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IN A CONFLICT BETWEEN EQUAL RIGHTS FOR WOMEN AND
CUSTOMARY LAW, THE BOTSWANA COURT OF APPEAL
CHOOSES EQUALITY

*Michael P Seng**

NINETEEN ninety-two was a good year for women's rights. The United States Supreme Court reaffirmed a woman's right to choose whether to have an abortion, stating that the right was important to facilitate "[t]he ability of women to participate equally in the economic and social life of the Nation."¹ Bill Clinton was elected President of the United States on promises to support "free choice" in abortions, to lift the "gag-rule" on abortion counseling by recipients of federal funds,² to support legislation for child care and family leave time from work and to open the military to gays and lesbians. The new first lady, Hillary Rodham Clinton, gave the country a new model for a first lady, and the United States Senate increased its membership of women by three hundred percent, including the first African-American woman.³ Nineteen ninety-two signaled that women were finally coming into their own in the United States and that the backlash against women so ably described by Susan Faludi was ending.⁴

A little noted decision handed down by the Botswana Court of Appeal in July of 1992 may give even greater satisfaction to the women's rights movement worldwide than the new turn of events in the United States. In *Attorney General v Unity Dow*,⁵ the Court of Appeal declared the Botswana Citizenship Act of 1984⁶ (the Act) unconstitutional on the ground that it discriminated against women. The decision is of major significance not only for Botswana, but for all of Africa, where women are struggling for recognition of some of the most basic human rights. The decision holds that customary laws on the status of women must yield to constitutional provisions protecting equal rights when there is a conflict.

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1. *Planned Parenthood v Casey*, 112 S. Ct. 2791, 2809 (1992).

2. The "gag-rule" was upheld by the United States Supreme Court in *Rust v Sullivan*, 111 S. Ct. 1759 (1991).

3. After the 1992 elections, there were six women in the Senate whereas there had previously been two. The number of women in the House of Representatives was increased from 29 to 48.

4. SUSAN FALUDI, *BACKLASH* (1991).

5. Civ App. No. 4/91 (Bots. App. Ct. June 3, 1992).

6. Cap. 01:01/1987 Rev Amending the Citizenship Act of 1982 (Act 25 1982). Relevant portions of the Citizenship Act of 1984 are reprinted on pages 2-3 of the *Unity Dow* opinion.

In 1984, the Botswana Citizenship Act was enacted to provide that persons could become citizens of Botswana by birth and descent only if at the time of birth their fathers were citizens of Botswana or, in the case of persons born out of wedlock, their mothers were citizens of Botswana.⁷ Unity Dow, a citizen of Botswana and a lawyer, was married to an American, Peter Nathan Dow, who had been residing in Botswana for fourteen years. Their first child was born out of wedlock in 1979 and accordingly was a citizen of Botswana. The couple were married in 1984 and had two additional children, both of whom were born in Botswana and lived there continuously since their birth. By terms of the Act,⁸ these children born after the marriage were not citizens of Botswana and were indeed aliens in the land of their birth.

I. THE LAND

Botswana is located in the heart of southern Africa. It is completely landlocked. To the south is South Africa, to the west is Namibia, to the north are Angola and Zambia and to the east is Zimbabwe. The country is roughly the size of Texas, and the terrain is largely desert and savanna. The population is just above one and a quarter million persons.

Compared to many modern African nations, ethnic and tribal tensions in Botswana are minimal.⁹ The majority tribe is the Tswana, followed by the Kalanga in the northeast. A number of smaller tribes also coexist in Botswana. Most notable to Westerners because of the large number of anthropological studies on them are the San, sometimes known as the Basarwa or Bushmen. Most of the people who reside in Botswana are cattle herders and farmers.

Probably because of its location and seeming lack of wealth, Botswana was never colonized by the Europeans to the extent of most other African countries. Because of disputes in the latter nineteenth century between the Batswana¹⁰ and the Afrikaners, the British created "Bechuanaland." The northern part of Bechuanaland, a British protectorate, is now Botswana. Botswana became independent of the British in 1966.

Botswana remains an exception in post-colonial Africa, where most nations have, for some period of time, experienced some form of

7 *Id.* § 4.

8. *Id.*

9. This does not mean that ethnic and tribal tensions are absent. For instance, the Kalanga want the right to instruct their children in school in their own language. Today the official language is English, and the language of use is Setswana. The San, who are traditionally nomadic hunters and gatherers and who are being pushed off the game reserves and other public lands, are seeking recognition of their traditional rights and culture.

10. The country is Botswana. The majority tribe is the Tswana, which has a number of different sub-tribes. Persons residing in Botswana are singularly referred to as Motswana and in the plural as Batswana. The language is Setswana.

authoritarian rule.¹¹ Regular elections have been held for the National Assembly and the Presidency. The Botswana Democratic Party (BDP) has traditionally swept all national elections, but there exists a vigorous if not powerful opposition. Concern is often voiced about the depth of the commitment to democracy and whether "democracy" will be crushed if the current majority sees its power begin to slip. Nonetheless, Botswana appears to be proud of their democratic tradition and are not likely to lightly forfeit it.

Botswana has a written constitution¹² and bill of rights.¹³ Botswana has an independent judiciary where judges are appointed by the President and can be removed only for cause.¹⁴ The lowest court is the High Court, and appeals can be taken to the Court of Appeal of Botswana in Lobatse. The Constitution specifically provides for judicial redress for those whose rights are violated.¹⁵

Botswana's democratic tradition is frequently traced back to the "kgotla" meeting.¹⁶ Under customary law, every Motswana belonged to a specific ward of varying size.¹⁷ Most governmental operations occurred at the ward level. Each ward had a headman, who was appointed by the chief largely on the basis of heredity. The headman was required to consult with the adult males in the ward. This consultation occurred at the kgotla meeting. The kgotla was held in the early morning at a regularly designated outside arena in the ward. Specific matters of administration and legislation were discussed, and everyone present was allowed to voice his opinion. Decisions were reached by consensus.

