.

5.2 Prohibition Of Discrimination In Constitution Of Botswana

Section 15 of the Constitution of Botswana is the main provision, which deals with discrimination in the Constitution of Botswana. Section 15 starts by prohibiting discrimination subject to exceptions.¹⁰¹ The section continues to provide for subject matters which do not fall within the purview of the section like any law which deals with matters of personal law or for issues dealing with members of a specific race, community or tribe.¹⁰² Relevant parts of the section are reproduced below for ease of reference.

⁹⁷ Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa at Article 13

⁹⁸ *Supra.* note 97 at article 7.

⁹⁹ *Ibid.* at Article 13

¹⁰⁰ *Ibid.* at Article 2.

¹⁰¹ *Supra.* note 5 subsection (1).

¹⁰² *Ibid.* at subsection (4).

The Constitution of Botswana generally prohibits discrimination¹⁰³. It provides –

“ Subject to the provisions of subsections (4), (5) and (7) of this section no law shall make any provision that is discriminatory either of itself or in its effect.”¹⁰⁴

Prohibition against discrimination, however, is precluded in instances where certain laws are peculiar to members of a particular race or tribe.¹⁰⁵ This is provided for in the following terms –

“(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision for-
(d) for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether the exclusion of any law in respect to that matter which is applicable in the case of other persons or not; or...”¹⁰⁶

In addition the Constitution precludes application of the prohibition against discrimination, from laws that were in force before it was drafted when it states that:

“Nothing contained or done under the authority of any law shall be held to be inconsistent with the provisions of this section...if that law was in force immediately before the coming into operation of this Constitution and has continued to be in force at all times since the coming into operation of this Constitution.”¹⁰⁷

Customary law is believed to precede the promulgation of the Constitution. The above-cited provision illustrates an acknowledgement by framers of the Constitution, of the prior existence of customary law before the dawn of constitutionalism in Botswana. The provision therefore makes customary law operate side by side the Constitution rather than bring it into conformity with its provisions. Customary law therefore continues to operate relatively in its pure form. It arguably has not been affected by the ratification of various international instruments that Botswana has ratified. It should also be noted that an exception is made to allow for discrimination in instances where the law makes provision with respect

¹⁰³ Constitution of Botswana, section 15.

¹⁰⁴ *Ibid.* subsection (1).

¹⁰⁵ *Supra.* note 89

¹⁰⁶ *Ibid.* at subsection (4).

¹⁰⁷ *Ibid.*

to adoption, marriage, divorce, burial, and devolution of property in death or other matters of personal law.¹⁰⁸ These are examples of areas where women subject to customary law face unequal application of progressive laws.

Another illustration of how women are denied the enjoyment of their fundamental freedoms in Botswana's dual legal system is when legislation is drafted. Botswana subscribes to the principle of constitutional supremacy, which basically provides that the Constitution is the supreme law of the land and therefore all laws enacted should be in accordance with its provisions¹⁰⁹. Because the Constitution already makes an exception under section 15 on matters of adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law when legislation is drafted its application is only limited to people not subject to Customary law. Yet it is under Customary law that much protection is needed because Customary law inherently protects men and disadvantages women. And this is legally sanctioned, because the law allows despite that it leads to injustice to some members of the society.

5.3 Legislations and Discrimination against Women Subject to Customary Law

Ratification of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) by Botswana was an opportunity for women to break barriers, which traditionally disadvantaged them. After ratification the government of Botswana embarked on a process of domestication through enactment of legislation. Several legislation have been enacted which perpetuate discrimination. For example the Abolition of Marital Power Act Cap. 29:07, the Adoption Act Cap. 28:01, the Matrimonial Causes Act Cap. 29:07,

¹⁰⁸ *Ibid.* at subsection (4) (c).

¹⁰⁹ Jutta Limbach. (2001), "The Concept of the Supremacy of the Constitution"; *The Modern Law Review*; Vol. 64, No. 1 pp. 1-10. Published by Wiley. Article URL: <http://www.jstor.org/stable/1097135>

all contain a provision that excludes people subject to customary law from the application of their provisions.

5.3.1 Abolition Of Marital Power Act

One of the legislations enacted was the Abolition of Marital Power Act.¹¹⁰ The Act was a result of a realization that placing men in positions of power deprived women of capacities, which would enable them to deal with challenges of daily life. Marital power as traditionally enjoyed by the husband, is one area which perpetuates disempowerment of women. Marital power is a Common-Law concept through which the husband exercises power over the wife's person and the power to administer their joint property if they are married in community of property or the wife's estate if they are married out of community of property¹¹¹. Women subject to marital power are deprived three essential capacities; these are contractual capacity, proprietary capacity and capacity to litigate.¹¹² "Female activities are almost always judged inferior to men's: while men deliberate and judge, women intrigue; men exchange information, women gossip; men intercede with supernatural forces, women are witches."¹¹³

The Act seeks to do away with the minority status women find themselves in by being subject to the husband's marital power to ensure that spouses enjoy equal powers in the administration of their estates and also in issues of guardianship of their children. Section 4(1)(a) abolishes marital power in marriages concluded after the operation of the Act and

¹¹⁰ Laws of Botswana Cap. 29:07

¹¹¹ Bojosi K. N. (2005) 'Botswana Abolishes Marital Power: A Commentary on some interesting aspects of the Abolition of Marital Power Act', *South African Law Journal* Vol. 123, No. 1 pages 12-23.

