



Customary Law Inheritance: Lessons Learnt from *Ramantele v Mmusi and Others*

Tabeth Masengu, Researcher at the Democratic Governance and Rights Unit,
University of Cape Town
Working Paper No 6
January 2015



Oxford Human Rights Hub
A global perspective on human rights



Table of Contents

1. Introduction	3
2. Customary Law and Women's Rights: Are They Mutually Exclusive?	7
2.1 An Overview	7
2.2 The Law in Botswana	10
3. <i>Mmusi and Other v Ramantele and Others</i> : Factual Background.....	13
4. The Ground Breaking Judgment in the High Court	15
4.1 The Applicants' and Respondents' Arguments.....	15
4.2 The Judgment.....	19
5. The Appeal Court Decision: Critique and Lessons Learnt	22
5.1 Ascertaining Customary Law: Evidence versus Practice	234
5.2 Asking the Constitutional Question: Is it Really Necessary?	26
5.3 The Adjudication of Customary Law: Is it Fair?	28
5.4 Culture and Identity: Adjusting to Changing Times	30
6. Recommendations.....	34
7. Conclusion	36

The views expressed in this paper are those of its independent author.

1. Introduction

Poverty, narrowly defined is the lack of physical, human and social capital to meet basic needs.¹ In Botswana, few women own land, which is a strong indicator of physical capital, and those who are owners, only have secondary rights.² This is despite recent land reforms³ and improved women's land rights.⁴ As in many other countries, women face the burden of poverty and the proportion of female headed households living in poverty is higher than that of male headed households.⁵ Predominantly a rural country with only 22 per cent of its population residing in urban areas, amongst other problems, women in Botswana have a lower employment rate to population and less income than men do.⁶ Hence women face an uphill battle in articulating their claims to equality and in ensuring that these claims are legally enforceable.

Jurisprudence in Botswana regarding equality and women's rights has for many years been dominated by the well-known case of *Attorney General of Botswana v Unity Dow*.⁷ In the *Dow*

* Tabeth Masengu is an admitted attorney of the High Court of South Africa.LLB Rhodes University (*Cum Laude*),LLM in Human Rights (*Cum Laude*) from The London School of Economics and Political Science. I gratefully acknowledge financial assistance from the NRF given through Professor Evance Kalula's Rated Researchers fund. I would also like to thank Jessica Hichens for her assistance and feedback throughout this article.

¹ K.Osei, Poverty Eradication in Botswana: Towards the Realisation of Vision 2016,(18)1 *Botswana Journal of African Studies*, (2004) 7-17 at 8.

² F.Kalabamu, Patriarchy and women's land rights in Botswana,26 *Land Use Policy* (2006) 237-246 at 237.

³ These include the National Development Plan (2010-2016) which has a land sector strategy that includes a lands acquisition and allocation programme.

⁴ Kalabamu, *supra* note 2.

⁵ *Botswana Country Report on the implementation of the Beijing Platform for Action* available, June 2014 at http://www.unwomen.org/~media/Headquarters/Attachments/Sections/CSW/59/National_reviews/Botswana_review_Beijing20.pdf.

⁶ World Bank Publications, *The Little Data Book on Gender 2011*, available at <http://issuu.com/world.bank.publications/docs/9780821398203?hootPostID=f5ef82fb18b45a23306988220571fa1b>.

⁷ *Attorney General v Unity Dow* (1992) BLR 119.

matter, the respondent challenged section 4 of the Citizenship Act,⁸ which precluded her two children from becoming citizens of Botswana because their father was an American citizen and this prevented her from passing on her citizenship. The High Court and later the Court of Appeal⁹ held that section 15 of the Constitution of Botswana must be interpreted to include sex as a ground of discrimination. This is because the makers of the Constitution would not have intended that equal treatment of males and females be exempted from the prohibition of discriminatory laws and discriminatory treatment found in subsections 15(1) or (2).¹⁰ Important for this discussion is that the Court of Appeal rejected the appellant's argument that 'sex' had been intentionally omitted from the definition of discrimination in section 15(3) of the Constitution. The Court dismissed the appellant's contention that the absence of 'sex' as a grounds of discrimination was so as to accommodate, subject to the fundamental rights protected by section 3 thereof, the patrilineal structure of Botswana society, in terms of the amongst others customary law.¹¹

In 2012, two decades after the historic *Dow* judgment, the High Court of Botswana handed down another ground-breaking judgment in *Mmusi & Others v Ramantele*¹² that confirmed the position that any unfair discrimination on the grounds of sex is intolerable in a Constitutional era. The Court of Appeal (herein referred to as the Appeal Court)¹³ later agreed with this. This paper examines the relevance of these two decisions in light of women and customary law inheritance. While the decision may be particular to Botswana, this paper argues that there are lessons to be learnt from this case that will be useful in any context in Africa when considering the implications of customary law inheritance practices on human

⁸ *Ibid.*

⁹ *Unity Dow*, supra note 7 at para 73.

¹⁰ *Ibid.*

¹¹ *Ibid* at paras 65 – 73.

¹² *Mmusi and Others v Ramantele and Another* (MAHLB-000836-10) [2012] BWHC 1.

¹³ *Ramantele v Mmusi and Others* (CACGB-104-12) [2013] BWCA 1.

rights generally and women's rights specifically. Customary law practices that deny women land rights contribute to the cycle of poverty that women in Africa face daily and closer scrutiny of court decisions is necessary to enhance justice for women.

This discussion begins with a description of customary law and its practices in relation to women in Botswana and Southern Africa in general before delving into the history of the *Mmusi* case. The protagonists in this case are four sisters who approached the High Court after failed efforts to prevent their nephew Moelfi Ramantele from inheriting their parents' homestead (which two of them resided on) by relying on the Ngwaketse custom. In terms of this custom, also known as ultimogeniture, the youngest son of the deceased is entitled to succeed to the property of his deceased father. The applicants sought to have the custom declared unconstitutional by relying on section 3(a) of the Constitution of Botswana which protects the fundamental rights and freedom of the individual. In order to comprehend the matter in its entirety, a succinct account of the background leading to the process in the High Court will be provided, with an additional discussion of the arguments from both parties. While the High Court found that the custom was *ultra vires* in terms of section 3(a) of the Constitution, the reasoning of the Appeal Court took an entirely different direction. It overturned the High Court judgment and found on the facts alone in favour of the sisters and cautioned against the unnecessary use of constitutional interpretation. A critique of the Appeal Court decision permits the extraction of four lessons that would be useful in future customary law adjudication. The origin of each lesson will be identified from the judgment with an explanation of why each is relevant to the future adjudication of customary law not just in Botswana, but in Africa as a whole.

