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A family home, five sisters and the rule of ultimogeniture: Comparing notes on judicial approaches to customary law in South Africa and Botswana

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Summary

Given the striking commonalities between the legal systems of South Africa and Botswana, both in terms of its common and customary law, and considering the propensity of the Botswana courts to engage with South African case law, a recent case of Botswana is of particular interest. In September 2013 in the Ramantele case, the Botswana Court of Appeal ruled on a customary law dispute that had been drawn out for more than seven years. The litigation history reads like a jurisprudential chronicle and demonstrates how traditional justice operates on various levels in a pluralistic justice system, and is a perfect example of legal pluralism in action. The case is interesting for a variety of reasons. First, it considers important principles regarding the meaning, status and ascertainment of customary law. Second, it discusses the influence of the Constitution on customary law and, third, it deals with the very important question as to the application of the Botswana Constitution on customary law. Lastly, it reflects on the role of the judiciary in solving customary disputes which, according to Lesetedi JA, is limited to the interpretation of 'the law to be applied in the dispute' and not to 'traverse issues that do not directly

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arise ... however important they may be'. In light of the fact that the Botswana legal system follows the principle of stare decisis and the fact that courts engage with the judgments of other jurisdictions, this case has the potential to influence the outcome of future cases of a similar nature. Against this background, this contribution investigates the contrasting approaches to constitutional adjudication in the context of customary law in the Botswana High Court and Court of Appeal, especially with reference to the approach followed by the South African Constitutional Court in the Bhe case.

Key words: *primogeniture; ultimogeniture; customary law of succession; human rights; Botswana; South Africa*

1 Introduction

The relationship between multiple legal systems in a pluralistic legal order remains a highly topical theme, especially in a post-colonial setting where transplanted and indigenous laws exist side by side. Botswana and South Africa are two examples. They share more than borders. They have historical links dating back to colonial times,¹ and both have a mixed, pluralistic legal system consisting of a transplanted, uncoded legal tradition (the common law)² and an indigenous, also uncoded, legal system (customary laws).³

1 The territory of Bechuanaland (nowadays Botswana) came under British rule in 1885 but its administration was eventually passed onto the former Cape Colony, which was a British colony. The law in force in the Cape colony, basically Roman-Dutch law with English law influences, was received in Botswana and remains the core of the Botswana legal system even after the relationship between South Africa and Botswana was severed in 1909. See F Morton *et al Historical dictionary of Botswana* (2008) 9-11; DDN Nsereko *Constitutional law in Botswana* (2002) xv-xviii; CM Fombad *The Botswana legal system* (2013) 55-92.

2 In this context, the expression 'common law' refers to the uncoded system of South Africa, which is a combination of English common law and Roman-Dutch law. The common law has been described as a 'virile living system of law, ever seeking, as every such system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society' in *Pearl Assurance Co v Union Government* 1934 AD 560 563.

3 Botswana's legal system can be described as dualistic if one refers to the two distinct legal traditions, one based on Western traditions (a combination of received Roman-Dutch law and English law) and the other on African traditions (a plurality of indigenous laws). For a discussion of the Western mix, see CM Fombad 'Botswana and the dynamics of legal modernisation within a dual English common law/Roman-Dutch legal heritage' (2005) 13 *African Journal of International and Comparative Law* 7-24, and for a discussion of the domain of customary law, see CM Fombad 'Customary courts and traditional justice in Botswana: Present challenges and future perspectives' (2004) 15 *Stellenbosch Law Review* 169-170. See also A Griffiths 'Legal pluralism in Botswana: Women's access to land' (1998) 42 *Journal of Legal Pluralism* 123-139, especially 133-136. See C Rautenbach 'Some comments on the status of customary law in relation to the Bill of Rights' (2003) 14 *Stellenbosch Law Review* 107 for a discussion of the position of customary law in South Africa.