¹¹² Bennett, T. W. (1999), 'Human Rights and African Customary Law under the South African Constitution', *Juta*

¹¹³ *Ibid.* at page 80.

section 4(1)(b) abolishes marital power in marriages concluded before the operation of the Act. The Act goes on to encourage equality between spouses by according both spouses equal capacity to act on behalf of the estate. Section 7(a) gives both spouses equal capacity to dispose of the assets of the joint estate. Section 7(b) gives both spouses equal capacity to contract on behalf of the estate and both spouses now have capacity to administer the joint estate. Section 8 empowers a spouse to perform any juristic act without consent of the other spouse. This right however is subject to a requirement under section 9 for spouses to obtain written consent of each other before performing certain juristic acts as listed in section 9. Section 10 provides for remedies where the joint estate suffers as a result of non-compliance with requirements of section 9. Several examples in case law illustrate instances where one spouse alienated or attempted to alienate assets of the joint estate without the consent of the other.¹¹⁴

It has been noted that;

“the combined effect of these provisions is to give spouses, equal, concurrent or independent management of the joint estate as well as the joint management of it. In terms of the equal management of the joint estate, both spouses have the power to perform acts binding on the joint estate without the consent or even knowledge of the other spouse.”¹¹⁵

The Act also made provision for the domicile of married women and domicile and guardianship of minor children. Domicile has been defined as the place where someone has physically been present with the intention to make that place a permanent home.¹¹⁶ It has also been defined as; “an idea of law which enables a person to be identified with a particular legal system for the purposes of determining his or her personal law.”¹¹⁷ Three types of domicile

¹¹⁴ *Moisakamo v Moisakamo* 1978 BLR 22 HC

¹¹⁵ Quansah, E. K., (2005), ‘Abolition of Marital Power in Botswana: A new dimension in marital relationships’, *University of Botswana Law Journal*, Vol. 2 5. pp1

¹¹⁶ Statsky, W. P. (1985) *West’s Legal Thesaurus/ Dictionary; A resource for the writer and the computer researcher*. West Publishing Company

¹¹⁷ Quansah, E. K. (2001) *Introduction to Family Law in Botswana*. 3rd Ed. Pula Press

are recognized by law; domicile of origin, of choice and of dependence. Domicile of origin is that which every infant acquires at the time of birth being the domicile of his or her parents at that time. Domicile of choice is that which an individual elects and chooses for him or herself to displace the domicile previously obtained. Domicile is important for purposes of determining a person's legal status, capacity to marry, divorce and nullity of marriage, the mutual rights and duties spouses and succession to movable property.¹¹⁸

Married women acquire a domicile of dependence by operation of law. They acquire the domicile of their husbands. Any change in the domicile of the husband consequently implied a change in the domicile of the wife. This was done for "public policy considerations, which required that a single legal system must regulate mutual rights and obligations of the husband and the wife."¹¹⁹ Other reasons advanced include that it was a result of the long enduring Common-law assumption that a woman occupies an inferior status to that of her male counterpart¹²⁰. In the context of Botswana the need for a single domicile for spouses was stated by Aguda C. J as follows-

"In my view all that can be said about subsection (1)(a) of section 7 of the Matrimonial Causes Act is that it makes an erroneous assumption of a fundamental principle of our common law. Parliament, or more appropriately the legal draftsman, must have thought, quite wrongly of course, that our law permits of separate domicile by the wife and the husband."¹²¹

As a consequence of this legal position, women are often disadvantaged. For example, where a husband deserts the wife and acquires a new domicile, the wife would also acquire a new domicile. This created a difficulty for the wife in bringing divorce proceedings before courts of the country where she is resident because she would be

¹¹⁸ *Supra*. note 40.

¹¹⁹ Kahn E. (1972), *The South African Law of Domicile of Natural Persons*. Juta, Cape Town.

¹²⁰ Kiggundu, J. (1990), 'The Law of Domicile in Botswana; The need for reform' *African Journal of International and Comparative Law*, Vol 2, pp 626.

¹²¹ *Egner v. Egner* (1974) 2 BLR 5 at page 7.

domiciled in a different place. The Act changed the above stated position by providing that a wife's domicile shall not by virtue of the marriage be considered to be the same as that of the husband, but shall be ascertained by reference to the same factors as apply to any individual capable of acquiring a domicile of choice.¹²² By abolishing the concept of domicile, the Act effectively remedied some of the challenges women found themselves in.

Application of the Act however has not been extended to marriages subject to Customary law due to the status that Customary law is accorded by the Constitution. Section 3 provides that; "this Act shall not apply to any marriage contracted under Customary Law."¹²³ The Act was meant to give better protection to property rights of women in marriage and ensure equality in marriages; because it only applies to marriages contracted under civil law, women married under customary law are left vulnerable. They are still subject to the same disadvantages that the law was meant to address. The women still need the assistance of their husbands to enter into contracts, to register immovable property in their names, to litigate and to administer joint property.¹²⁴ It therefore follows that women who are subject to marital power cannot effectively access justice; as a minor, any chance of getting redress for a wrong suffered is at the pleasure of her husband or male guardian. Inability to conclude contracts unassisted also places them at a disadvantage in terms of benefiting from various government poverty eradication programs. Traditionally in Setswana a woman cannot be a breadwinner, it is a role for the husband as the head of the household.¹²⁵ Tswana men are

¹²² *Supra.* note 33 at section 16.

¹²³ Abolition of Marital Power Act Cap.29:07 section 3.