The first lesson focuses on the requirement that evidence of a customary law practice must be adduced in court. The Appeal Court found that the evidence in favour of the Ngwaketse custom was lacking; and the author submits that this approach in some matters is not always practical. The High Court's decision by Dingake J was heavily criticised by the Appeal Court for having unnecessarily dealt with a constitutional question and this is where the second

lesson emanates from. It is derived from examining whether a constitutional question should always be asked by the courts in dealing with matters before them. The third lesson investigates the governance of customary law and asks who the customary law officers dispensing justice in these communities are, and whether or not they are in a position to make the correct decisions. This is especially important because prior to the High Court application, the matter had been heard in three different customary courts with two of them ruling that Ngwaketse customary law must be applied, which would have left the sisters with no homestead. The events in customary courts have a great impact on litigants who often cannot afford to approach the High Court for further relief if they feel aggrieved.

The final lesson situates these issues within the sphere of culture and identity; the central argument relied on by Molefi Ramantele and the Attorney General, who were the appellants in the Appeal Court. While culture is not static and changes with the times, there is resistance to such changes because adjudication of said matters tends to be underpinned by a fear that the courts wish to interfere with a community's culture, and inadvertently, its identity. The paper will conclude by providing recommendations that could be useful for courts to apply when adjudicating the relationship between customary law and modern human rights principles.

2. Customary Law and Women's Rights: Are They Mutually Exclusive?

2.1 An Overview

Most African legal systems are pluralistic, and are composed of African customary law, religious law, common or civil law, and legislation.¹⁴ There is no single definition of customary law agreed upon by lawyers, jurists and anthropologists. Customary law includes the customs and traditions of a people which play a crucial role in shaping their culture.¹⁵ These traditions and customs are passed on over time from one generation to another in different contexts all over Africa. The living customary law is dynamic and constantly adapting to changing social and economic conditions. Himonga *et al* argue that new customary norms are the product of the melding of local customs and practices, religious norms and social and economic imperatives (and one may add constitutional imperatives), with the result that living customary law is formed out of interactive social, economic and legal forces which give it its flexibility in content.¹⁶ However, Joireman believes that customary law is explicitly political and is best viewed as a battleground in the struggle for power within a society.¹⁷ He submits that during the colonial era, customary law provided a way for older men within traditional societies to reclaim some of the independence and control which they lost due to colonisation. They were able to use customary law to assert control over women, younger men, and children - the limited realm over which they were given authority by the colonial power.¹⁸

¹⁴ M. Ndulo, African Customary Law, Customs, 18(1) *Indiana Journal of Global Legal Studies* (2011) 87 - 120 at 88.

¹⁵ B. Twinomugisha, The Future of African Customary Law' in J. Frenrich et al (eds), *The Future of Customary Law*, Cambridge (2012) 446 - 466 at 448.

¹⁶ C. Himonga and C. Bosch, The Application of African Customary Law under the Constitution: Problems Solved or Just Beginning?, 117 *South African Law Journal* (2000) 306 – 341 at 319.

¹⁷ S. Joireman, The Mystery of Capital Formation in Sub-Saharan Africa, 36 *World Development*, (2008) 1233 – 1246 at 1235.

¹⁸ *Ibid.*

This assertion of control still exists, with great impact on the lives of the majority of African women in the area of personal law in regard to matters such as marriage, inheritance and traditional authority.¹⁹ Though some positive aspects of customary law include the emphasis on community and duties of individuals towards communities, customary law does also contain gender discriminatory practices that impede on women's dignity. Prevalent practices regarding women include the payment of bride price (also known as *lobolo*²⁰), widow's inheritance (also known as *levirate*²¹) and initiation ceremonies when a girl reaches adolescence. In relation to property rights, Sub-Saharan countries' notions of culture and tradition nearly always require the transfer of power, land and property to men alone.²² In addition, the administration of customary law is done through traditional leaders called village chiefs, sub-chiefs and headmen whose positions are hereditary – passed on from father to son.²³ It is a rare occurrence to find a female sub-chief or headperson, which further removes women from the processes of determining how customary law is applied to them.

Women are sometimes viewed as an addition to their tribe or clan as opposed to equals in their own right. Hence, once a woman is married she becomes part of her husband's family and falls under his guardianship. An unmarried woman remains under her father's guardianship and control, so a woman effectively always has a male head over her.²⁴ When this male head dies, if he dies intestate – as often occurs in areas where customary law is

¹⁹ Ndulo, *supra* note 14.

²⁰ One of the main gifts includes a monetary payment made by the husband's extended family to the wife's extended family. The literal translation "bride-price" does not adequately capture the non-monetary aspects of *lobolo*.

²¹ Common in Zambia, where the deceased's brother inherits the widow to 'free' her from her husband's spirit.

²² A. Richardson, Women's Inheritance Rights in Africa: The Need to Integrate Cultural Understanding and Legal Reform, 11(2) *Human Rights Brief*, (2004) 19 - 22 at 1.

²³ *Ibid* at 2.

²⁴ This notion is contested in the South African context however, with evidence to suggest that this was only made a universalised feature of customary law by an amendment to the Black Administration Act of 1927.

practised – the woman is likely to get very little. She is disinherited of any land her husband or father may have owned, any houses, including the home she lives in, cattle, vehicles (if any) and any other property. Further, inheritance claims made by male family members are often self-serving because men view themselves not only as successors to the status of the deceased but also to the ownership of property.²⁵

While some customs are widespread and have been in existence for years, the enactment of more progressive constitutions has drawn scrutiny to long-accepted but unjust practices. In South Africa, for example, this old order underwent its first Constitutional Court challenge in *Bhe and Others v Magistrate Khayelitsha and Others*.²⁶ In this case the applicants challenged the customary law of male primogeniture²⁷ that excludes females from inheriting the deceased's main possessions.²⁸ The majority judgment held that the customary law of primogeniture discriminates unfairly against children born out of wedlock and women, and that excluding women from inheritance on grounds of gender was a clear violation of section 9(3) of the South African Constitution which prohibits discrimination on various grounds.²⁹ Former Chief Justice Pius Langa went further to state that this exclusion is a form of discrimination that entrenches past patterns of disadvantage among a vulnerable group exacerbated by old notions of patriarchy and male domination. This, he held, was incompatible with the guarantee of equality under the constitutional order.³⁰

Bhe paved the way for a new approach to discriminatory customary law practices in South Africa. However, it is not the only country in the region that has shown positive outcomes in

²⁵ L. Mbatha, Reforming the Customary Law of Succession, *SAJHR*, (2002) 18, 259- 286 at 267.

²⁶ *Bhe and Others v Magistrate Khayelitsha and Others* 2004 (1) SA 580 (CC).

²⁷ Some provisions of the Black Administration Act 38 of 1927 were also challenged.

²⁸ In *Bhe* the daughters could not inherit their deceased father's house and in *Shibi v Sithole and Others* 2005 (1) BCLR 1 (CC), Ms Shibi could not inherit from her deceased brother's estate.

²⁹ *Bhe*, *supra* note 26 at para 91.