In spite of the fact that Botswana is geographically and population-wise much smaller than South Africa,⁴ both have a large percentage of traditional communities living under a system of customary law. In both countries, justice is dispensed within a dual system of mainstream courts⁵ and customary courts, co-existing and interconnected in many ways.⁶

The connection between the common law of South Africa and Botswana is often acknowledged by the Botswana judiciary. In *Kweneng Land Board v Mpofu*,⁷ the High Court of Botswana in Lobatse confirmed that '[t]he common law of Botswana, like that of South Africa, is not the English common law; it is the Roman-Dutch law'. The common law is thus a unified system of law which is territorial in nature: It has legal force in the whole of South Africa and Botswana, although the contemporary content of the common law differs quite considerably in both countries as a result of legal developments and other influences.

Customary law, on the other hand, is neither a unified system of law nor is it territorial. Although the term 'customary law' is used in the literature, legislation and case law of both countries, it is an umbrella term to describe the patchwork of traditional legal systems of traditional communities in South Africa and Botswana. Customary law is a myriad of personal laws intertwined with the different communities that follow their own laws, regardless of the territory in which they live. In the Botswana case of *Sekale v Ministry of Health*,⁸ the court agreed that customary law 'consists of a series of tribal customary laws whose number equates to the number of tribes in Botswana who have their own separate laws' and that it 'emerges from what people do and what they believe and accept to be binding on them'.⁹ In South Africa the situation is the same.¹⁰

4 Botswana is 581 730 square kilometres with a population of just over two million, and South Africa is 1 219 090 square kilometres with a population of almost 54 million people. See CIA 'The world factbook' <https://www.cia.gov/library/publications/the-world-factbook/> (accessed 11 August 2015).

5 These are the statutory courts based on Western principles. See Fombad (n 1 above) ch 5 for an overview of the mainstream court system in Botswana.

6 Informal and formal customary court structures exist both in Botswana and South Africa, and the transfer of cases by means of appeals, reviews or other methods to the mainstream courts is possible. The customary courts in both countries operate on several levels and differ from community to community. See I Schapera *A handbook of Tswana law and custom* (2004) 279-300 for a discussion of the procedures, and also Fombad (n 1 above) 112-115 for an overview of contemporary customary courts in Botswana. For the position in South Africa, see C Rautenbach & JC Bekker 'Traditional courts and other dispute resolution mechanisms' in C Rautenbach & JC Bekker (eds) *Introduction to legal pluralism in South Africa* (2014) 231-253.

7 2005 1 BLR 3 (CA) 15.

8 2006 1 BLR 438 (HC) para 20.

9 As above.

10 TW Bennett 'Application and ascertainment of customary law' in Rautenbach & Bekker (n 6 above) 38.

As a result of the general policies of non-interference and indirect rule of the former colonial powers, the common laws in South Africa and Botswana never supplanted the customary laws and this remains relevant for both countries.¹¹ Although the former policies were conducive to the survival of customary law, it did not entirely escape the winds of change. Over the years, customary law has been influenced by societal and economic changes, legislation, international law and judicial pronouncements in both countries.¹²

In spite of these commonalities between South Africa and Botswana, there are important differences which should be kept in mind, especially pertaining to the recognition, application and ascertainment of customary law. In the case of South Africa, customary law is explicitly recognised by the South African Constitution,¹³ and the courts are compelled to apply customary law where it is applicable.¹⁴ The supremacy of the South African Constitution has certain consequences for customary law, most notably the fact that it is subject to the Constitution. Similar to common law, customary law thus is open for constitutional scrutiny.¹⁵

On the other hand, the Botswana Constitution¹⁶ does not implicitly recognise customary law, but recognises it indirectly by referring to it in connection with the right to a fair trial,¹⁷ the right to equality¹⁸ and the promulgation of statutes.¹⁹ The application and ascertainment of customary law are regulated in terms of the Botswana Customary Law Act,²⁰ which commenced three years after the Botswana Constitution.²¹ Of interest is section 3, which prescribes

11 Fombad (n 1 above) 59; TW Bennett *Customary law in South Africa* (2004) 35-37.

12 For a discussion, see CM Fombad 'Gender equality in African customary law: Has the male ultimogeniture rule any future in Botswana?' (2014) 52 *The Journal of Modern African Studies* 475 487-490.

13 The Constitution of the Republic of South Africa, 1996. See secs 39(2) & (3), 211, 212 & Schedule 4 (Part A). See Bennett (n 10 above) 38-41 for a discussion.