¹²⁴ Schapera, I. (1938) 'A Handbook of Tswana Law and Custom', Oxford University Press See also Hallward-Driemeier, Mary, and Tazeen Hasan. 2012. Empowering Women: Legal Rights and Economic Opportunities in Africa. Africa Development Forum series. Washington, DC: World Bank. DOI: 10.1596/978-0-8213-9533-2. License: Creative Commons Attribution CC BY 3.0

¹²⁵ Schapera, I. (1938), 'A Handbook of Tswana Law and Custom', Oxford University Press.

usually averse to having their wives assume the role of a breadwinner therefore they are always reluctant to giving their consent for their wives to benefit from government initiatives.

As part of a national poverty reduction strategy, a number of initiatives have been put in place to promote income generation. It is sad to note that rural women, the very demography, which disparately needs poverty eradication programs, is disadvantaged from benefitting from them. Women subject to customary law are unable to benefit from these initiatives because of the current status of the law.

5.3.2 Adoption Act

The Adoption Act¹²⁶ was enacted to provide for the adoption of children in Botswana. Even though the Act aims at regulating adoptions in Botswana, its provisions are not applicable to adoptions undertaken in accordance with customary law. An exception contained in the Act reads “Nothing in this Act shall be construed as preventing or affecting the adoption in accordance with customary law of a child who is subject to customary law by a person who is also subject to customary law.”¹²⁷ Although this section may seem specifically focused on children rather than on women, it is impossible to separate its effect on a mother under the customary justice system. As already discussed above a woman is regarded as a minor under customary law, thus all major decisions are made by her husband or male guardian. A mother’s consent under customary law is not a prerequisite in the adoption process of her child.¹²⁸

5.3.3 Matrimonial Causes Act

¹²⁶ Laws of Botswana Cap. 28:01

¹²⁷ *Ibid.* at section 16.

¹²⁸ *Supra.* note 71 at page 50.

The Matrimonial Causes Act is another piece of legislation whose provisions do not extend to marriages contracted in accordance with customary law.¹²⁹ The Act provides amongst other things for payment of maintenance in cases of divorce and nullity¹³⁰. It also makes provision for payment of alimony in cases of judicial separation.¹³¹ Women married in accordance with customary law are placed at a disadvantage because they cannot bring a claim for maintenance or alimony on the basis of this Act. Most women who are married in accordance with customary law are women who are not very advanced in education and they mostly are housewives. So when a man decides to divorce, during separation the woman is left without any means of supporting herself. The woman is also left with no recourse before the courts for her plight because the law does not cover her.

5.4 The Impact of Customary Rules and Practices

The Constitution of Botswana, in addition to making customary law operate side by side with it; without bringing it into conformity with its provisions, makes discrimination within customary law unchallengeable. This is evident in the following constitutional provision:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any restriction on the rights and freedoms guaranteed by sections 9, 11, 12, 13 and 14 of this Constitution, being such a restriction as is authorized by section 9(2), 11(5), 12(2), 13(2), or 14(3) as the case may be.”¹³²

This provision effectively prohibits aggrieved persons from accessing remedies for wrongs that they may suffer as a result of discrimination on matters of personal law under customary law. As noted by scholars, “by according supra-constitutional status to personal

¹²⁹ Laws of Botswana Cap. 29:06 at section 3.

¹³⁰ *Supra*. note 115 at section 25.

¹³¹ *Ibid.* at section 27.

¹³² *Ibid.* subsection (7).

law, the state privileges the views of those able to assert private power to define customary or religious norms in the ways that disadvantage weaker social groups.”¹³³

The *Mmusi and Others v Ramantele and Others*¹³⁴ case illustrates an attempt to challenge a rule on inheritance under customary law. The brief facts of the case are as follows: On May 15 2007, the first applicant (Edith Mmusi) sued her nephew the 1st respondent (Molefi Silabo Ramantele) in the Lower Customary Court for an order declaring, among other things, that she was entitled to inherit the house forming part of her late father’s estate. According to the facts the first applicant’s late father died intestate. The court dismissed her appeal on the grounds that under Ngwaketse customary law, a woman cannot inherit her father’s dwelling house.¹³⁵ The applicant was given thirty days to vacate the home in issue after the date of the Order.¹³⁶ On November 4 2008, the applicant appealed to the Higher Customary Court where Kgosi Lotlaamoreng held that the home belonged to all children born of Silabo and Thwesane.¹³⁷ He further held that all the children had the right to use it as they wish whenever they have a common event. He then ordered the elders to convene a meeting with all concerned parties to identify one child who will take care of the home.¹³⁸ The case was then appealed to the Customary Court of Appeal, which awarded the home to the 1st respondent and ordered the 1st applicant to vacate the home within 3 months of the order.¹³⁹

¹³³ Helling, Anne and Aasen, Henriette Sinding (2013). Women's Human Rights : CEDAW in International, Regional and National Law. Retrieved from <http://www.ebib.com>

¹³⁴ MAHLB-000836-10

¹³⁵ *Ibid.* para. 10 at page 3.

¹³⁶ *Ibid.* paragraph 11 at page 3.

¹³⁷ *Molefi Silabo Ramantele v Edith Mosadigape Ramantele* Civil Case No. 99-10 dated 22 September, 2010.

¹³⁸ *Supra.* note 9 paragraph 8 at page 3.

¹³⁹ *Supra.* note 10.

The applicant being dissatisfied with the decision of the Customary Court of Appeal brought an application before the High Court of Botswana joined by her two sisters. The High Court stated the issue:

“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.”¹⁴⁰ .