The kgotla also operated as a local court.¹⁸ Disputes were placed before the kgotla, evidence was heard and discussed and a consensus reached. Appeals could be taken to the Chief's kgotla. The kgotla system furthered individual participation and responsibility and militated against dictatorial

11. See John Holm, *Botswana: A Paternalistic Democracy*, in 4 DEMOCRACY IN DEVELOPING COUNTRIES: AFRICA 179 (Larry Diamond et al. eds., 1988).

12. BOTSWANA CONST. (amended 1987).

13. *Id.* ch. II.

14. The President appoints the Chief Justice of the High Court, *id.* ch. VI, § 96(1), and the President of the Court of Appeal. *Id.* ch. VI, § 100(1). Judges are appointed to the High Court on the advice of the Judicial Service Commission, *id.* ch. VI, § 96(2), as are the Justices of the Court of Appeal. *Id.* ch. VI, § 100(2). The Constitution provides for the independence of the Judicial Service Commission. *Id.* ch. VI, § 103.

Judges on the High Court and Court of Appeal must retire, unless an exception is made, at the age of 65, or they can be removed either for nonperformance of their duties or for misbehavior. *Id.* ch. VI, §§ 97-101.

15. The Constitution provides that if any person alleges that any of the provisions of the Bill of Rights "has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress." *Id.* ch. II, § 18.

16. See L.D. Ngcongco, *Botswana's Historical Experience with Democracy in DEMOCRACY IN BOTSWANA* 42-47 (Holm & Molutsi eds., 1989).

17. See I. SCHAFERA & JOHN L. COMOROFF, *THE TSWANA* 39-41 (rev. ed. 1991).

18. See *id.* at 49-51.

rule. The focus was on harmony and consensus and the good of the community

At the time of independence in 1966, Botswana was one of Africa's poorest and least developed areas. The people lived and worked much as they had done for centuries. However, diamonds were discovered in Botswana the year after independence and today Botswana has one of the highest per capita income reserves in Africa. Unlike other African nations, Botswana did not go on a spending binge. The infra-structure and educational resources have been developed but not at the expense of conspicuous consumption. Nonetheless, tensions are beginning to show¹⁹ Traditional life is being disrupted. Batswana are moving to the cities, and family breakups, illegitimacy and crime are starting to edge upward. Compared to the rest of the continent, Botswana's problems appear to be solvable so long as the will remains to do that.

II. THE STATUS OF WOMEN UNDER TSWANA CUSTOMARY LAW

The Batswana had a highly developed customary law that covered the marriage relationship and the status of women. Traditionally, marriage was a matter of general community concern and was considered a union of families more than a union between two individuals.²⁰ In practice, the offspring of the marriage were often shared between the families.²¹ Polygamy was widely practiced in traditional society, but the practice is dying out today²²

Formerly, women were considered to be socially inferior to men and were treated as minors throughout their lives. Before marriage, a woman was under the guardianship of her father; after marriage, she was under the guardianship of her husband; after her husband's death, she was under the guardianship of her son or other male relative.²³ Women had little, if any, part in governmental activities. In public social activities, they generally formed separate groupings, and they had their own separate work and domestic responsibilities.

Today, some women leave home and accumulate assets of their own and participate in commercial transactions without the consent of a guardian.²⁴ Women also vote and participate in political activities, although few women hold important positions in either the public or the private

19. See Joseph Contreras, *An African Success Story* NEWSWEEK, Oct. 28, 1991, at 20.

20. B.C. Thema, *The Changing Pattern of Tswana Social and Family Relations*, in 4 BOTSWANA NOTES & RECORDS 39, 40 (1972).

21. *Id.* at 41.

22. I. SCHAPERA, *MARRIED LIFE IN AN AFRICAN TRIBE* 336 (1941).

23. *Id.*

24. See Simon Roberts, *Tswana Family Law*, in 5 RESTATEMENT OF AFRICAN LAW (BOTSWANA I) 20 (1972).

sectors.²⁵ Neither the customary law nor the common²⁶ or statutory law has kept pace so as to fully define the rights and responsibilities of women in this new environment.²⁷

Traditionally among the Tswana, marriage was not accomplished through a single ceremony. It started with a mutual agreement (a betrothal) between the two families and was completed by the transfer of *bogadi*, generally in the form of cattle, from the bridegroom to the bride's family.²⁸ The couple generally lived together and had children after the betrothal. The transfer of *bogadi* may not have occurred for some time thereafter.

The Tswana distinguished between physiological paternity and legal paternity.²⁹ Legal paternity did not occur until the transfer of *bogadi*. Until *bogadi* was transferred, a woman's reproductive power belonged to her own family, and children were considered part of her father's house. Upon the payment of *bogadi*, the husband was fully entitled to the children he had begotten so that they became part of his house. Because the husband owned the reproductive rights of his wife, he could also claim any children begat through her adulterous activities.³⁰ Today, customary law has evolved so that children born to a married woman are members of her husband's descent group regardless of whether *bogadi* has been transferred.³¹

Traditionally, unmarried girls who became pregnant were scorned, and their children either were killed at birth or suffered from severe social stigma.³² Today, this is not the case.³³ The child is considered part of the mother's family. The father takes the child if he marries the mother or adopts the child. If the father does not exercise either of these options, a man who subsequently marries the woman may claim the child, although the child may enjoy a status inferior to the husband's own children.

Under customary law, women were clearly not equal to men. In this, Tswana society differed little from most traditional societies, including traditional Western societies. Today in Botswana, couples who marry may choose to be bound either by customary law or by common or statutory law. However, the common or statutory law is little better than customary law when it comes to women's rights. Under the Roman-Dutch common law applied in Botswana, the husband is designated head of the family,

25. Motsei Madisa, *Women and Politics*, in MULTI-PARTY DEMOCRACY IN BOTSWANA 55-59 (Mpho G. Molomo & Brian T. Mokopagosi eds., 1991).