14 The applicability of customary law deals with the topic of 'choice of law' or 'conflict of laws' which is either prescribed by statutes or judicial pronouncements. See Bennett (n 10 above) 41-44. In *Mayelane v Ngwenyama* 2013 (4) SA 415 (CC) para 54, the Constitutional Court laid down evidentiary rules for proving customary law, namely, evidence from individuals living under customary law, advisors to traditional leaders, traditional leaders or other experts. See the discussion at 2.7.1 below.

15 See, eg, *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC); *Bhe v Magistrate, Khayelitsha*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* 2005 (1) SA 580 (CC) (*Bhe* case); *Shilubana v Nwamitwa* 2009 (2) SA 66 (CC); *Pilane v Pilane* 2013 4 BCLR 431 (CC); *Sigcau v President of the Republic of South Africa* 2013 9 BCLR 1091 (CC); and *MM v MN* 2013 (4) SA 415 (CC).

16 LN 83 of 1966, as amended.

17 Secs 10(12)(b) & (e) Botswana Constitution.

18 Sec 15(4)(d) Botswana Constitution.

19 Sec 88(2) Botswana Constitution. Any legislation pertaining to customary law must be done in consultation with the House of Chiefs.

20 51 of 1969.

21 The Botswana Constitution entered into force on 30 September 1966 and the Customary Law Act on 22 August 1969.

the application of customary law in 'proper cases' and, if improper, the common law must be applied. The Act does not explain when a case would be 'proper' and when not, but a number of statutes exclude the application of customary law in various areas which would make it improper to apply customary law.²² Section 11 of the Customary Law Act prescribes the rules which must be applied to ascertain customary law, but only when doubt remains as to its contents after evidence has been led. The court may then consult reported cases,²³ textbooks and other sources, and may receive opinions to determine the customary law. However, if after all this customary law could not be determined, the court must deal with the matter 'in accordance with the principles of justice, equity and good conscience'.²⁴ This direction, according to Fombad,²⁵ gives the courts a wide discretion which must be 'exercised with caution, sensitivity, knowledge and understanding' of their judicial role. There is, of course, always the danger that a judge who has been educated in the common law tradition would choose to apply the common law instead of developing an offending customary law rule, as has happened in the South African *Bhe* case.²⁶

Statutory definitions of customary law exist in both South African and Botswana law. Although neither definition is flawless,²⁷ they do provide some guidance as to the meaning of customary law. In South Africa, the Recognition of Customary Marriages Act²⁸ describes customary law as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'. By contrast, the Botswana Customary Law Act²⁹ defines it 'in relation to any particular tribe or tribal community', as 'the customary law of that tribe or community

22 Fombad (n 1 above) 86 discusses a few examples. One instance is sec 10(8) of the Botswana Constitution which stipulates that criminal offences may only be punished in terms of written law.

23 There seems to be no limitation as to which cases may be consulted, except that they must be reported cases. This is a strange instruction, since judges often refer to the unreported judgments of their counterparts.

24 Sec 10(2) Customary Law Act.

25 Fombad (n 1 above) 483.

26 *Bhe* case (n 15 above). In order to fill the void caused by the striking down of the rule of male primogeniture, the court held that the Intestate Succession Act 81 of 1987, with certain modifications regarding polygynous unions, had to be applied to all customary law estates. This approach has been criticised by a number of legal scholars, eg, SM Weeks 'Customary succession and the development of customary law: The *Bhe* legacy' in A Price & M Bishop (eds) *A transformative justice: Essays in honour of Pius Langa* (2015) 215 216; S Sibanda & TB Mosaka 'A cultural conundrum, Fanonian alienation and an elusive constitutional oneness' in Price & Bishop (above) 256 277-278.

27 For criticism raised against the South African definition, see JC Bekker & C Rautenbach 'Nature and sphere of African customary law' in Rautenbach & Bekker (n 6 above) 18-24, and for criticism against the Botswana definition, see Fombad (n 1 above) 85-86.

28 120 of 1998, sec 1. A similar definition is contained in sec 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act 9 of 2009.