The court after considering a plethora of laws and authorities from different jurisdictions as well as international human rights instruments made the following observation-

“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.”¹⁴¹ “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.”¹⁴²

Based on the above reasoning, the court held that the Ngwaketse Customary Law rule in question violated the applicant’s rights to equal protection of the law. The judgment of the Customary Court of Appeal was reviewed and set aside. The court noted “denying or limiting women’s equality was fundamentally unjust.”¹⁴³ The court also noted that exclusion of women from inheritance perpetuated the practice of placing women in a position of subservience and subordination.¹⁴⁴

It is important at this juncture to observe that the judgment of the Court as stated above; gave the impression of an attempt by the courts, as custodians of the law to join hands

¹⁴⁰ *Supra*. note 9 page 1 MAHLB-000836-10

¹⁴¹ *Ibid.* at page 67, paragraph 217.

¹⁴² *Ibid.* paragraph 218.

¹⁴³ *Ibid.* at page 64, paragraph 205.

¹⁴⁴ *Ibid.* at page 64, paragraph 205.

in fighting gender inequality.¹⁴⁵ If the case had not proceeded to a further appeal it would have led to legal reform in Botswana, which would have been a great achievement and triumph for constitutionalism and the rule of law in the country.

On appeal to the Court of Appeal, the High Court judgment was quashed and substituted. The manner in which the Court of Appeal handled the case illustrates a “hands-off approach” that appears to have been adopted by Botswana on issues that concern customary law. In the judgment of the Court of Appeal the court notes that the judge in the High Court misdirected himself when he determined that the case required an examination of the Constitution of Botswana. The court stated-

“...when the matter came before Dingake J. in review proceedings brought on constitutional grounds, he had before him three conflicting outcomes all purportedly arrived at by applying Ngwaketse customary law principles on intestate succession to the same facts. He did not deal with those facts ...and thus failed to arrive at the correct conclusion without resorting to the Constitution at all, as he should have done.”¹⁴⁶(emphasis is mine).

The Court of Appeal further criticized the court *a quo* for failing to apply a fundamental rule used in the interpretation of provisions of the Constitution.¹⁴⁷ The court stated that when making his analysis Dingake J. should not have confined his analysis to a single section of the Constitution. The court remarked -

“...the judge omitted to mention this well known rule and proceeded improperly in my view, to consider section 3 of the Constitution in isolation in regard to gender based inequality before the law, without fully considering, as he was bound to , section 15 which deals specifically with discrimination on the ground of sex...”¹⁴⁸

¹⁴⁵ At page 65 paragraph 211 the court said-

“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.”.

¹⁴⁶ *Ramantele v. Mmusi and Others*, CACGB-104-12, paragraph 7 at page 5.

¹⁴⁷ Under section 29, subsection (1) of the Interpretations Act it is provided that “An Act or an instrument shall be construed as a whole.”.

¹⁴⁸ *Supra*. note 21 paragraph 12 at page 9.

The Court of Appeal held the view that it was erroneous for the court to have decided to call for an amendment of the Constitution. Furthermore the Court of Appeal went on to assert that unfair discrimination against women had already been outlawed in Botswana. In this regard, the Court observed:

“The presentation of the stated case enabled Dingake J. to embark on a lengthy and erudite analysis of equality before the law and of gender discrimination in customary law, calling in aid cases from all over the world. Unfair discrimination against women was, of course outlawed in Botswana as being unconstitutional many years ago in the seminal case of *ATTORNEY GENERAL vs DOW* 1992 BLR 119 CA.”¹⁴⁹

The Court of Appeal in its conclusion did not embark on a determination of whether the Ngwaketse customary rule in question was unconstitutional. Thus, the court did not do away with the customary rule in question. It simply looked at the fact that in the case in question there was no surviving son or even a last born son. The only surviving children were the three sisters in question. The court pointed out that:

“it is not necessary to make a constitutional determination in order to resolve this case, which mainly turns on its facts. It was for the court to identify the correct version on evidence led, not for counsel to decide this in the stated case. According to the facts there was no surviving son, let alone a last born son. The outcome of the court of appeal was to evict an 80 year old woman without compensation and no regard to her future security. It is difficult to imagine a case more manifestly unjust, and the application of the last born rule was not justified either by evidence or by circumstances.(emphasis is mine)”¹⁵⁰

It is perhaps important to note that the Court of Appeal made reference to the position stated in the Dow case where unfair discrimination against women was declared unconstitutional. It is also important to refer to Amisah J. P. who said:

“ Our attention has been drawn to the patrilineal customs and traditions of the Batswana to show, I believe, that it was proper for Parliament to legislate to preserve or advance such customs and traditions. Custom and tradition must a fortiori, and from what I have already said about the preeminence of the Constitution, yield to the Constitution of Botswana. A constitutional guarantee cannot be overridden by custom. Of course, the custom, will as far as possible be read so as to conform to the Constitution. But where this is impossible, it is the custom not the Constitution that must go.”¹⁵¹

¹⁴⁹ *Supra*. note 21 para. 10 at page 7.

¹⁵⁰ *Ibid*. para. 41 at page 29.

¹⁵¹ *Attorney General v. Unity Dow* (1992) B. L. R. 119 at 137

I humbly submit that when referring to the *Dow* case, the Court of Appeal should have also taken the opportunity to pronounce on the status of the constitutionality of the primogeniture rule in question rather than stating that “it was not necessary to make a constitutional determination to resolve the issue, ... and that the application of the last born son was not justified by evidence or circumstance”.¹⁵² The manner in which the court made the conclusion begs the question whether; if a last-born son had been present would the application of the last-born rule justified by evidence and circumstance? It would have been an opportunity to advance the rule of law and enhance women’s access to justice. As Banda notes,

“The courts should be courageous enough and give effect to such a change. By exercising judicial activism the courts will be able to broaden the definition and understanding of customary law, but the courts would also be able to direct the attention of the agents of the legal system to adopt a more critical attitude towards concepts such as customary law.”¹⁵³

Viewed from the perspective of section 15 of the Constitution, where discrimination in matters of personal law in under customary law is an exception, it may be submitted that the Court of Appeal, was acting in accordance with the constitution thus adhering to the principle of supremacy of the constitution.