26. "Common law" in Botswana is generally the Roman-Dutch law borrowed from South Africa.

27. Athaliah Molokomme, *Women's Law in Botswana: Laws and Research Needs*, in THE LEGAL SITUATION OF WOMEN IN SOUTHERN AFRICA 13 (Julie Steward & Alice Armstrong eds., 1990); Roberts, *supra* note 24, at 18 ff.

28. The marriage ceremony is described in I. SCHAPER, A HANDBOOK OF TSWANA LAW AND CUSTOM 125 (1970).

29. *Id.* at 169.

30. *Id.* at 170-71.

31. Roberts, *supra* note 24, at 22.

32. SCHAPER, *supra* note 28, at 171-73.

33. Roberts, *supra* note 24, at 22.

chooses the matrimonial domicile, has guardianship of the children and exercises control over the couple's joint property unless specifically excluded from doing so by contract before the marriage.³⁴ Modern statutes have done little to correct this situation.³⁵

III. THE UNITY DOW CASE

Unity Dow filed her action in the High Court to declare Section 4 of the Citizenship Act in violation of the fundamental rights and freedoms protected by Chapter II of the Botswana Constitution. The High Court ruled in her favor, finding that the Act discriminated against women.³⁶ The High Court judge stated:

I therefore find that Section 4 [of the Citizenship Act] is discriminatory in its effect on women in that, as a matter of policy,

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

What I have set out at length may inhibit women in Botswana from marrying the man whom they love. It is no answer to say that there are laws against marrying close blood relations—that is a reasonable exclusion

It seems to me that the effect of section 4 is to punish a citizen female for marrying a non-citizen male. For this she is put in the unfavourable position in which she finds herself viz-a-viz her children and her country

The fact that according to the Citizenship Act a child born to a marriage between a citizen female and a non-citizen male follows the citizenship of its father may not in fact have that result.

34. Athaliah Molokomme, *Marriage—What Every Woman Wants or "Civil Death"?* in *WOMAN AND LAW IN SOUTHERN AFRICA* 182-85 (Alice Armstrong & Welshman Ncube eds., 1987). See also John Kiggundu, *The Law of Domicile in Botswana: The Need for Reform*, 2 *AFR. J. INT'L & COMP LAW* 626 (1990).

35. Molokomme, *supra* note 34, at 185.

36. The High Court decision is analyzed in E.K. Quansah, *Unity Dow v Attorney General of Botswana—One More Relic of a Woman's Servitude Removed*, 4 *AFR. J. INT'L & COMP LAW* 195 (1992).

It depends on the law of the foreign country. The result may be that the child may be rendered stateless unless its parents emigrate. If they are forced to emigrate then the unfortunate consequences which I have set out earlier in this judgment may ensue.³⁷

The Attorney General appealed to the Court of Appeal on the grounds that the High Court erred in holding that the Act was unconstitutional and that, in any event, the complainant lacked standing to make the argument.

A. *The Botswana Citizenship Act of 1984*

The modern nation-state, with its attendant concepts of citizenship, did not exist in traditional Tswana society. The basic unit in society was the family. Family ties were close. Family members helped each other in times of trouble, and family relationships were governed by well-defined principles.³⁸

Tribal membership was quite fluid.³⁹ While tribal membership was primarily determined by descent through the father, persons could become members of a tribe through conquest or by pledging allegiance to the Chief. Tribal membership was thus not permanently fixed by birth.

In traditional Tswana society, even apart from issues of gender, not all persons were equal.⁴⁰ Nobles were those related to the Chief. Commoners were non-royal members of the nuclear group who participated fully in the life of the tribe. Immigrants or foreigners were aliens who had not become fully assimilated. They could participate in community activities, although as a practical matter their word might not count for as much as that of a noble or commoner. Some Tswana had serfs. The serfs were often members of minority tribes like the Bushman, and they had few civil rights. Upward mobility between the classes appears to have been fluid. Today, most class distinctions and inequalities have, at least in theory, ceased to exist.

The British created the Bechuanaland Protectorate in 1885. Presumably, persons who were in the area of the Protectorate acquired citizenship under British law,⁴¹ but the real concern about who was a citizen of Botswana did not arise until the creation of Botswana as an independent nation-state in 1966.

Chapter III of the 1966 Constitution defined citizenship. Section 21 declared, with certain exceptions, that a person born in Botswana after

37. Attorney General v Unity Dow Civ App. No. 4/91, at 5 (Bots. App. Ct. June 3, 1992) (opinion of Amissah, J.P.).

38. See SCHAPERA & COMOROFF, *supra* note 17 at 38-39.

39. See *id.* at 28-29; SCHAPERA, *supra* note 28, at 118-21.

40. SCHAPERA, *supra* note 28, at 30-31. See also K. Datta & A. Murtagh, *The Rights of Minorities and Subject Peoples in Botswana: A Historical Evaluation*, in DEMOCRACY IN BOTSWANA 58-68 (John Holm & Patrick Molutsi eds., 1989).