³⁰ *Ibid.*

this regard. The Kenyan Constitution contains a Bill of Rights that overrules customary law norms that conflict with constitutional provisions by stating that "...any law including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency and any act or omission in contravention of this Constitution is invalid."³¹ The Constitution of Malawi states that in the application and development of amongst others, customary law, the relevant organs of State shall have due regard to the principles and provisions of the Constitution.³² Further to the west of Africa, Ghana is widely seen as a leader in the struggle for inheritance rights because the Constitution states that "[s]pouses shall have equal access to property jointly acquired during marriage" and that "[a] spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will."³³ Conversely, others such as the Zambian Constitution³⁴ contain an exemption for the application of customary law by stating that the anti-discrimination clause provided in the Bill of Rights does not apply "with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law."³⁵

2.2 The Law in Botswana

Like most African countries, Botswana has a pluralistic legal system, comprised of five primary sources, namely the Constitution, Roman Dutch law, statutory law passed by parliament, case law and customary law.³⁶ Regarding customary law, Griffiths writes that in Botswana, women generally occupy a subordinate position in comparison with men. This encompasses the management and control over economic resources and also extends to

³¹ The Constitution of Kenya 2010, Article 2.

³² The Constitution of the Republic of Malawi 1995, Article 24(2).

³³ The Constitution of the Republic of Ghana 1992, Article 22(3) (a).

³⁴ The Constitution of Zambia of 1991 amended in 1996.

³⁵ *Ibid* at Article 23 (c).

³⁶ Richardson, *supra* note 22 at 20.

family life.³⁷ Hence women have limited authority in their homes, their tribes or clans and over immovable and movable property. Mafhoko-Ditsa argues that current poverty measures in Botswana do not adequately depict women's vulnerability to poverty³⁸ and there is a lack of appreciation of the effect of discriminatory social norms.³⁹ The Constitutional aspect of Tswana Law prohibits discrimination in section 15(1) of the Constitution.⁴⁰ It states that subject to the particular subsections,⁴¹ "no law shall make any provision that is discriminatory either of itself or in its effect." There are, however, exemptions in this section, with one being subsection (4) which states that:

Subsection (1) of this section shall not apply to any law so far as that law makes provision —

(d) for the application in the case of members of a particular race, community or tribe of customary law with respect to any matter whether to the exclusion of any law in respect to that matter which is applicable in the case of other persons...

In addition, while section 15(3) defines discrimination as affording different treatment to people on various grounds including race and political opinion, sex or gender was previously omitted as an express ground for discrimination.⁴² Customary law is governed by the Customary Courts as described in the African (Customary) Courts Proclamation of 1961.⁴³

³⁷ A. Griffiths, *Women's Worlds: Siblings in Dispute over Inheritance: A View from Botswana* (in Special Issue on Women, Law and Language), 49(1) *SEEU Review*, (2002) 61 - 84 at 63.

³⁸ Female-headed households make up 41% of those living in poverty as opposed to 34% for male headed households.

³⁹ See Q. Mosarwe, *Gender disparities contributing to women's poverty*, 6th March 2014, available at http://www.womenscoalition.org.bw/povert_&_empowerment.htm.

⁴⁰ The Constitution of Botswana 1996.

⁴¹ *Ibid*, Subsections 4, 5 and 7.

⁴² The Constitution was amended post the *Dow* case to include "sex".

⁴³ As Amended by the African Courts Act 1968.

The Customary Law Act⁴⁴ is the legislation that was promulgated to oversee and administer the application of customary law in Botswana.⁴⁵ Section 2 contains the interpretation clause which states that:

“Customary law” means in relation to any particular tribe or tribal community, the customary law of that tribe or community in so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice.

Section 4 of the Customary Law Act provides that subject to three exceptions, customary law shall be applicable in all civil cases and proceedings where the parties thereto are “tribesmen”. These exceptions include an express agreement or relevant circumstances that show that parties would want the matter regulated by common law, where the “transaction” in question is unknown to customary law and thirdly where all parties express consent to the common law being applicable.⁴⁶ The use of the word “tribesmen” in this Act further buttresses the ties between customary law and culture and identity, which will be discussed in length later.

⁴⁴ The Customary Law Act of 1996.

⁴⁵ It replaced the Customary Law (Application and Ascertainment) Act 51 of 1969.

⁴⁶ The Customary Law Act, *supra* at note 44 at Sections 4 (a)-(c).

3. *Mmusi and Other v Ramantele and Others*: Factual Background

Edith Mmusi (the first applicant in the high court), her three sisters and brother Banki were born to Sibalo Ramantele and Theswane Ramantele, who died in 1952 and 1988 respectively. Their father bore a son with another woman before they were born – one Segomotso Ramantele – who was the father of the respondent in this matter, Mr Molefi Ramantele. Segomotso never resided at the family homestead in Mafhikana ward, and went to live in South Africa where he later died.⁴⁷ The family lived in their home in Mafhikana ward, Kanye, in the southern part of Botswana, until Edith moved out when she married. Two of the three younger sisters later married and subsequently left the homestead and so did Banki. After the death of her husband in 1988, Edith, a retired teacher, moved back to the family home when she was 58 years old, and was living there when this case came to court.

After the death of their father, the four sisters took care of their widowed mother and built a three bedroom house on the property. Banki, who was the last-born, did not contribute to the homestead and in fact, refused to buy his mother fencing for the yard. In the year 2000, Edith Mmusi built a house with four rooms at her parents' matrimonial homestead, fenced the home and built a toilet and installed a tap.⁴⁸ In 2006, when Segomotso Ramantele died, his son Molefi instituted proceedings in the Lower Customary Court in Kanye asserting that he was entitled to the family homestead as it had been bequeathed to his father by his uncle Banki. On 15 May 2007, the lower Customary Court held that Molefi was entitled to the property because according to the Ngwaketse culture, inheritance of the home was given to the youngest male child. This is because under customary law, the consideration is that he is never leaves the home, unlike the girl child whose inheritance is derived from her marriage.⁴⁹ The original homestead of Edith's parents was awarded to Molefi because he was considered

⁴⁷ Applicants' affidavit, paras 22-23.

⁴⁸ *Ibid* at 39, para 16.

⁴⁹ Judgment of Lower Customary Court record at 156.

as the heir to Banki, who was his parents' last born.⁵⁰ Edith was given six months to decide what to do with the house which she had built on the plot.

This decision went on appeal to the main Customary Court in November 2008. Kgosi Lotlaamoreng sitting in the court held that there had been no meeting to distribute the property of Edith's parents. As a result, he decided that regardless of the marital status of any of the children, the home belonged to all the children born to Sibalo and Theswane Ramantele. He ordered that a meeting be convened by the relevant elders present, for all concerned parties, in order to appoint a child who would look after the home on behalf of the others.⁵¹ Mr Molefi (Edith's nephew) was dissatisfied with this decision and appealed to the Customary Court of Appeal in Gaborone. In January 2009, the Customary Court of Appeal dismissed the main Customary Court's judgment and found in favour of Mr Molefi, stating that he was entitled to inherit the parents' homestead as per Ngwakeste customary law. The Court held that by attempting to undo an agreement between the brothers (Molefi's father and his brother Banki), Edith and her sisters were trying to change the Ngwaketse custom. He further stated that women who had been married should not try to claim assets from their parents as this was contrary to the cultural norm.⁵²

⁵⁰ This was based on the assertion that Banki had transferred the property to Segomotso.

⁵¹ *Supra* note 49 at 159.

⁵² Customary Court Appeal Record at 112.