¹⁵² *Supra.* note 108.

¹⁵³ *Supra.* note 35 at page 25

CHAPTER SIX

Comparative Constitutional Impact on Customary Law: The South African Experience.

South Africa experienced a long and protracted period of apartheid and racial strife, which was perceived as unlikely to end. The adoption of the 1993 Constitution was unexpected by many. Some authors described in it the following terms, “South Africa’s transformation captured the imagination of the world. It was a model of a peaceful alternative to a bloody revolution...at the heart of this transformation lies the South African Constitution.”¹⁵⁴

Following a long checkered history of discrimination, stakeholders during the making of the Constitution made a conscious decision to ensure that all persons in South Africa are to be subject to a uniform standard of treatment.¹⁵⁵ They viewed the Constitution as providing “a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful existence and development for all South Africans, irrespective of color, race, class, belief or sex.”¹⁵⁶ Women’s movements took the opportunity to make their voice heard as they advocated for gender equality. “Women sought to ensure that South Africa’s transformation included a commitment to changing many aspects of their lives.”¹⁵⁷ The right to culture within the South African Constitution was also not forgotten and as a

¹⁵⁴ Hassen Ebrahim; (2001) ‘The making of the South African Constitution: Some Influences accessed in Andrews P. and Ellman Stephen, (ed.) 2001, “Post Apartheid Constitutions-Perspectives on South Africa’s Basic Law”. Witwatersrand University Press and Ohio University Press.

¹⁵⁵ Siri Gloppen (1997); South Africa: The Battle over the Constitution, Ashgate Publishers, England.

¹⁵⁶ Hassen Ebrahim (1998), The Soul of a Nation- Constitution-making in South Africa, Oxford University Press, Cape Town, Foreword xv

¹⁵⁷ Andrews P., (2001) “The Stepchild of a National Liberation: Women and Rights in the New South Africa”, accessed in Andrews P. and Ellman Stephen, (ed.) 2001, “Post Apartheid Constitutions-Perspectives on South Africa’s Basic Law. Witwatersrand University Press and Ohio University Press at page 326

response to historical disrespect for indigenous law and custom, advocacy for culture was strong. The international rekindling of the rights of the indigenous peoples resonated strongly in South Africa, and as a result in one of his works Albie Sachs¹⁵⁸ advocated for cultural pluralism, religious and linguistic diversity to be tolerated and encouraged. He went on further to state that cultural rights of all citizens should be given constitutional protection.¹⁵⁹ As a consequence of strong advocacy for the protection of both culture and women's rights, a conflict emerged between certain aspects of indigenous custom and the consensus on gender equality.¹⁶⁰ A compromise was then reached to incorporate the right to culture within the Constitution, however subjecting it to principles of equality and human dignity. These two principles are regarded as "the centerpieces within a pluralistic system which seeks to harmonize practices of religious and cultural members of the society."¹⁶¹

6.1 Bill of Rights

The South African Constitution¹⁶² contains comprehensive provisions dealing with equality, human rights and freedoms. Chapter I titled Founding provisions, states the values that South Africa is founded on as; human dignity, attainment of equality and advancement of human rights and freedoms.¹⁶³ Consistent the founding values, the constitution has a Bill of Rights, which contains provisions, which augment the founding principles. Section 7(1) provides- "This Bill of Rights is a corner stone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

The South African constitution further enjoins the state to protect, respect and promote

¹⁵⁸ Albie Sachs, (1992), 'Advancing Human Rights in South Africa', Oxford University Press, Oxford

¹⁵⁹ *Ibid.*

¹⁶⁰ *Supra.* note 98 at page 332.

¹⁶¹ Andrews, P., (2012), 'From Cape Town to Kabul: Rethinking Strategies for Pursuing Women's Human Rights', Farnham, Surrey; Burlington VT Ashgate.

¹⁶² South African Constitution of 1996.

¹⁶³ *Ibid.* at section 1(a).

the fulfillment of the Bill of Rights.¹⁶⁴ The application of the Bill of Rights is far reaching in that it extends to; the legislature, executive and judiciary and all organs of state.¹⁶⁵ “The Bill of Rights is not confined to protecting individuals against the state. In certain circumstances the Bill of Rights directly protects individuals against abuses by other individuals by providing for the direct horizontal application of the Bill of Rights.”¹⁶⁶

The right to culture is guaranteed under section 30, which provides; “Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.”¹⁶⁷

Section 31 (paraphrased) provides; “(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community (a) to enjoy their culture....(b) to form, join and maintain cultural...associations...”.

The right to culture is to be exercised in accordance with the Bill of Rights. Section 31 continues; “(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.”¹⁶⁸

Section 31 serves as an internal limitation clause. The section ensures that, the practice of culture is does not undermine fundamental rights and freedoms espoused in the Constitution. Enjoyment of the right to culture must be done in line with respect human dignity, attainment of equality and advancement of human rights and freedoms. Subjecting the right to culture to the Bill of Rights makes cultural practices subject to review. The Constitutional Court in the case *Alexkor Ltd And Another V Richtersveld Community And*

¹⁶⁴ *Supra.* note 162 at section 7(2).