41. Unity Dow Civ App. No. 4/91 at 26 (opinion of Amissah, J. P.).

September 30, 1966 would become a citizen of Botswana.⁴² Section 22 distinguished children born outside of Botswana. They became citizens only if their fathers were citizens of Botswana.⁴³

The present Citizenship Act came into effect in 1984 and repealed Chapter III of the Constitution. It provided in pertinent part:

4. (1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth,
 - (a) his father was a citizen of Botswana; or
 - (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.
- (2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.
5. (1) A person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth,
 - (a) his father was a citizen of Botswana; or
 - (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.
- (2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless he was a citizen at the time of such commencement.⁴⁴

The purpose of the 1984 Act was to bring citizenship into accord with customary law. After the Act came into force, members of the Law Reform Committee went about the country getting the reaction of the people to it.⁴⁵ The evidence indicated that the majority of Botswana supported the Act and that only a small group of urban women married to foreigners opposed it.⁴⁶

In his opinion holding the Citizenship Act unconstitutional, Judge President Amisshah of the Court of Appeal refused to give the Law Commission Report any weight.⁴⁷ The Report was assembled after the Act was passed. Furthermore, what the Court was trying to do, he noted, was unravel the meaning of the Constitution and not the meaning of the Citizenship Act. The Judge President suggested that had the Law Commission canvassed the people of Botswana prior to the adoption of the Constitution to determine whether they felt the overriding characteristics of their society should not be altered by any individual rights or freedoms conferred by the Constitution, the report might have been of assistance in construing ambiguities in the Constitution.⁴⁸ However, no ambiguities

42. BOTSWANA CONST. ch. III, § 21. See Quansah, *supra* note 36, at 197

43. *Unity Dow* Civ App. No. 4/91, at 47 (opinion of Amisshah, J.P.).

44. Citizenship Act of 1984, Cap. 01:01/1987 Rev., §§ 4-5.

45. REPORT OF THE LAW REFORM COMMITTEE ON (I) MARRIAGE ACT (II) LAW OF INHERITANCE (III) ELECTORAL LAW AND (IV) CITIZENSHIP LAW (1989).

46. Quansah, *supra* note 36, at 201-02.

47. *Attorney General v Unity Dow* Civ App. No. 4/91, at 24-26 (Bots. App. Ct. June 3, 1992) (opinion of Amisshah, J.P.).

48. *Id.* at 25-26.

existed in the Citizenship Act requiring resort to a report compiled after the fact.

In argument before the Court of Appeal, the Attorney General agreed that the Citizenship Act discriminated against women, but he argued that the Act was intentionally discriminatory to preserve the traditional male orientation of Tswana society.⁴⁹ In his dissenting statement, Justice Schreiner commented that when Botswana adopted its Constitution it was assumed that "the social *mores* of the various groups of inhabitants were presumably intended to continue unaffected by independence save to the extent that changes were specifically provided for in the Constitution."⁵⁰

However, the Judge President did not see any reason why citizenship in Botswana must necessarily follow the customary or traditional systems of the people.⁵¹ He looked at the situation in Botswana before independence, when under the British law all persons born under the protection of the sovereign became citizens by birth. It was not claimed, he noted, that this situation interfered with the male orientation of Botswana customary society during that period.⁵²

The Judge President also quoted the distinction made by Oppenheim between "nationality" in the sense of citizenship in a state and "nationality" in the sense of belonging to a particular racial or ethnic grouping.⁵³ The state could define the former without resort to customary ideas about the latter.

The Judge President held that in the final analysis custom must yield to the preeminence of the Constitution: "A constitutional guarantee cannot be overridden by custom. Of course, the custom will as far as possible be read so as to conform with the Constitution. But where this is impossible, it is custom not the Constitution which must go."⁵⁴

In a concurring opinion, Judge Bizos acknowledged that "the customs, traditions and culture of a society must be borne in mind and afforded due respect," but they cannot prevail when they conflict with the express provisions of the Constitution. "In relation to the protection of personal and political rights the primary instrument to determine the heartbeat of Botswana is its Constitution."⁵⁵

The Attorney General further tried to justify the law on the ground that it eliminated problems of dual citizenship; however, the Judge President held that eliminating dual citizenship does not necessarily require legislation which discriminates between the sexes of the parents.⁵⁶ Therefore, if gender equality is illegal under the Botswana Constitution, resort to arguments

49. *Id.* at 21.

50. *Id.* at 108 (opinion of Schreiner, J.).

51. *Id.* at 26 (opinion of Amisshah, J.P.).

52. *Id.* at 27-28.

53. *Id.* at 28 (quoting 1 L. OPPENHEIM, INTERNATIONAL LAW 645 (8th ed. 1955)).

54. *Id.* at 24. See also *Ephrahim v. Pastory* Civ App. No. 70 (Tanz. High Ct. 1989).

55. *Unity Dow* Civ App. No. 4/91, at 105 (opinion of Bizos, J.).

56. *Id.* at 30 (opinion of Amisshah, J.P.).

about customary law and about the problems of dual citizenship will not carry the day

B. Section 3 of the Botswana Constitution

The provisions in the Constitution that Unity Dow claimed gave her rights contravened by the Citizenship Act were Sections 3 and 14.

Section 3 of the Botswana Constitution provides:

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

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.⁵⁷

Section 14 deals with protection of the freedom of movement, defined as “the right to move freely throughout Botswana, the right to reside in any part of Botswana, the right to enter Botswana and immunity from expulsion from Botswana.”⁵⁸

The Attorney General argued that Section 3 is simply a preamble to Chapter II, which defines the fundamental rights and freedoms of the individual and that Section 3 did not alone confer any rights. He further argued that Section 15, which provides protection against discrimination, defines discrimination only on the bases of “race, tribe, place of origin, political opinions, colour or creed.”⁵⁹

Judge President Amisshah began his opinion with a discussion about the nature of a constitution and constitutional interpretation:

The object [the constitution] is designed to achieve evolves with the evolving development and aspirations of its people. In terms of the Interpretation Act,^[60] the remedial objective is to chart a future for the people, a liberal

57 BOTSWANA CONST. ch. II, § 3.

58. *Id.* ch. II, § 14(1).

59. *Id.* ch. II, § 15(3).