4. The Ground Breaking Judgment in the High Court

4.1 The Applicants' and Respondents' Arguments

In 2010, Edith Mmusi and her sisters Bkhani Moima, Jane Lekoko and Mercy Ntshakisang were the four applicants in the High Court seeking a declaration that the Ngwakestse customary law rule was unconstitutional. They argued that the customary rule violated their right to equal protection and treatment under the law in terms of section 3(a) of the Constitution of Botswana. Counsel for the applicants argued that section 3(a) is a substantive section conferring rights on the individual.⁵³ He referred to precedent where the court held that all people must be treated equally⁵⁴ and submitted that the UN Human Rights Committee⁵⁵ had interpreted the right to equal protection as not only providing for equality before the law but also as a guarantee to all persons, equal and effective protection against unfair discrimination on any of the enumerated grounds, including sex.⁵⁶

Counsel further argued that section 3(a) could only be limited where the right at issue prejudiced the rights and freedom of others and on the ground of public interest. He submitted to the court that holding that women are equally entitled to inherit serves to broaden the rights of others and cannot be said to be prejudicial to anybody. In conclusion, he referred to Botswana's report to the Committee on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in which the government stated that:

In the traditional setup women have limited inheritance rights as evidence by the application of customary law. In this regard the law tends to treat

⁵³ Customary Court Appeal Record at 112.

⁵⁴ *Kamanko v Attorney General* 2001 (2) BLR 54.

⁵⁵ Tasked with monitoring the International Convention on Civil and Political Rights, to which Botswana is a signatory.

⁵⁶ *Mmusi*, *supra* note 22 at para 23.

men and women differently. Upon the death of their parents unmarried women are likely to be evicted by the heir.⁵⁷

The reference to the CEDAW report was not fully elaborated thereafter, but the intention must have been that the court view it as an admission by the government that the current inheritance system was discriminatory. A system that admittedly evicted unmarried women from their parents' home when their parents died could not possibly be in furtherance of the objectives of CEDAW.⁵⁸ Signatories to the Convention are amongst other things instructed to undertake measures to eliminate discrimination including enacting legislation and modifying of social and cultural patterns.⁵⁹ While the modification of this cultural pattern could not be done by the courts, a declaration from the courts with regards to its unconstitutionality would be the first step in recognising the need for changes in the system. This would be a useful step in convincing the legislatures to enact law that would clarify the supremacy of equality and dignity above all else.

The first respondent's Heads of Argument emphasised that in defining equality, regard should be paid to what is actually practised in the society, and not necessarily what is written in law, as the meaning of equality in any jurisdiction is influenced by the historical, socio-political and legal conditions of any society concerned.⁶⁰ Counsel further argued that the right to equality is the most difficult right, as it promises more than it can deliver.⁶¹ Hence, although gender inequalities are still visible in society, the court must be slow to upset entrenched customs

⁵⁷ Botswana's Periodic Report CEDAW/CBOT3 (20 October 2008).

⁵⁸ CEDAW describes discrimination as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status..."

⁵⁹ Articles 2 and 5 of CEDAW.

⁶⁰ Respondent's Heads of Argument in the High Court, at para 6.

⁶¹ *Mmusi*, supra note 22 at para 28.

such as the one under consideration.⁶² He sought to persuade the court that the Customary Court of Appeal did not apply the principle of male primogeniture as that differed from Ngwaketse customary law.

While male primogeniture gives all the deceased's inheritance to the first born male, the family home in the Ngwaketse culture was inherited by the last born male child and the rest of the inheritance distributed amongst his siblings. This, he maintained, was the difference between the two and hence the distribution of the remaining inheritance amongst siblings in the Ngwaketse custom was the legislator's method of putting women on par with men.

Despite an admission that on the face of it, the family home inheritance is based on gender and position of birth and amounts to differentiation, he sustained that these inequalities were justifiable.⁶³ He further added that the position of the last born son is actually less favourable than other siblings because the inheritance of the property comes with a condition that the property should be used by siblings in certain circumstances such as weddings and funerals.

The second respondent was the Attorney General, who represented the Presiding Officer of the Customary Court of Appeal. Counsel for the Attorney General stated that Parliament must inevitably take a moral position in tune with what it perceived to be the public mood. Counsel submitted that as a result of Botswana's cultural inclination, the time had not come to consign the impugned Ngwaketse customary law to the dustbin of history.⁶⁴ Customary law enjoyed the protection under section 15(4) (c) and (d) of the Constitution⁶⁵ and she insisted that since the section had been amended after the *Dow* case to include "sex" as a ground of discrimination, the court was duty bound to apply the exceptions as they stood. This in essence meant that the court should not consider the custom as being discriminatory at all.

⁶² *Ibid* at para 31.

⁶³ *Mmusi*, supra note 12 at para 38.

⁶⁴ *Ibid* at paras 45-46.

⁶⁵ These sub-clauses exempt customary law from the non-discrimination clause.

The Attorney General's representative concluded by stating the Ngwaketse custom was practised by 91% of the population of Botswana who were descendants of the Tswana and Kalanga speaking tribes. Therefore, it would be absurd to expect the courts to condemn such practices.⁶⁶

4.2 The Judgment

Handed down in October 2012, Dingake J's ground-breaking judgment commenced with a thorough interrogation of the concept of equality, and stated that equality was better understood when applied in context and not in the abstract.⁶⁷ He made a distinction between formal and substantive equality, highlighting that the latter required a thorough understanding of the impact of the discriminatory action upon a particular category concerned.⁶⁸ While not every differentiation amounts to discrimination, the determining factors are the impact of the discrimination on the victims and the value of dignity.⁶⁹ Dingake J discussed constitutional interpretation in detail by quoting from the *Dow* case, where Aguda JA stated that:

The courts must breathe life into [the Constitution] from time to time as the occasion may arise...We must not shy away from the basic fact that whilst a particular construction of a constitutional provision may be able to meet the demands of the society of a certain age, such construction may not meet those of a later age.⁷⁰

⁶⁶ *Ibid* at para 57.

⁶⁷ *Mmusi*, *supra* note 12 at para 62.

⁶⁸ *Ibid* at paras 64 – 67.

⁶⁹ *Ibid* at para 71.

⁷⁰ *Ibid* at para 84.

He defined customary law as per the Customary Law Act⁷¹ and stated that the Customary Act preserves customary law that is not repugnant to written law, morality and justice. He further determined the question before the court as “whether the rule that permits only the youngest male son to inherit intestate is incompatible with the provisions of the written law?” He then referred to the Constitution of Botswana⁷² and highlighted section 3 which protects the fundamental rights and freedoms of the individual whatever his race, place of origin, political opinions, colour, creed or sex.⁷³ Therefore, he pointed out that an understanding of section 3 required an examination of both *Dow*⁷⁴ and *Student’s Representative Council of Molepolole College of Education v the Attorney General*.⁷⁵ In the latter case, the court held that a regulation that discriminated against pregnant women and affected their college attendance offended the provision of the Constitution in question. They emphasised that if the framers of the Constitution had intended that men and women be treated differently, they would have stated so in clear and unambiguous terms. Hence both women and men were entitled to equal protection by the law.