¹⁶⁵ *Supra.* note 126 at section 8.

¹⁶⁶ Ian Currie and Johan De Waal, (2005), “The Bill of Rights Handbook”, 5th Edition, Juta and Co.

¹⁶⁷ *Supra.* note 128 at section 30.

¹⁶⁸ *Supra.* note 126 at section 31(2).

*Others*¹⁶⁹ stated-

“While in the past indigenous law was seen through the common law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution.”¹⁷⁰

The Constitutional Court of South Africa in a landmark case of *Bhe and Others v Magistrate Khayelitsha and Others*¹⁷¹ struck down a rule of male primogeniture applicable under African Law of Succession. The case was an application for confirmation of an order of the Cape Town High Court. The issue before the court was the constitutional validity of the rule of male primogeniture as espoused by customary law of succession.¹⁷² Ms Bhe sought no relief for herself but brought the action (a) on behalf of her minor daughters, (b) in the public interest and (c) in the interest of female dependants, descendants other than eldest descendants and extra-marital children who are descendants of people who die intestate.¹⁷³ Ms Bhe’s minor daughters were intestate heirs of Mr Vuyo Elius Mgolombane who passed away in October 2002. The deceased had obtained a housing subsidy, which he used to purchase immovable property and some building materials. Ms Bhe and the deceased had cohabited until his death.¹⁷⁴ According to the Intestate Succession Act an estate of “a Black and allotted to him or accruing under Black law or custom to any woman with whom he lived in a customary union” was to be “administered under Black law and Custom.”¹⁷⁵ Accordingly the Khayelitsha Magistrate in accordance with the provisions of the Intestate Succession Act appointed the deceased’s father as the representative and sole heir of the estate.¹⁷⁶ It must be

¹⁶⁹ 2003 (12) BCLR 1301 CC.

¹⁷⁰ *Ibid.* para. 51

¹⁷¹ Reported as *Bhe and Others v Magistrate, Khayelitsha and Others* in 2004 (2) SA 544(C); and 2004 (1) BCLR 27 (C).

¹⁷² *Ibid.* at page 5.

¹⁷³ *Ibid.* at page 6.

¹⁷⁴ *Ibid.* at page 8-9.

¹⁷⁵ Black Administration Act 81 of 1987 at section 23

¹⁷⁶ *Supra.* note 137 at page 9.

noted that according to section 23 and the regulations under the Act, the estate fell under Black law and custom therefore the two minor children did not qualify to be heirs to the estate of their deceased father. As the sole heir, the deceased's father, decided to sell the property to defray expenses incurred during the funeral.¹⁷⁷

The applicants approached the Cape Town High Court to obtain two interdicts to prevent (a) sale of the immovable property for purposes of off-setting funeral expenses and (b) further harassment of Ms Bhe by the father of the deceased. The High Court concluded that the legislative provisions that had been challenged and on which the father of the deceased relied, were inconsistent with the constitution thus invalid.¹⁷⁸ At the constitutional court the court declared Nonkululeko Bhe and Anelisa Bhe the sole heirs of the deceased estate of Vuyo Elius Mgolombane. It also ordered the deceased's father to sign all documents and take all steps required of him to transfer the entire residue of the said estate to the rightful sole heirs. The Constitutional court also declared that the rule of male primogeniture as it applied to customary law was inconsistent with the Constitution and invalid to the extent that it excluded or hindered women and extra-marital children from inheriting property. The court held: "It bears repeating, however, that as with all law, the constitutional validity of rules and principles of customary law depend on their consistency with the Constitution and the Bill of Rights."¹⁷⁹

Subjecting the right to culture to the Bill of Rights serves as an internal limitation clause.¹⁸⁰ The South African Constitution provides an avenue through which any person who suffers harm due to discrimination emanating from customary law can access justice.

¹⁷⁷ *Supra.* note 137

¹⁷⁸ *Supra.* note 134 BCLR at page 37.

¹⁷⁹ *Supra.* note 137 at para 46.

¹⁸⁰ Bennett, T. W., (2011), 'Legal Pluralism and the Family in South Africa: Lessons from Customary Law Reform'; *Emory International Law Review*, Vol. 25, page 1034.

Customary law in the South African Constitution may be subject to review.¹⁸¹ Furthermore the South African Constitution prohibits the state from unfairly discriminating against any one, whether directly or indirectly.¹⁸² Culture is one of the grounds where discrimination is prohibited.¹⁸³ As noted by Andrews,¹⁸⁴ “Another fairly unique feature of the Bill of Rights is its vertical as well as horizontal reach. In other words the Bill of Rights has application as between government and its citizens.”¹⁸⁵

The vertical and horizontal reach of the Bill of Rights ensures that the state in addition to not discriminating against anyone, acts positively in preventing discrimination.

6.2 Equality Provision

In addition to the Bill of Rights provision the South African Constitution contains an extensive equality provision. The equality provision follows the wording of international and regional human rights instruments for example the ICCPR, the CEDAW and the ACHPR.

The equality provision reads in part –

“(1) Every one is equal before the law and has the right to equal protection and benefit of the law.

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.”¹⁸⁶

The Constitutional Court has described the position of the equality provision as; “The guarantee of equality lies at the very heart of the Constitution. It permeates the very ethos upon which the Constitution is premised.”¹⁸⁷ In addition the *Bhe and Others* case also

¹⁸¹ *Supra.* note 180.

¹⁸² *Supra.* note 33 at section 9(3).