60. The Interpretation Act of 1984, Cap. 01.01, § 26 provides: “Every enactment shall be deemed remedial and for the public good and shall receive such fair and liberal construction as will best attain its object according to its true intent and spirit.”

interpretation of that objective brings into focus considerations which cannot apply to ordinary legislation designed to fit a specific situation.⁶¹

The Judge President examined precedents from Botswana and foreign jurisdictions on constitutional interpretation and concluded:

The lessons they teach are that the very nature of a constitution requires that a broad and generous approach be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect that objective of the constitution; and that where rights and freedoms are conferred on persons by the constitution, derogations from such rights and freedoms should be narrowly or strictly construed.⁶²

By opening the Pandora's box of constitutional interpretation, the Judge President started a debate that should be familiar to those concerned with current constitutional theory in the United States. In his dissenting opinion, Judge Schreiner cautioned that general dicta indicating that the courts should interpret provisions protecting human rights liberally does not justify a departure from the "plain" meaning of the words used in the Constitution.⁶³

Judge Puckrin, another dissenter, suggested that there were three schools of constitutional interpretation: the "Framer's Intent" school, the "Living Tree" metaphor and purposive interpretation.⁶⁴ He rejected the "Framer's Intent" school on the ground that a constitution must be interpreted in light of contemporary experience, not by what was said in the past.⁶⁵ He rejected the "Living Tree" metaphor, which holds that a constitution is capable of growth and expansion through constitutional interpretation, because growth must be derived from the democratic process and not from judicial conviction.⁶⁶ Purposive interpretation involves the interpretation of rights "in accordance with the general purpose of having rights, namely the protection of individuals and minorities against an overbearing majority."⁶⁷ Judge Puckrin suggested that the latter approach combined with a contextual approach is the preferred method to determine the ambit and extent of any freedom or right under debate.

Judge President Amisshah rejected the argument that Section 3 was nothing more than a preamble.⁶⁸ He based his conclusion on the wording and structure of Section 3 "[Section 3] is the key or umbrella provision

61. *Attorney General v Unity Dow* Civ App. No. 4/91, at 10 (Bots. App. Ct. June 3, 1992) (opinion of Amisshah, J.P.).

62. *Id.* at 12-13.

63. *Id.* at 111 (opinion of Schreiner, J.).

64. *Id.* at 135-40 (opinion of Puckrin, J.).

65. *Id.* at 136.

66. *Id.* at 138.

67. *Id.* at 139-40.

68. *Id.* at 14 (opinion of Amisshah, J.P.).

in Chapter II under which all rights and freedoms protected under the Chapter must be subsumed.”⁶⁹

The Judge President rejected the argument that only Section 15 prohibits discrimination. Rather Sections 4 to 19 expand or limit Section 3, but “[S]ection 3 itself encapsulates the sum total of the individual’s rights and freedoms under the Constitution in general terms.”⁷⁰ Thus, Section 3 requires equal treatment for all, including women, except where limited by other sections in Chapter II.

The Judge President then considered whether the silence in Section 15 on sex discrimination should be construed as allowing discrimination on the ground of sex. The Attorney General argued that the word “sex” was intentionally omitted from Section 15(3) “to accommodate the patrilineal structure of Botswana society, in terms of the common law, the customary law, and statute law”⁷¹

The Judge President noted that the definition in Section 15(3) is expressly stated to be applicable to that section alone and, therefore, can have no application to the equal protection principles articulated in Section 3.⁷² He noted that the provisions in Chapter II stating an exception or limitation to a right or freedom do so expressly, in clear language.⁷³ There is no language in Chapter II that excepts discrimination on the basis of sex from the rights conferred in Section 3.⁷⁴ The Judge President concluded that the framers of the Constitution did not intend to declare that all vulnerable groups or classes were identified and mentioned for all time in the Section 15(3) definition. Rather, the groups are mentioned by way of example.⁷⁵ He suggested that discrimination against the disabled, discrimination based on language or geographical division or discrimination on the basis of religion or community may be prohibited, although these classifications are not mentioned in Section 15(3).⁷⁶

To exclude gender discrimination from constitutional proscription would allow the legislature to exclude women from voting or holding political office.⁷⁷ The Judge President remarked that a decision by the Court of Appeal upholding gender discrimination under the Botswana Constitution would be as outrageous today as the decision of the United States Supreme Court upholding racial discrimination under the U.S. Constitution in *Dred Scott v Sanford*⁷⁸ was in 1857.⁷⁹

69. *Id.* at 15.

70. *Id.* at 17

71. *Attorney General v Unity Dow* Civ App. No. 4/91, at 32 (Bots. App. Ct. June 3, 1992) (opinion of Amissah, J.P.).

72. *Id.* at 33.

73. *Id.* at 34.

74. *Id.* at 36.

75. *Id.* at 40.

76. *Id.* at 41.

77. *Id.*

78. 60 U.S. (19 How.) 393 (1857).

79. *Unity Dow*, Civ App. No. 4/91 at 44 (opinion of Amissah, J.P.).

The Attorney General's argument that a law relating to citizenship was a "personal law" and therefore fell under Section 15(4) of the Constitution which excluded laws "with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law" from the anti-discrimination provisions was likewise rejected.⁸⁰ The Judge President first commented that Section 15 did not deal with sex but only with discrimination on the basis of "race, tribe, place of origin, political opinions, colour or creed."⁸¹ Second, the Judge narrowly defined personal law as "the system of law that applies to a person and his transactions determined by his tribe, religious group, case, or other personal factors, as distinct from the territorial law of the country to which he belongs, in which he finds himself, or in which the transaction takes place."⁸²

The fact that former Chapter III of the Constitution had provisions that defined a child's citizenship based on the citizenship of the father⁸³ was also deemed to be irrelevant.⁸⁴ The Citizenship Act, merely a statute, must be consistent with the Constitution which can always place limitations on its exemptions. Therefore, the limited exemption in the Constitution did not grant a general license to discriminate on the basis of gender. Based on these reasons, the Court of Appeal held that Section 3 outlawed gender discrimination, at least when the treatment of the different sexes cannot be based on biological differences.⁸⁵

C. *International Law*

The Court of Appeal found support for its opinion that the Botswana Constitution prohibited gender discrimination in international law. By looking to the standards of international law, the Court showed a catholicity that has not always characterized the decisions of the U.S. Supreme Court.⁸⁶

Judge President Amissah referred to Section 24 of the Botswana Interpretation Act,⁸⁷ which allows the courts to construe an enactment by reference to any relevant international treaty, agreement or convention.⁸⁸ He also referred to Article 2 of the Universal Declaration of Human

80. *Id.* at 45.