Dingake J then undertook a lengthy comparative case law analysis of different jurisdictions with specific reference to equality and freedom from discrimination.⁷⁶ This included the South African case of *Bhe*,⁷⁷ which Dingake J used to highlight the differences between the Constitution of Botswana and the South African Constitution. The former constitution permits discrimination through the application of customary law,⁷⁸ while the latter does not. This is

⁷¹ *Supra* note 44.

⁷² Of 1966.

⁷³ These freedoms include amongst others life, liberty, security of the person and the protection of the law but subject to respect for the rights and freedoms of others and public interest.

⁷⁴ Discussed in the introduction section of this paper

⁷⁵ 1995 BLR 178.

⁷⁶ These included the UK, India and Ghana.

⁷⁷ Constitution of Botswana, *supra* note 26 at Article 15 (4).

why, he clarified that the applicants' focus was on section 3(a) – equal protection of the law – and not section 15 which is the prohibition of discrimination clause. His analysis also referred to the Tanzanian case of *Ephraim v Pastory*⁷⁹ where the High Court considered the Haya customary law. According to this rule, daughters had no power to sell inherited land and this was found to be inconsistent with the Bill of Rights and regional and international law.

Dingake J examined Botswana's international and regional obligations⁸⁰ before stating that "it is axiomatic, that by ratifying the above International legal instruments, state parties commit themselves to modify the social and cultural patterns of conduct that adversely affect women...".⁸¹ Hence, the customary law practice in question needed to be considered in light of those obligations.

He concluded by stating that Ngwaketse custom amounts to discrimination based on the prohibited ground of gender in section 3(a) and a determination needs to be made as to whether it is justifiable. The court was not persuaded that allowing other members the use of the family home for gatherings (once inherited by the male heir) made the discrimination justifiable. It held that there was no legitimate government purpose to be served by the discriminatory rule, as it was not only irrational but an unjustifiable assault on the dignity of the applicants and women generally.⁸² The Customary Court of Appeal order that required the first applicant to vacate the home was considered a gross form of discrimination that could not be justified on the basis of culture because it infringed the sister's fundamental right to equality and equal protection of the law.⁸³ Therefore, Dingake J found that the custom violated section 3(a) of the Constitution and emphasised the urgent need for parliament to

⁷⁸ *Ibid.*

⁷⁹ *Ephraim v Pastory* (2001) AHRLR 236.

⁸⁰ These included the International Covenant on Civil and Political Rights and the African Charter on Human and People's Rights.

⁸¹ *Mmusi*, supra note 12 at para 187.

⁸² *Ibid* at para 169.

⁸³ *Ibid* at para 200.

abolish all laws that are inconsistent with section 3(a).⁸⁴ The Ngwaketse rule in question was declared *ultra vires* of section 3 and the Customary Court of Appeal ruling was set aside.

⁸⁴ This he added would ensure that the right to equality ceased to be an illusion.

5. The Appeal Court Decision: Critique and Lessons Learnt

The Attorney General, as second appellant in the Appeal Court⁸⁵, filed Heads of Argument stating that the High Court erred by failing to take into consideration section 15(4)(c) of the Constitution that contained the exemptions from the non-discrimination clause. According to her, the Ngwaketse custom enjoyed the protection provided under section 15 and too much weight had been given to international instruments and foreign decisions.⁸⁶ Section 3 was viewed as providing a general principle whilst section 15 was regarded as more specific. Hence, the second appellant averred that the High Court had erred when it considered section 3 in isolation. In conclusion, the Attorney General surmised that the inclusion of “sex” in section 15 subsequent to *Dow* proved that this type of discrimination was still permissible under sub-section 15(4) as the sub-section had not been removed by the legislators.

Counsel for the respondent countered this argument by alleging that first the appellants’ Heads of Argument⁸⁷ were paradoxical and internally inconsistent because the first appellant argued that the male primogeniture did not exist in Ngwaketse customary law. Despite stating that primogeniture would be intolerable under the Constitution, he sought to rely on male ultimogeniture to lay claim to the family homestead.⁸⁸ This, the appellant alleged, was why the respondents were disqualified from inheriting, because none of them was the youngest male child. The respondents asserted that Ngwaketse customary law, properly understood, is flexible, and does not prescribe an invariable rule regarding intestate inheritance. If customary law did prescribe such a rule, then it violated the fundamental rights in sections 3 and 15 of the Constitution.⁸⁹

⁸⁵ Heard in 2013.

⁸⁶ Attorney General’s Heads of Argument, Court of Appeal judgment at paras 4.1 - 4.3.

⁸⁷ The First appellant being Mr Moelfi Ramentele

⁸⁸ The focus of the claim being that the alleged predecessor Uncle Banki was the youngest son of the deceased who is alleged to have inherited the property for no other reason than being the youngest male child.

⁸⁹ Respondent’s Heads of Argument, Court of Appeal judgment at para 6.

On 3 September, 2013, the Appeal Court handed down its decision.⁹⁰ The conclusion to the *Mmusi* case was not a confirmation of the High Court's decision declaring the Ngwaketse custom unconstitutional as some would have hoped. It instead substituted the High Court decision with a different order that included the declaration that Ngwaketse custom does not prevent female children from inheriting the family home. It overturned the decision of the Customary Court of Appeal and held that the facts of the transfer of the property from one brother to another had not been proved. Lastly, the Appeal Court also upheld the decision of Kgosi Lotlaamoreng II of the Customary Court that had stated that all children should share the distributable estate. A critique of the judgment follows in an effort to derive four useful lessons.

5.1 Ascertaining Customary Law: Evidence versus Practice

In the majority judgment written by Lesetedi JA,⁹¹ a major concern was the lack of what he considered as proper evidence⁹² from the appellants and respondents regarding the practice of Ngwaketse customary rule. The unanimous judgment stated that in the absence of evidence led in the Customary Court of Appeal, it was unclear how the High Court was able to rely on papers filed on record to determine the nature, scope and justification of the custom if there was one.⁹³ Thus, the first aspect of the judgment to be examined is the issue of evidence and what the Appeal Court referred to as the lack of substantial evidence to prove the practice of the Ngwaketse custom. People of a particular tribe are privy to practices that relate to the administration of customary law in their areas. Often, these customary laws are unwritten. Yet, a majority of Africans identify with customary laws and conduct their lives in confirmation with them. Consequently, an approach by courts to try to adapt strict legal

⁹⁰ *Supra* at note 13.

⁹¹ *Ibid.*

⁹² The court also stated that the matter had a long and chequered history beset by errors and factual and procedural misdirections.