29 Sec 2.

so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice'. An important difference between these two definitions is the fact that the South African provision does not have an internal repugnancy clause, while the Botswana provision does. This may have important consequences for the way in which the courts approach customary law matters, as will be illustrated below.³⁰

Another tangent point between South Africa and Botswana is the tendency of Botswana judges to routinely refer in their judgments to South African case law and literature.³¹ In *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd*,³² Tebbutt JA declared:

The courts of Botswana have never been reluctant, in their own adaptation of the common law to the requirements of modern times, to have regard to the approach of the South African courts and to the writings of authoritative South African academics.

South African precedents also have persuasive value in Botswana courts, as confirmed in *State v Maitumelo Molefe*:³³

The decisions of the South African courts, or those of any other foreign court ... are not binding on the courts in Botswana; but such decisions *may have very substantial persuasive value, especially those of South Africa* where the common law is also Roman-Dutch law.

Historically, and also in line with the constitutional prescripts of section 39(1)(c) of the South African Constitution,³⁴ the Constitutional Court of South Africa has considered Botswana cases at least nine times during a period of 16 years.³⁵ The number of citations is not indicative of the importance attached by South African constitutional court judges to Botswana cases, but merely of the fact that South African judges continue to take cognisance of foreign cases

30 See 2.7 below.

31 A number of reasons have been advanced for this being so. Besides historical and other links, South African judges have been acting as presiding officers in Botswana courts and lawyers have been receiving their legal training at South African universities. DDN Nsereko *Criminal law in Botswana* (2011) 43.

32 [1996] BLR 190 (CA) 194-195.

33 [1968-1970] BLR 100 (HC) (my emphasis).

34 This provision empowers the courts to consider foreign law when interpreting the Bill of Rights.

35 The period concerned is 1995 to 2011. The relevant cases are *S v Makwanyane* 1995 (3) SA 391 (CC) para 77 (1 time); *S v Zuma* 1995 (2) SA 642 (CC) paras 15 & 41 (3 times); *S v Williams* 1995 (3) SA 632 (CC) para 40 (1 time); *S v Mhlungu* 1995 (3) SA 867 (CC) para 78 (1 time); *Shabalala v Attorney-General Transvaal* 1995 (2) SACR 761 (CC) para 28 (1 time); *Osman v Attorney-General for the Transvaal* 1998 (4) SA 1224 (CC) para 21 (1 time); and *Bothma v Els* 2010 (1) SACR 184 (CC) para 57 (1 time). The empirical results are available at <http://www4-win2.p.nwu.ac.za/dbtw-wpd/textbases/ccj.htm> (accessed 13 August 2015). For a general discussion of the statistical results during this period, see C Rautenbach 'South Africa: Teaching an "old dog" new tricks? An empirical study of the use of foreign precedents by the South African Constitutional Court (1995-2010)' in T Groppi & M Ponthoreau (eds) *The use of foreign precedents by constitutional judges* (2013) 185-209.

post-1994. It does, however, illustrate that the South African Constitutional Court also engages in constitutional dialogue with its close neighbours.

Given the striking commonalities between the legal systems of South Africa and Botswana, both in terms of its common and customary laws, and considering the propensity of the Botswana courts to engage with South African case law, a recent case of Botswana is of particular interest. In September 2013, in the *Ramantele* case,³⁶ the Botswana Court of Appeal ruled on a customary law dispute that had been drawn out for more than seven years. There is nothing extraordinary about the facts of the case, except that it deals with an inheritance issue, and more specifically with the rule of ultimogeniture,³⁷ which normally is dealt with in a traditional way within the privacy of the family. In this case, however, the family members could not reach consensus and decided to use the available remedies that both the customary and common law of Botswana had on offer to solve their dispute.

The litigation history reads like a jurisprudential chronicle which began on an informal level with family mediation,³⁸ and continued on a formal level, first in the official customary courts³⁹ and, finally, in the mainstream courts – the High Court and subsequently the Court of Appeal. The course of the case demonstrates how traditional justice operates on various levels in a pluralistic justice system, and is a perfect example of legal pluralism in action.⁴⁰ The case is interesting for a variety of reasons. First, it considers important principles regarding the meaning, status and ascertainment of customary law.⁴¹ Second, it discusses the influence of the Constitution on customary law⁴² and, third, it deals with the very important question as to the application of the Botswana Constitution on customary law.⁴³ Finally,

36 *Ramantele v Mmusi* [2013] BWCA 1 (*Ramantele* case). Two judgments were delivered, one by Lesetedi JA with Kirby JP, Twum JA, Foxcroft JA and Legwaila JA concurring. This judgment will be referred to as the *Ramantele* case (main judgment). The other judgment was a separate but concurring judgment by Kirby JP. This judgment will be referred to as the *Ramantele* case (separate judgment).