81. *Attorney General v Unity Dow* Civ App. No. 4/91, at 45 (Bots. App. Ct. June 3, 1992) (opinion of Amissah, J.P.).

82. *Id.* at 46.

83. *See supra* text accompanying note 43.

84. *Unity Dow*, Civ App. No. 4/91, at 47-48 (opinion of Amissah, J.P.).

85. *Id.* at 43.

86. *See United States v Alvarez-Machain*, 112 S. Ct. 2188 (1992) (upholding the jurisdiction of United States courts to try a Mexican national who was kidnapped and brought to the United States by United States agents); *Stanford v Kentucky* 492 U.S. 361, 369 n.1 (1989) (upholding the imposition of capital punishment for crimes committed by juveniles, despite contrary international standards). *See also* Louis Henkin, *A Descent Respect to the Opinions of Mankind*, 25 J. MARSHALL L. REV 215 (1992).

87. Interpretation Act of 1984, Cap. 01.01, § 2.

88. *Unity Dow*, Civ App. No. 4/91 at 49 (opinion of Amissah, J.P.).

Rights,⁸⁹ which provides that all persons enjoy the right to be free from distinctions based on sex, and concluded:

The British Government must have subscribed to this Declaration on behalf of itself and all dependent territories, including Bechuanaland, long before Botswana became a State. And it must have formed part of the backdrop of aspirations and desires against which the framers of the Constitution of Botswana formulated its provisions.⁹⁰

Botswana is a signatory of the African Charter on Human and People's Rights,⁹¹ which prohibits sex discrimination. The Attorney General argued that although Botswana had ratified the African Charter, it had not incorporated it into domestic law.⁹² The Judge President acknowledged that the African Charter was not binding inside Botswana as legislation, but stated that it could clearly be referred to as a source for interpreting difficult provisions of the Botswana Constitution.⁹³ He concluded:

I am in agreement that Botswana is a member of the community of civilised States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its Courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken. This principle, used as an aid to construction as is quite permissible under Section 24 of the Interpretation Act, adds reinforcement to the view that the intention of the framers of the Constitution could not have been to permit discrimination purely on the basis of sex.⁹⁴

89. *Universal Declaration of Human Rights*, G.A. Res. 217 (III), U.N. Doc. A/810 (1948). Article 2 reads: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour sex, language, religion, political or other opinion, national or social origin, property birth or other status."

90. *Unity Dow*, Civ App. No. 4/91 at 52 (opinion of Amissah, J.P.).

91. The African Charter was adopted on June 17 1981 by the Eighteenth Assembly of the Heads of State and Government of the Organization of African Unity Article 2 of the Charter provides: "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status." African Charter on Human and Peoples' Rights art. 2, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 551, 553 (Ian Brownlie ed., 1992). Paragraphs 1 and 2 of Article 12 state:

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

Id. art. 12, ¶¶ 1-2, *supra*, at 554.

92. *Attorney General v Unity Dow* Civ App. No. 4/91 (Bots. App. Ct. June 3, 1992) (opinion of Amissah, J.P.).

93. *Id.* at 53.

94. *Id.* at 54.

In his separate opinion concurring with Judge President Amissah, Judge Bizos similarly concluded that the Botswana Constitution was enacted with reference to modern international standards prohibiting gender discrimination.⁹⁵ However, Judge Schreiner disagreed. He stated that Section 15(9) preserves laws that were in force before the Constitution was enacted and continue to be in force after its enactment from the anti-discrimination provisions of Section 15. He also relied on former Chapter III of the Botswana Constitution, which provided that under certain circumstances children took the citizenship of their father and not their mother. He argued that these provisions evidenced that the drafters of the Botswana Constitution had no intention to outlaw discrimination on the ground of sex so as to comply with international standards, and he concluded that change, if it is to come, will have to come through legislative action.⁹⁶

However, by looking to international standards, the majority of the judges on the Court of Appeal gave the decision in *Unity Dow* a firm grounding. The decision provides a useful precedent for Botswana and for the other African nations that have ratified the African Charter on Human and People's Rights.

D. Standing

The final argument raised by the Attorney General was that the complainant had no standing to bring this action. He argued that she was not sufficiently affected by any action that might be taken against her children, that as a practicing lawyer she freely chose to marry into the existing citizenship regime and that there was no immediate threat that her husband would be expelled from Botswana thereby disrupting the lives of her children.⁹⁷

The Judge President countered that a person should not be prejudiced in his or her rights because that person is a lawyer.⁹⁸ In response to the Attorney General's argument that the doctrine of *popularis actio* of Roman law, which gives individuals the right to assert matters of public interest, is not a part of Roman-Dutch common law, the Judge President cited the holding of a South African Appellate Court that once an individual's personal rights are affected, the individual can also "protect the rights of the public."⁹⁹

The Judge President also relied on Section 18(1) of the Botswana Constitution, which allows any person who alleges a violation of the Constitution to apply to a court for redress. He stated that this provision gives broad standing rights and should not be whittled down by principles

95. *Id.* at 100-01 (opinion of Bizos, J.).

96. *Id.* at 128 (opinion of Schreiner, J.).

97. *Id.* at 54-55 (opinion of Amissah, J.P.).

98. *Id.* at 55.