⁹³ *Ramantele, supra* at note 7 at para 37.

evidential rules as applied in common law may not always result in obtaining the best evidence.⁹⁴

The Appeal Court stated that a court should not be quick to consider the constitutionality of customary law unless it is possessed with the existence, content, rational and application of the custom. Lesetedi JA found that no evidence was led in the Customary Court to show the existence of such a rule and that the three tiers of the customary court system could not agree on its existence, let alone its application to this case.⁹⁵ The Appeal Court decided that Dingake J erred in this regard because the practice of the Ngwaketse custom had not been proved. Despite the Appeal Court's lack of satisfaction with the evidence led, to adduce the customary law, it cannot be stated for a fact that the custom does not exist, and this is the first important lesson of this case. Both parties to the matter indicated that it was a practice in their affidavits and the Attorney General's Heads of Argument did not dispute the custom, but rather defended it.

The Attorney General submitted that 91 per cent of the population of Botswana were descendants of the Tswana and Kalanga speaking tribes that practiced the rule that sought to be impugned.⁹⁶ Discrepancies as regards the facts of how the said property may or may not have been distributed in the Customary Courts are acknowledged by the author,⁹⁷ yet this does not negate the fact that the dispute over the home arose because of the expectations emanating from the Ngwaketse custom. As Himonga *et al* submit, customary law rules differ from customs because customary law rules require a convergence of behaviour, which when deviated from is met with pressure of conformity.⁹⁸ The Customary Appeal Court's verdict in

⁹⁴ For example the reliance of written documentation or agreements that is popular in common law may not have the same effect as customary law relies heavily on oral agreements.

⁹⁵ *Ibid.*

⁹⁶ *Ibid* at para 10.

⁹⁷ The Court of Appeal decision covers this in detail in pages 7-12.

alleging that Edith Mmusi was trying to change the Ngwaketse culture is itself an indication of the pressure to conform to the rules. Himonga and Pope⁹⁹ also emphasise that the ascertainment of customary law requires that a court determines whether the alleged rule is indeed a law as defined by the community, as the source of living customary law is the community itself.

The existence of the Ngwaketse custom was further confirmed in an interview with counsel¹⁰⁰ for the applicants in the High Court (respondents in the Appeal Court). Counsel dismissed any possibility that the rule did not exist and further stated that “people in communities feel it is their own custom and that it should not be challenged; it is practised in communities all over Botswana and women know this.” Griffiths, a legal anthropologist, also chronicles her experience researching customary law disputes in Molepolole, Botswana’s biggest village that lies in the south east of the country. She writes that women find themselves operating within a gendered environment where men generally have better access to resources than them.¹⁰¹ Her research focuses on two inheritance cases that not only depict the customary law rules in practice but also demonstrate that customary law can accommodate changing times.

In the *Mmusi* case, perhaps the High Court should have required that the evidence be adduced to substantiate the rule in question by way of requesting witnesses from the community to testify before it. This witness base would, however, have to be broad-based to include both women and children.¹⁰² On the other hand, if the parties to the matter were not in dispute as regards the existence of the rule, calling witnesses may have further prolonged an already drawn out process. Thus, courts need to be wary not to dismiss the existence of a

⁹⁸ C. Himonga and C. Bosch, *supra* note 6 at 335.

⁹⁹ C. Himonga and A. Pope, *Mayelane v Ngwenyama and Minister of Home Affairs: a reflection on wider implications*, 52, *Acta Juridica: Marriage, Land and Custom*, (2013), 313-338 at 327.

¹⁰⁰ Telephonic interview of Tshiamo Rantao by Tabeth Masengu, held on 4 March 2014.

¹⁰¹ A. Griffiths, *supra* note 37 at 63.

¹⁰² C. Himonga and C. Bosch, *supra* note 6 at 337.

customary law rule based on the evidence or lack thereof that they have before them because what the courts might dismiss due to the failure to meet evidential rules is in fact the lived reality of numerous people.¹⁰³ Post-colonial official customary law has been distorted and a reliance on this distorted law, to the detriment of current practices in communities will only place women in further peril.

5.2 Asking the Constitutional Question: Is it Really Necessary?

The second lesson learnt from the Appeal Court decision relates to the respondent's bid to have the Ngwaketse rule declared unconstitutional in the High Court. Lesetedi JA stated that where it is possible, if a case can be heard before the court without having to decide a constitutional question, the court must follow that approach.¹⁰⁴ The constitutional question was regarded as irrelevant to the real dispute between the parties when viewed in light of the evidence called at the court of first instance¹⁰⁵, because the resolution of the case turned mainly on the facts.¹⁰⁶ Kirby JP in his concurring judgment also added that where a case can be resolved and appropriate leave can be granted by an appeal or by review proceedings, even if constitutional issues are raised amongst others, that is the procedure to be adopted.¹⁰⁷

Even though he had already arrived at that conclusion, Lesetedi JA went on to stipulate what requirements would have had to be satisfied by the appellants before a constitutional question was even asked. Crucial to this is the fact that while the first respondent has been in

¹⁰³ The South African case of *Shilubana v Nwamitwa*, 2009 (2) SA 66(CC) provides further discussion on this issue.

¹⁰⁴ *Ramantele*, *supra* note 13 at 41.

¹⁰⁵ Evidence which argued that there had been no distribution of property that would have led to the Appellants claim.

¹⁰⁶ This was also confirmed in a concurring judgment by Kirby JP.

¹⁰⁷ Concurring judgment written by Judge President Kirby of the Court of Appeal, p.16 para 23.

undisturbed possession of the property for over twenty years, no evidence was led of the distribution of the property to Banki by Sibalo Ramantele.¹⁰⁸ He asserted that the lack of evidence regarding the transfer of property should have ended the matter with no need to delve further into the implications of what the disinheritance would have done to the respondents.

The court referred to *S v Mhlungu and Others*¹⁰⁹, where Mohammed J held that “as a general principle, where it is possible to decide any case, civil or criminal, without reaching a constitutional issue that is the course which should be followed.” The general idea is that constitutional challenges are a serious step and their decisions have a great impact, hence settling the matter at a more basic level is preferred.¹¹⁰ Counsel for Edith Mmusi and her sisters submitted that the question of fairness should have been asked in the High Court before a constitutional question was posed.¹¹¹ Thus, Dingake J should have been asking whether the alleged Ngwaketse custom met the interpretation of the Customary Law Act as regards whether it was contrary to natural justice, morality or humanity. While the respondents (applicants in the High Court) stated that there was a constitutional question in the matter, it is the judge’s role to hone in on the relevant issues so as to ensure the advancement of the determination of the case.

Avoiding a constitutional issue if possible is not just pragmatic but also has the advantage of reducing the length of the trial and the costs to litigants. The matter first went to the Customary Court in 2007, but a dispute over the homestead had arisen as early as 1999.¹¹²

¹⁰⁸ The deceased uncle of the appellant.

¹⁰⁹ *S v Mhlungu and Others* 1995 (3) SA 867 (CC) at para 59.

¹¹⁰ Others like Christa Rautenbach see this approach as being conservative. See her paper, ‘Legal Pluralism in Action: Ultimogeniture under the Microscope in the Highest Court of Botswana’, a Conference Paper presented at the Law and Society Association Conference, May 29th –June 1st, Minneapolis, USA.

¹¹¹ *Supra* note 100.