¹⁸³ *Ibid.*

¹⁸⁴ Andrews, P., (2007) ‘Learning to Love after Learning to Harm: Post Conflict Reconstruction, Gender Equality and Cultural Values’, *Michigan State Journal of International Law* (15:41), pp. 41-62.

¹⁸⁵ *Ibid.* at page 54.

¹⁸⁶ *Supra.* note 128 at section 9.

¹⁸⁷ *Frazer v Children’s Court, Pretoria North and Other* 1997 (2) SA 261 (CC)

illustrates how the court applied the principle of equality in determining the issues before it.

Langa DCJ stated:

“To the extent that the primogeniture rule prevents all female children and significantly curtails the rights of male extra-marital children from inheriting, it discriminates against them too. These are particularly vulnerable groups in our society, which correctly places much store in the well-being and protection of children who are ordinarily not in a position to protect themselves. In denying female and extra marital children the ability and the opportunity to inherit from their deceased fathers, the application of the principle of primogeniture is also in violation of section 9(3) of the Constitution.”¹⁸⁸

The court also held that exclusion of women from inheritance on the grounds of gender was a form of discrimination that entrenched past patterns of disadvantage among a vulnerable group. Further that it is a clear violation of section 9(3) of the Constitution thus incompatible with the guarantee of equality under the Constitution.¹⁸⁹ The South African Constitution also guarantees achievement of substantive equality and further enjoins the state to enact national legislation to prevent and prohibit discrimination.¹⁹⁰ The court took opportunity to consider whether the principle of primogeniture was compatible with section 10, which provides for everyone’s inherent dignity. ¹⁹¹The court found that the principle violated section 10 as well in that it did not respect and protect of the applicants. It noted; “The rights to equality and culture are the most valuable rights in an open and democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination on grounds that include race and gender.”¹⁹²

In conclusion the principle of primogeniture was found to be violating several provisions of the Constitution, being the founding principles (human dignity, attainment of equality and advancement of human rights and freedoms), the Bill of Rights, the equality and prohibition against discrimination clause and human dignity clause.

¹⁸⁸ *Supra.* note 137 para. 93

¹⁸⁹ *Supra.* note 137 para. 91.

¹⁹⁰ *Supra.* note 128 at section 9(5)

¹⁹¹ *Supra.* note 137 para. 48

¹⁹² *Ibid.* at para. 71.

The promulgation of the 1996 constitution gave impetus to reform in various areas of cultural practices. Customary law began to enjoy an elevated status as evidenced by section 211, which recognized application of customary law as one of the laws in South Africa.¹⁹³ it also recognizes institutions, status and role of traditional leadership according to customary law and subjects them to constitutional provisions. Institutions like the South African Law Reform Commission (SALRC) have been set up to spearhead reform to bring customary law into conformity with the constitution. For example after the *Bhe* case the SALRC drafted a Bill for the amendment of customary law of succession. The SALRC has also worked on several Bills; Recognition of Customary Marriages Act, Reform of Customary Law Succession Act, the Equality Act, an amendment to the Administration of Estates Act had also tabled a paper on circumcision and virginity testing.

The treatment of customary law within the South African legal system is a model, which engenders enjoyment of the right to culture as well as respect for human rights. The South African Constitution explicitly grants the right to culture to every person. Enjoyment of this right is subjected to overarching standards set by the Constitution. The right to culture within the South African Constitution is subject to the Bill of Rights and the equality clause. This is in sharp contrast to the situation, which prevails within the Botswana legal system where exercise of the right to culture is not subjected to constitutional guarantees rather customary law and cultural practices are exempt from the discrimination prohibition in the Constitution.¹⁹⁴ The varying approaches adopted by the two countries in issues of culture were further illustrated in the two cases discussed above where the rule of primogeniture was at issue. When the issue was before the South African Constitutional Court, in the case *Bhe*

¹⁹³ Grant Evadne; (2006), 'Human Rights, Cultural Diversity and Customary Law', *Journal of African Law*, Vol. 50, No. 1 pp1-23 at page 7 Accessed at <http://www.jstor.org/stable/27607953>

¹⁹⁴ *Supra.* note 65.

*and Others v Magistrate Khayelitsha and Others*¹⁹⁵ the court struck down the rule on the basis that it violated the equality provision in the Constitution.¹⁹⁶ In sharp contrast when the issue was before the Botswana Court of Appeal, in the case *Mmusi and Others v Ramantele and Others*,¹⁹⁷ the court quashed an earlier judgment of the High Court where the rule was struck down. The Court of Appeal did not determine whether the rule of primogeniture was constitutional but rather castigated the earlier court for making such a determination. The Court of Appeal applied section 15 of the Constitution, which contains an exception on issues of personal law under customary law.

Under the South African legal system the state is constitutionally bound to enact legislation to prevent and prohibit discrimination. The Constitution of Botswana is silent on the same. The state is not constitutionally bound to enact legislation to prevent and prohibit discrimination. As already noted above newly drafted legislation, which seeks to promote equality like the abolition of Marital Power Act, are forced to discriminate against people subject to customary marital law. And this discrimination or exclusion is mandated by section 15 of the Constitution of Botswana.

¹⁹⁵ *Supra.* note 146.

¹⁹⁶ *Supra.* note 164.

¹⁹⁷ *Supra.* note 120.