99. *Id.* at 56 (citing *Wood v Odanquva Tribal Auth.* [1975(2)] A.D. 294, at 310).

derived from the common law, whether Roman-Dutch, English or Botswana.¹⁰⁰

The Judge President further rejected the argument that the Citizenship Act affected only the children, not their mother. By placing restrictions on the children, the mother's freedom was also circumscribed.¹⁰¹ Furthermore, the Judge President rejected the argument that because under Botswana customary law the father is the guardian of the children, only he can represent the children's interests. He held that a parent has responsibilities to a child distinct from those of a guardian that give the parent standing to sue on behalf of the child.¹⁰²

Neither of the dissenting judges disputed the Judge President's finding that the complainant had standing to bring the action. The decision therefore stands as a powerful precedent to uphold broad standing for persons who seek to challenge unconstitutional governmental actions in Botswana in the future.¹⁰³

IV IMPLICATIONS OF THE DECISION

The Court of Appeal left the citizens of Botswana with two basic choices: amend the Citizenship Act of 1984 to comply with the Constitution,

100. *Id.* at 57

101. *Id.* at 59

102. *Attorney General v Unity Dow*, Civ App. No. 4/91, at 59-60 (Bots. App. Ct. June 3, 1992) (opinion of Amisshah, J.P.).

103. Judge Aguda, in his separate concurring opinion, relied on §§ 42 and 44 of the Constitutions of the Federal Republic of Nigeria, 1979 and 1989 respectively *Unity Dow*, Civ App. No. 4/91, at 92-93 (opinion of Agula, J.). These sections of the Nigerian Constitution, like § 18(1) of the Botswana Constitution, allow any injured person to bring an action for redress of his or her constitutional rights. In *Adesanya v President of the Republic*, 2 Nig. Con. L. Rep. 358 (Nig. Sup. Ct. 1981), Chief Justice Fatayi-Williams construed § 41 to hold that a senator lacked standing as an injured person to challenge the appointment and subsequent confirmation of the Chairman of the Federal Election Commission. Despite this holding, the Chief Justice made the following observation:

[I] take significant cognisance of the fact that Nigeria is a developing country with a multi-ethnic society and a written Federal Constitution, where rumour-mongering is the pastime of the market places and the construction sites. To deny any member of such a society who is aware or believes, or is led to believe, that there has been an infraction of any of the provisions of our Constitution, or that any law passed by any of our Legislative Houses, whether Federal or State, is unconstitutional, access to a Court of Law to air his grievance on the flimsy excuse of lack of sufficient interest is to provide a ready recipe for organized disenchantment with the judicial process.

In the Nigerian context, it is better to allow a party to go to court and to be heard than to refuse him access to our courts. Non-access, to my mind, will stimulate the *free-for-all in the media* as to which law is constitutional and which law is not! In any case, our courts have inherent powers to deal with vexatious litigants or frivolous claims. To re-echo the words of Learned Hand, if we are to keep our democracy there must be one commandment—thou shall not ration justice.

Id. at 373.

or amend the Constitution to permit gender discrimination. The latter approach, while it might be politically popular among traditionalists,¹⁰⁴ would clearly retard future progress toward the implementation of the human rights standards now contained in Chapter II of the Botswana Constitution and in the African Charter on Human and People's Rights and other international documents. The liberal interpretation given to Section 3 of the Botswana Constitution by the Court of Appeal, if allowed to stand, opens the door for the further recognition of human rights in Botswana.

Judge Aguda, in his concurring opinion, specifically disclaimed any inference that the Court was deciding any issue other than the validity of the Citizenship Act.¹⁰⁵ The Attorney General had argued that if the Citizenship Act was declared unconstitutional, the courts would also have to declare unconstitutional the Administration of Estates Act,¹⁰⁶ which allows women to administer an estate only with her husband's consent,¹⁰⁷ the Deeds Registry Act,¹⁰⁸ which prevents immovable property from being registered in the name of a woman married in community of property,¹⁰⁹ the Companies Act,¹¹⁰ which allows a woman to become a director of a company only if her husband gives his consent, and a host of other laws.¹¹¹

104. A newspaper article reported that few Botswana citizens favored amending the Citizenship Act to give equal rights to women and that many knowledgeable observers believed the *Unity Dow* decision would never be enforced. Nonetheless, the article reported that a women's rights group was preparing a campaign to force the legislature to amend the Citizenship Act and to reform the many other laws that discriminate against women. Bobbie Jo Kelso, *A Woman's Place Is At the Center of the Storm*, DAILY MAIL, Aug. 14-20, 1992, at 12.

Of course, a third option also exists; that is for the legislature to do nothing, thereby leaving the decision unimplemented. If that were to happen, the decision might still have an important educative function and would inform Botswana that when they discriminate on the basis of gender they are going against the spirit and letter of their constitution. It would be hoped that eventually political leaders and the populace would accept the principle that discrimination against women is not only technically illegal but is wrong.

105. *Unity Dow*, Civ App. No. 4/91, at 88 (opinion of Aguda, J.).

106. Cap. 31.01, § 28(5).

107. The United States Supreme Court declared unconstitutional an Idaho law requiring that males be preferred to females in the choice of persons to administer intestate estates. *Reed v Reed*, 404 U.S. 71 (1971).

108. Cap. 33.02, § 18(4).

109. The United States Supreme Court held unconstitutional a Louisiana law that gave a husband exclusive control of jointly held property. *Kirchberg v Feenstra*, 450 U.S. 455 (1981). Similarly, in *Ephrahim v. Pastory*, Civ App. No. 70 (Tanz. High Ct. 1989), the High Court of Tanzania relied in part on the African Charter, which had been ratified by the Tanzanian legislature, to hold that a woman could inherit land. It was argued that under customary law a woman's right over property was limited, but the court held that the Tanzanian Bill of Rights took precedence over customary law. This case is discussed in Rebecca J. Cook, *International Human Rights Law Concerning Women: Case Notes and Comments*, 23 VAND. J. TRANSNAT'L L. 779, 815 (1990).

110. Cap. 42:01.

111. *Unity Dow*, Civ App. No. 4/91, at 88 (opinion of Aguda, J.).