This dispute arose eight years after the first respondent had been in undisturbed possession of the property and only came to finality fourteen years after the problems commenced. The respondents are all advanced in age and avoiding a constitutional question could have concluded the dispute swiftly. It is important to note that most women challenging customary law practises are indigent and are often represented pro-bono. The respondents in this case were aided by the Botswana Teachers Union who assisted with costs in the High Court and pro-bono representation from the Southern African Litigation Centre in the Court of Appeal.¹¹³ Therefore, the need to avoid deciding an irrelevant constitutional question saves time and money for people who cannot afford to endure a lengthy litigation process.¹¹⁴

5.3 The Adjudication of Customary Law: Is it Fair?

The administration of customary law is mostly done by men who sit as councillors, headmen and presiding officers in various *kgotlas*¹¹⁵ and courts in Botswana. While they may be well versed in custom and cultural practises, this expertise does not necessarily extend to the other four primary sources of law in Botswana.¹¹⁶ The Appeal Court stated that if the customary law rule did exist, a consideration of whether it satisfied the legal test to constitute an enforceable customary law would have to be made. The test involves using the definition of customary law in the Act¹¹⁷ read with section 10(2) of the same Act. Section 10(2) states that:

¹¹² The Mafhikana Headman testified in the Customary Court that the respondent's uncles had early on consulted him regarding who was the final beneficiary of the estate.

¹¹³ Information obtained from Mr Rantao.

¹¹⁴ The author does recognise that there may be some instances where avoiding the constitutional question will deprive the parties of the relief they seek hence in these matters, the constitutional question will be imperative.

¹¹⁵ Administrative meetings for headmen in villages.

¹¹⁶ The Constitution, Roman Dutch law, statutory law and case law.

¹¹⁷ *Supra* note 44 at Section 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.

Using the two sections, the court found that a customary law rule that denies children who have played a major role in developing a particular part of the estate in favour of a child who had not played any part goes against the notions of fairness, equity and good conscience.¹¹⁸

The Appeal Court rightly pointed out the legal test to be used as regards section 10(2) of the Customary Law Act, but it is striking that none of the Customary Courts used the interpretative section of the Customary Law Act. The lesson here is that as the gatekeepers of customary law, presiding officers are not acquainted with how to interpret customary law in order to ensure that is not incompatible with the provisions of written law or contrary to humanity or natural justice.¹¹⁹ When the author spoke to Mr Tshiamo Rantao¹²⁰ about this omission in the Customary Court, he explained that Customary Courts are clueless as regards the application of the Customary Law Act and are not aware of the test that is provided. He further contended that laws are written in English, but the presiding officers often use vernacular which further complicates the use of the Customary Law Act. This problem invariably leads to unfair results and hence there is an urgent need to educate Customary Court officials on the Act and perhaps provide a translation of the Act in the local languages.¹²¹

Further, a judge on the Botswana High Court revealed that “although customary law must always be applied in the context of the Constitution, few if any of the presiding officers have

¹¹⁸ Mbatha, *supra* at note 25, confirms this reasoning by stating that succession practises while catering for the needy, remained compensatory to those who dedicated their time and resources towards ensuring the welfare of parents.

¹¹⁹ *Ibid* at Section 2.

¹²⁰ Counsel for the applicants in the High Court.

¹²¹ *Supra* note 100.

read the constitution or understand its nature and character and how it relates to other laws including customary law.”¹²² This admission not only supports Mr Rantao’s observation but raises questions as to how many disputes that did not go further than the Customary Appeal court have been decided in accordance with the law. Perhaps, as Mbatha argues, some judges disregard the negative effect of their decisions on women’s property rights because they may not be experienced in constitutional law.¹²³ Customary Courts are the courts of first instance for a large number of Tswana citizens and in most cases those are the only courts before which they appear. Therefore, it becomes crucial to adequately train presiding officers and to ensure that they are well versed in legislation that relates to the administration of customary law and constitutional obligations. Otherwise the administration of justice, equity and fairness will be further obstructed due to an application of a legal system in Customary Courts that shuns changing developments in human rights. The consequences of this obstruction will invariably be borne by women primarily, because of societal inequality.

5.4 Culture and Identity: Adjusting to Changing Times

It is noteworthy that in the High Court, both counsel for the two respondents (appellants in the Appeal Court) admitted that women were treated differently with regards to the Ngwaketse custom, and both referred to the public mood or societal concerns. By suggesting that the custom should not be impugned because Botswana was culturally inclined, the Attorney General implied that culture can and should be a valid reason for discrimination. Her office made the same argument 21 years ago in the *Dow* case. The Attorney General at that time famously stated that “it is not unfair to say that if gender discrimination were outlawed in customary law, very little of customary law would be left at all.”¹²⁴ Interestingly, despite the lapse of two decades and the constitutional progress in Botswana and regionally during this

¹²² Anonymous electronic interview, 18 March 2014.

¹²³ *Supra* at note 118.

¹²⁴ Appellants Head of Argument in *Attorney General v Unity Dow* at page 20.

period, the Attorney General's office still sought to use culture as a valid reason to condone discrimination on the basis of sex.

The Appeal Court dealt with this issue aptly and provided us with the final lesson. The court said that customary law is not static, but rather develops and modernises with time. Harsh and inhumane aspects of custom, the Court held, are discarded as time goes on.¹²⁵

Customary law needs to respond to changing times and to understand existing social and economic conditions. Lesetedi JA stated that customs are continuously modified on a case by case basis to keep pace with the times and that customary law was developed to protect the community's social fabric and cohesion. Kirby JP gave examples of instances in Botswana where customary law has changed to accommodate changing times even in inheritance matters.¹²⁶ This includes the modification of the stated the rule of thumb that the youngest son inherits the family home.

In *Alexkor Ltd and Another v Richtersveld Community and Others*¹²⁷, the South African Constitutional Court emphasised that:

Indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life

Twinomugisha observes that where inflexibility to change is noticed, there is a narrow interpretation of customary law. This presents it as rigid, inflexible and oppressive and ignores its potential to improve the quality of life of disadvantaged and marginalised groups.¹²⁸ Such

¹²⁵ *Ramantele*, supra note 12 at para 77.

¹²⁶ Concurring judgment of the court, p. 19-20, paras 26-27.

¹²⁷ *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC) para 52.

¹²⁸ B. Twinomugisha, supra note 15 at 448.

interpretations fail to recognise that customary law is capable of transformation in response to changing circumstances.

A customary law dispute that arose in 1989 in the village of Molepolole, Botswana provides a fitting example of such a transformation. Goitseman and her brother David sought a resolution through an informal hearing with members of the *Kgotla*.¹²⁹ Goitseman built up the family compound and established a house with her earnings with no help from her brothers. Her brother David argued that under customary law the household fell under his control because he was male and should be the heir. Despite different views expressed by the *Kgotla* councillors, it was clear that division of the family property had become more complex, and some of these changes reflected altered life experiences in which the number of women getting married was on the decline.¹³⁰ Goitseman as an unmarried woman was still associated with the natal household. David, who had appealed to tradition for his own benefit, now became constrained by it. The councillors found that a man of David's age, with his skills (as a lawyer), was expected to have built his own household and his sister's investment in the property meant she should control it. Here, customary law was flexible enough to accommodate her claims thus proving that in practice, it need not act to the detriment of women.