CHAPTER SEVEN

Conclusion and Recommendations

7.1 Conclusion

Botswana is a pluralistic legal system, where statutory law operates alongside customary and religious law. In an effort to take cognizance of the various legal cultures present in Botswana, framers of the post colonial Constitution when drafting the non discrimination clause decided to exempt its application from laws which were present before the promulgation of the Constitution. Customary law is the main law, which was present before the promulgation of the Constitution, and it is recognized as having “provided a firm foundation for all subsequent laws and for the Constitution itself...”.¹⁹⁸

The treatment of customary law within the Constitution of Botswana leaves a lot to be desired. Exempting customary law from the provisions of section 15 of the Constitution has created a situation whereby women subject to customary law remain legally vulnerable even where laws are enacted to improve the situation and status of women. When laws like the Abolition of Marital Power Act, the Adoption Act, the Matrimonial Causes Act are drafted they have to contain a provision which exempts their application from people subject to customary law. This is inevitable because Botswana subscribes to the principle of constitutional supremacy. Therefore because the Constitution exempts issues of personal matters under customary law from the non-discrimination provision, all laws that have a bearing on issues of personal matters under customary have to discriminate against people subject to customary law for them to be valid.

Exempting customary law from the provisions of section 15 of the Constitution also makes unjust and unfair customary practices unchallengeable before courts of law. The exemption makes such practices supra constitutional. According customary law and practices

¹⁹⁸ *Supra*. note 25

supra-constitutional status, impedes access to justice for a lot of women who are disadvantaged by being subject to customary legal system. Sanctioning discrimination in personal matters under customary law, section 15 defeats attainment of equality and non-discrimination as espoused in several international and regional instruments, which Botswana has ratified. This was illustrated in the *Mmusi* case ¹⁹⁹discussed above.

As discovered during the research; the approach taken by the South African Constitution in handling issues of culture is a model, which engenders respect for human rights. The right to culture within the South African legal system is subject to compatibility with the provisions of the constitution. As already noted above the principles of equality and non-discrimination, are the founding values in the South African constitution. In addition they are comprehensively provided for at section 9 and section 10 respectively. The exercise and enjoyment of the right to culture is subject to an internal limitation clause. The internal limitation clause makes it possible to subject systems of cultural law to review.

The South African constitution enjoins the courts to promote the values based on human dignity, equality and freedom when interpreting the Bill of Rights. Also the courts are constitutionally bound to consider principles of international law... when developing customary law.²⁰⁰

The current constitutional provision regarding non-discrimination within the Constitution of Botswana does not comply with international human rights standards which Botswana is party to.

¹⁹⁹ *Supra.* note 108

²⁰⁰ *Supra.* note 128 at section 39

7.2 Recommendations

In my considered opinion for the Botswana to fulfill its obligations under the various international human rights instruments she has ratified Botswana should undertake a wholesome constitutional reform process. It is therefore recommended that Botswana should do the following:

- 1) Reform all laws especially the Constitution, regulations, customs and practices, which discriminate against women.
- 2) Promote customs and practices, which favor gender equality and women's rights.
- 3) Capacitate community leaders (be it chiefs, or religious leaders) and those who oversee customary justice institutions about women's rights and gender equality. Capacitating community leaders who in-turn will sensitize their communities will foster a bottom-up approach to achievement of gender equality and respect of human rights. When community leaders tackle gender equality at the grassroots level, they will complement the legislative reform that will be undertaken. The laws will be easier to reform and implement.
- 4) After capacitating community leaders, they should be encouraged to sensitize their communities on gender equality and women's rights.
- 5) It is also recommended that proper institutions, which will be responsible for the protection and preservation of human rights, be set up. These include an independent Human Rights Commission, an independent Law Reform Commission,²⁰¹ a Constitutional Court. Proper institutions will greatly enhance access to justice.

²⁰¹ Currently a Law Reform Unit is being set up within the Legislative drafting Division of the Attorney General's Chambers. In my opinion this is will hinder the proper functioning of unit because it will be susceptible to influence by government.

- 6) Civil Society organizations should be empowered financially and otherwise so that they may advocate for the vulnerable and marginalized women. Civil Society Organizations are also instrumental in educating the vulnerable and marginalized and empower them to claim their rights and hold the duty bearers accountable.

It is further recommended that when undertaking legislative reforms a human rights based approach should be adopted. A human rights based approach is “a conceptual framework for the process of human development that is based on international human rights standards and operatively directed to promoting and protecting human rights”.²⁰² The human rights based approach has been recognized as leading to “better and sustainable human development results.” (United Nations 2006). The human rights based approach ensures involvement and empowerment of the most vulnerable and marginalized in our societies, enables them to participate in policy formulation and hold accountable those who have a duty to act.²⁰³ Through this approach legislation and most importantly the constitution will address practices and traditions that discriminate against women. Customary law will be tested against the standards of human rights as espoused in the constitution and other legislations.

It is further recommended that when carrying out a reform of the Constitution the following provisions be included:

1. an equality provision which will expressly grant both men and women equality before the law without discrimination, and

²⁰² Abramovich, Victor (2006) “The Rights-Based Approach in Development. Policies and Strategies.” *CEPAL Review* 88 (April): 33–48. See also information on human rights based approach accessed at

http://www.undg.org/content/programming_reference_guide_%28undaf%29/un_country_programming_principles/human_rights-based_approach_to_development_programming_%28hrba%29

²⁰³ United Nations. 2006. Frequently Asked Questions on a Human Rights–Based Approach to Development Cooperation. New York: United Nations. More information on human rights based approach available at

<http://www.ohchr.org/Documents/Publications/FAQen.pdf>

2. a provision on women's rights which, will make it mandatory for the state to protect women, to ensure equal opportunities for men and women, and make it mandatory for the state to eliminate all forms of discrimination against women.

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