37 In terms of this rule, the youngest son of a deceased is entitled to inheritance.

38 Customary justice is usually done within informal hierarchical structures commencing with the household, family and descent groups. Sec 3 of the Customary Courts Act (Cap 04:05 of the Customary Law Act 1969) consolidates the law relating to formal customary courts and indirectly sanctions their existence by laying down that the Act shall not apply to 'informal proceedings of an arbitral nature before a body (not established or recognized as a customary court under this Act) constituted under customary law'.

39 In terms of sec 2(1) of the Customary Courts Act, 'customary court' means '(a) a lower customary court; or (b) a higher customary court, established or recognised under the provisions of this Act'.

40 Legal pluralism has been described by J Griffiths 'What is legal pluralism?' (1986) 24 *Journal of Legal Pluralism* 1–2 to mean 'that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs'.

41 See the discussion at 2.7.1.

42 See the discussion at 2.7.2.

43 See the discussion at 2.7.3.

it reflects on the role of the judiciary in solving customary disputes which, according to Lesetedi JA, is limited to the interpretation of 'the law to be applied in the dispute' and not to 'traverse issues that do not directly arise ... however important they may be'.⁴⁴ In light of the fact that the Botswana legal system follows the principle of *stare decisis*,⁴⁵ this case has the potential to influence the outcome of future cases of a similar nature.

Interestingly, both the High Court and Court of Appeal considered South African cases, but reached totally opposite outcomes.⁴⁶ In a comparative context, the legal reasoning followed by the Botswana Court of Appeal regarding a variety of customary law issues will no doubt be of interest for the South African judiciary which has been struggling with similar questions.

Against this background, the aim of the article mainly is to investigate the contrasting approaches to constitutional adjudication in the context of customary law in the Botswana High Court and Court of Appeal, especially with reference to the approach followed by the South African Constitutional Court.

2 Facts of the case and litigation history

2.1 Birth of the dispute

The facts of the case were summarised by Kirby JP, who delivered a concurring but separate judgment in the Court of Appeal.⁴⁷ The late Silabo, a member of the Ngwaketse community, was the owner of a piece of land in Kanye in the Mafhikana ward, on which he established his homestead together with his wife, Thwesane. When he died in 1952, his estate, consisting of livestock and other property, was distributed amongst his heirs, except for his homestead in which Thwesane remained until the day of her death. After their father's passing, the five daughters developed the homestead for themselves and their mother with their own resources.⁴⁸ Neither the two sons (Banki and Basele), nor Silabo's biological son from another relationship (Segomotso) participated in any way in the developments. Thwesane died in 1988, but her estate was not

44 *Ramantele* case (main judgment) para 74.

45 In accordance with this rule, which was adopted from English law, a court is bound to former precedents when the same points arise again in litigation. However, a court will deviate from a former decision under certain circumstances, for example if it is satisfied that the former decision was incorrect. *Kweneng Land Board v Mpofu* 2005 1 BLR 3 (CA) 15.

46 See 2.6 and 2.7 below.

47 See the *Ramantele* case (separate judgment) paras 2-4. See also the *Ramantele* case (main judgment) paras 2-9. For the sake of convenience, only the first names of the parties and other relevant family members will be referred to.

48 They used their own resources to build three dwellings on the homestead. The largest one was built by the first respondent, who has been occupying it since 1991.

distributed. The couple's last-born son, Bashele, died in 1990 and their first-born son, Banki, five years later, in 1995. Their older half-brother, Segomotso, died in 2006. Edith (the first respondent in the Court of Appeal) was widowed in 1991 and returned to her parents' homestead to live in a house that she had built. At the time of the appeal she was already over 80 years old.