Closely related to the issue of accepting the flexible nature of customary law is the fear that changing customary law rules will inadvertently mean losing cultural ties. Cultural relativism is the standard defence when customary law rules are placed under a human rights lens.¹³¹ This was depicted in the *Mmusi* case and is widely used to seek condonation for traditional and religious practises that are harmful to women. In this regard, the Protocol to the African

¹²⁹ An administrative unit derived from households.

¹³⁰ A. Griffiths, *supra* note 37 at 75-76.

¹³¹ H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis*, JurisNet LLC (2000) at 222.

Charter on Human and Peoples' Rights on the Rights of Women in Africa (Protocol for Women)¹³² has been commendable by enshrining the right to a positive culture. Article 17 (1) states that "Women shall have the right to live in a positive cultural context and to participate at all levels in the determination of cultural policies."¹³³ This recognises the importance of culture and community to African women and avoids throwing the baby out with the bath water.¹³⁴ Although Botswana has not ratified the Protocol for Women, the steps taken in the *Mmusi* case are consistent with the need to ensure a positive cultural environment is created for all women to enable them to lead a life free of discrimination. A positive culture free of discrimination will convey to women that they are of equal worth, are equal to men and affirm their dignity.

¹³² Of 2003 also known as the Maputo Protocol.

¹³³ 17(2) requires that the State take all appropriate measures to enhance women's participation in the formulation on cultural policies.

¹³⁴ For an interesting discussion of this, see C.Nyamu-Musembi, An Actor-oriented Approach to Rights in Development, *IDS Bulletin*, 36, 1, (2005),41-49.

6. Recommendations

In light of the four lessons referred to above, it is imperative that courts consider each one when adjudicating customary law issues before them. In addition, to avoid instances where it is difficult to ascertain whether the customary rule does exist, the witness base needs to be broadened. To do this, courts would need to adopt procedures of taking evidence that are gender and age-sensitive.¹³⁵ This is because the culture of many African societies inhibits free communication in some cases by men or women in the presence of people of the opposite sex and by children in the presence of adults.¹³⁶ Such a step would ensure that reliance is placed on the actual people living in the communities as opposed to outdated writing.¹³⁷ If written customary law is to be a source, it should be that of current works from scholars who have or are engaged with community practices and can attest to the current customs. Secondly, there is a need to adopt guidelines that ought to be considered in determining the content of a customary norm. Part of the problem in the *Mmusi* case was that there were no fixed criteria to determine the Ngwaketse culture, which resulted in a decision stating that it does not exist even when it does.

Van der Westhuizen J in *Shilubana v Nwamitwa*¹³⁸ suggested four factors that ought to be considered in determining the content of a customary norm. These factors require a consideration of:

- (1) the traditions of the community concerned,
- (2) the possible distortion of records due to colonial experience,
- (3) the need to allow communities to develop customary norms and
- (4) the fact that customary law, like any other law, regulates the lives of people.

¹³⁵ C. Himonga and C. Bosch, *supra* note 16 at 338.

¹³⁶ *Ibid.*

¹³⁷ Kirby JP referred to textbooks written in the 1980's regarding customary law.

¹³⁸ *Shilubana and Others v Nwamitwa* (2009 (2) SA 66 (CC)).

Having a consideration of the community concerned would require an in depth analysis of how the members of the tribe or clan commonly handle inheritance matters. However, different factors will come into play at different times in varied contexts hence this must be borne in mind when determining a customary norm. Thirdly, the recognition that records could be distorted due to colonial experience would require a greater focus on oral testimony as opposed to records from years back.¹³⁹ Allowing communities to develop customary norms would be crucial for women. It is essential that women are allowed to play a huge role in customary rule formulation and a court should seek to establish whether or not this has been possible. Finally, it is necessary for the courts to always bear in mind that customary law regulates the lives of people who, in most cases, are not affluent or educated. Therefore, courts should endeavour to critically engage with their experiences and their understanding of customary law.

¹³⁹ The Court of Appeal referred to contemporary records from 1981 to support their decision that the custom did not exist.

7. Conclusion

Edith Mmusi used her retirement fund to build a house on her parent's homestead where she has had undisturbed possession for more than two decades. Yet had the matter not proceeded beyond the Customary Court of Appeal, she would have found herself destitute and homeless despite the fact that her nephew and his deceased father contributed nothing to the maintenance of the homestead. In the *Mmusi* case, the Appeal Court's unanimous decision that the Ngwaketse custom would not have passed the interpretive test in the Customary Law Act was a triumph. In addition, the declaration that any customary law unjustly discriminating against women solely on the basis of their gender would violate the Constitution was a welcome relief for the sisters who had waited for finality regarding this dispute and for women in Botswana in general. However, it was also a reminder that customary law still has its challenges and that women have to endure practices that impoverish them based on their sex. These practises contribute to the feminisation of poverty and stunted economic development in countries around the continent.

This paper has attempted to highlight four lessons that have been learnt from the *Mmusi* case. There is a need to identify the existence of customary law rules even if there is insufficient evidence present in court to confirm their existence. This is critical to a proper adjudication of inheritance matters. While judges who are progressive and who seek to champion the cause for human rights are applauded, great care must be taken in ensuring that the case before them cannot be resolved without a constitutional challenge. The presence of a repugnancy clause in the Customary Law Act¹⁴⁰ meant that the *Mmusi* case was resolved by the Appeal Court to the exclusion of the Constitution. However, this approach may also have its disadvantages.¹⁴¹ The author maintains that if a proper construction of the issues at hand can be elicited without delving into a constitutional issue

¹⁴⁰ Section 2 of the Customary Law Act

¹⁴¹ Rautenbach at note 110, argues that this approach still left a few questions answered such as if they Edith and her surviving sisters are co-owners of the homestead, who is the next successor in line if one or all of them were to die?

that should be the preferred approach. However, for this approach to be viable, the proper regulation of customary law in lower courts will be crucial to the adjudication of cases. Proper training of presiding officers to ensure that they have a thorough understanding of the Customary Law Act, especially its interpretive provision, will also go a long way in ensuring that disputes do not have to reach the higher courts, because they would have been dealt with accordingly in the lower courts. This would require the resolutions of disputes that are consistent with protection of human rights and the consideration of the needs of vulnerable people.

Advocating for a positive culture that acknowledges changing times and seeks to modify outdated and inhumane practices would serve women better than dismissing all customary law rules as violations of their rights. Where inheritance is considered, this would require acknowledging that families are not as strongly knit as they used to be and that more and more women are unmarried or widowed. It would also require a contemplation of the fact that women are more likely to take care of aging parents and/or contribute to the family homestead and thus should be allowed to inherit from that to which they contributed.¹⁴² A failure to do this would leave women as prisoners of an oppressive past.¹⁴³ This should not be allowed to prevail unquestioned.

I

¹⁴² *Supra* at note 134.

¹⁴³ S. Sibanda, *When is the Past not the Past?*, 17(3) *Human Rights Brief* (2010) 31 – 35 at 6.