Judge Aguda denied that the unconstitutionality of these laws was a foregone conclusion. He gave some examples in which difference of sex may justify difference of treatment. For instance, the penal code provisions prohibit the execution of a pregnant woman, and the Employment Act provisions allow a pregnant woman maternity leave from her employment.¹¹² Nonetheless, these examples are restricted to situations resulting from actual, and not just perceived, biological differences between men and women. The statutes cited by the Attorney General are not of this kind, and they will obviously be very difficult for the courts to sustain in light of the *Unity Dow* holding.

Women throughout southern Africa have been advocating an end to unequal treatment. The Women and Law in Southern Africa Research Project has been doing comparative research in Botswana, Lesotho, Mozambique, Swaziland, Zambia and Zimbabwe. The project has already generated two books¹¹³ and a number of reports, particularly on maintenance law

At about the same time the *Unity Dow* decision was handed down, the Swaziland research team of the Women and Law Project issued a report on maintenance in that country¹¹⁴ The Swazi report showed that maintenance problems were widespread in that country; thirty-eight percent of the women surveyed had a maintenance problem, but only thirty-six percent of these women had done anything about it. Women were reluctant to use the legal system to force maintenance for a number of reasons, including fear and a general sense of powerlessness. When women did go to court, they generally received inadequate awards and had difficulty enforcing them.¹¹⁵ The *Unity Dow* decision may not directly have a solution for all of these problems; but, to the extent that the Botswana Court of Appeal recognized equal rights for women, the decision may prompt an increased awareness of the problems faced by women, thereby inspiring a search for solutions to those problems not only in Botswana but throughout Africa.

One could argue that the Court of Appeal was overly influenced by evolving international standards on sexual equality and that it should have been more sensitive to Tswana customary law. Thus, the Court should have left the Botswana legislature free to evolve its own solution on how to accommodate human rights norms to traditional standards.¹¹⁶

112. *Attorney General v Unity Dow* Civ App. No. 4191, at 88-89 (Bots. App. Ct. June 3, 1992) (opinion of Agunda, J.).

113. *WOMEN AND LAW IN SOUTHERN AFRICA*, *supra* note 34; *THE LEGAL SITUATION OF WOMEN IN SOUTHERN AFRICA*, *supra* note 27

114. *WOMEN AND LAW RESEARCH IN SOUTHERN AFRICA PROJECT, MAINTENANCE IN SWAZILAND* (1992).

115. *Id.* at iii.

116. See Abdullahi Ahmed An-Na'im, *Civil Rights in the Islamic Constitutional Tradition: Shared Ideals and Divergent Regimes*, 25 J. MARSHALL L. REV. 267 (1992). A weakness not apparent on the face of the decision is that all the justices on the Court of Appeal are expatriates. Despite some criticism from legal practitioners, the government has not moved expeditiously to appoint Botswana judges.

Nonetheless, the goal of international human rights norms is to establish a bottom line below which societies cannot go regardless of their own cultural values.¹¹⁷

Botswana adopted its own bottom line when it enacted its Constitution in 1966. As interpreted by Judge President Amisshah, Section 3 of the Botswana Constitution establishes the international norm that prohibits discrimination based on sex as the law of Botswana. Section 18 insures that the courts will be open to those who suffer injury because of a violation of the provisions of the Constitution. The international norm has thus not been thrust upon the people of Botswana, the people themselves agreed when they adopted the Constitution to be governed by the international norm.

The victory won by Unity Dow is not for women only. It will also benefit males. This is illustrated by the Nigerian case, *Shugaba Abduvahaman Darman v Minister of International Affairs*.¹¹⁸ Darman, who was the leader in the Borno State House of Assembly, was kidnapped from his home by his political rivals, transported across the Chad border and refused entrance back into Nigeria, even though he possessed a Nigerian passport. The government argued that he was not a Nigerian citizen because his father had been born in Chad. However, Darman was able to establish that his mother was born in Nigeria. On that basis, the courts declared him a citizen of Nigeria and ruled that his deportation was illegal. They ordered that his passport be returned and that Darman be awarded damages. Had Unity Dow not prevailed, a person of Darman's status in Botswana could be deported from Botswana and denied his passport.

By holding the Citizenship Act of 1984 unconstitutional, the Court of Appeal of Botswana made a powerful statement supporting sexual equality and the norms established by the international community. It gave constitutional protection not only to women, but to all persons in Botswana.

117 James Silk, *Traditional Culture and Human Rights*, in HUMAN RIGHTS IN AFRICA. CROSS-CULTURAL PERSPECTIVES 290 (Abdullahi A. An-Na'im & Francis M. Deng eds., 1990). The United Nations Human Rights Committee avoided the question whether the Canadian Indian Act that denied a Native American woman her status as an Indian if she married a non-Native American man but did not deny Indian status to a Native American man who married a non-Native American woman constituted illegal sex discrimination under the International Covenant on Civil and Political Rights. *Lovelace v. Canada*, Communication No. R. 624, 36 U.N. GAOR Supp. (No. 40) at 166, U.N. Doc. A/36/40, reprinted in 2 HUM. RTS. L.J. 158 (1981). The Committee was able to avoid the question because the Covenant did not take effect in Canada until after Mrs. Lovelace's marriage. Nonetheless, the Committee found that Canada violated Article 27 of the Covenant that guaranteed minorities the right to enjoy their own culture in community with other members of their group. See Cook, *supra* note 109, at 784-85; James W. Zion, *North American Indian Perspectives on Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES 193-93 (Abdullahi An-Na'im ed. 1992).

118. 2 Nig. Con. L. Rep. 459 (Maiduguri High Ct. 1981), *aff'd*, 3 Nig. Con. L. Rep. 915 (Kaduna Fed. Ct. App. 1982).

In doing so, it provided a persuasive precedent for the protection of human rights for many other African nations as well.