After Segomotso's death, his son Molefi (the appellant in the Court of Appeal) claimed that he was the only heir of the homestead via his father, who had allegedly obtained the homestead from Banki through an exchange-agreement, Banki having inherited it from Thwesane as the couple's youngest son.⁴⁹ Edith, on the other hand, conceded that the homestead belonged to their mother, Thwesane, and averred that she and her sisters were her only successors. This dispute became the object of a long and tedious process which finally came to an end in the highest court of Botswana, the Court of Appeal.⁵⁰

In terms of the law of Botswana, the intestate estates of people living under a system of customary law devolve in accordance with the customary rules of a particular community. Section 7 of the Customary Law Act provides that 'customary law shall be applicable in determining the intestate heirs of a tribesman and the nature and extent of their inheritance'. The customary law that applied to the facts of the case was the Ngwaketse rule of inheritance, which is based on the principle of ultimogeniture. In terms of this rule, the last-born son of a deceased is qualified to inherit the homestead of the family to the exclusion of all other siblings, male and female.⁵¹ This rule formed the basis of the dispute between the full-blood daughters of Segomotso and his half-blood grandson, Molefi, who wanted to claim his inheritance and, in the process, have them evicted from the homestead which they still occupied.

2.2 First step in mediation: A family affair

The first step in trying to resolve the dispute was taken on an informal level within the structures of the family unit. In accordance with customary law practices, the uncles and elders of the family at first tried to resolve the dispute, but they could not agree on the outcome.⁵² Some felt that Banki had inherited the homestead from his mother, Thwesane, as the youngest son, in accordance with the Ngwaketse custom. Others maintained that he had died before the estate had been distributed and also that he did not qualify as the heir because he had been banished from the homestead due to his bad

49 His contention was based on the Ngwaketse custom that the last born son qualifies as intestate heir to the exclusion of all female and other male siblings. See *Ramantele* case (separate judgment) para 4.

50 See the discussion at 2.7 below.

51 *Ramantele* case (main judgment) para 23.

52 *Ramantele* case (main judgment) para 15.

behaviour. The Mafhikana headman was also involved in seeking a resolution for the dispute, but was not able to persuade the family members to reach an agreement. Seeing that consensus could not be reached, the dispute was referred to the headman's court to adjudicate.

2.3 Lower customary court: The headman has spoken

The formal litigation between the parties commenced before the customary court of first instance during August 2007. The dispute came before the headman of the parties' ward, Ketsitlile, who, together with three other ward members, found in favour of Molefi after having heard conflicting evidence from a number of witnesses.⁵³ Ketsitlile found that under the Ngwaketse culture, the male child inherited because 'a male child never leaves his parents' home except when he marries, or due to bad behaviour which his parents do not condone', whilst a girl child 'leaves her parents' home when she gets married'.⁵⁴ Accordingly, the headman held that there was overwhelming evidence to prove that the homestead had been given to Segomotso and that Molefi was entitled to the homestead as the heir of Segomotso.⁵⁵

Edith was ordered to vacate the homestead within six months, but she was not satisfied with the outcome and appealed to the chief's court.⁵⁶

2.4 Higher customary court: The chief's ruling

The appeal came before Chief Kgosi Lotlaamoreng II, who dealt with the matter on 4 November 2008. He did not agree with the outcome of the headman's court and held that the dispute had to be decided on the facts. According to him, the facts revealed that all the male issue of Silabo and Thwesane had died before the homestead was distributed. The homestead thus belonged to all the children 'born of Silabo and Thwesane' and they all 'have a right to use it as they wish whenever they have a common event'.⁵⁷

53 There are discrepancies between the High Court and Appeal Court regarding the exact date when the dispute was before the headman's court. See the *Mmusi* case, which refers to 15 May 2007, and the *Ramantele* case (main judgment), which refers to 15 August 2007. The exact date is not of importance for this discussion, however, and such discrepancies often result from the fact that the headman's court is not normally a court of record. The proceedings in the headman's court have been recorded in detail in the *Ramantele* case (main judgment) paras 14-34.

54 *Ramantele* case (separate judgment) para 5A.

55 *Ramantele* case (main judgment) para 30.

56 An overview of the proceedings in the headman's court is provided in the *Ramantele* case (separate judgment) para 5A. The judgment of Dingake J in the High Court, however, states that Edith was given only 30 days to vacate the homestead, and the situation is a bit unclear. See the *Mmusi* case para 10.

57 *Ramantele* case (main judgment) para 31; *Ramantele* case (separate judgment) para 5B.

Kgosi Lotlaamoreng II ordered the elders present at the hearing to convene a meeting to determine which one of Silabo and Thwesane's children should be appointed to look after the homestead on behalf of all the children.⁵⁸

This time it was Molefi who did not agree with the order, and he appealed to the next level of traditional dispute resolution, namely, the customary court of appeal.

2.5 Customary court of appeal: Back to basics

The customary court of appeal did not agree with the order made by the higher customary court (the chief's court),⁵⁹ and made a ruling similar to that of the headman's court,⁶⁰ namely, that the Ngwaketse customary law had to be applied, which meant that Banki, as the last-born son of Silabo and Thwesane, was the rightful heir to the homestead.⁶¹ The homestead thus was the property of Segomotso through the agreement between himself and Banki, and, consequently, the property of Molefi through succession.

Edith was once again notified to vacate the homestead within three months,⁶² but instead of filing an appeal, Edith and three of her sisters (respondents 2, 3 and 4 in the Court of Appeal) brought an application in terms of section 18(1) of the Botswana Constitution⁶³ for review on constitutional grounds before the High Court of Gabarone. The dispute no longer formed part and parcel of the customary dispute resolution mechanisms, but was brought under the realm of the mainstream court system. Similar to South Africa,⁶⁴ the mainstream courts in Botswana are compelled to apply customary law under certain circumstances, especially where the proceedings are between members of traditional communities.⁶⁵

58 *Ramantele* case (main judgment) para 31.

59 See 2.4 above.

60 See 2.3 above.

61 The judgment was delivered on 5 September 2007.

62 *Ramantele* case (main judgment) paras 32-33; *Ramantele* case (separate judgment) para 5C; *Mmusi* case paras 9-11.

63 Sec 18(1) of the Constitution stipulates that '[i]f any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, 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'.

64 Sec 211(3) of the South African Constitution compels South African courts to apply customary law when it is applicable.

65 See secs 3 and 4 of the Customary Law Act, and also the discussion at 2.7.2 below.

2.6 High Court of Botswana: A constitutional approach

The application for review in the *Mmusi* case was brought in a rather unorthodox way,⁶⁶ but was nevertheless enthusiastically considered by Dingake J, the presiding judge in the High Court. He decided the case on constitutional grounds. Initially, the applicants (Edith and her sisters) argued that the Ngwaketsi rule of ultimogeniture was unconstitutional because of its violation of section 15(1) of the Constitution, which prohibits discriminatory laws '[s]ubject to the provisions of subsection (4)'. The question as to what 'discriminatory' means is answered in subsection 3, namely:

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

Subsection 4 is an exclusionary clause which excludes the operation of section 15(1) in the case of law that makes provision for, amongst others, 'devolution of property on death or other matters of personal law'.⁶⁷ Subsection 4 proved to be an insurmountable hurdle to the applicants, which is probably the reason why the applicants decided to abandon their reliance on section 15(1) and instead to put their faith in section 3(a) of the Botswana Constitution.⁶⁸ Section 3(a) reads:⁶⁹

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

(a) life, liberty, security of the person and *the protection of the law*.

It was not a problem for the Court that the applicants no longer stood by section 15 to argue their case, because it felt that it was the prerogative of the parties to decide which provisions of the Constitution they wanted to rely on.⁷⁰ After giving a detailed analysis

66 Instead of launching an appeal or review proceedings against the decision of the customary Court of Appeal, which was the logical step to take, the parties filed for review in terms of order 35, rule 1 of the Court Rules. In addition, the review application was procedurally flawed, because it was filed out of time without express grant of leave as set out in order 61(8) of the High Court Rules. Furthermore, Dingake J was criticised for permitting counsel to formulate two contradictory rules of customary law to be tested for their constitutionality while constitutionality was not an issue at all. *Ramantele* case (main judgment) paras 35-36.

67 Botswana Constitution sec 15(4)(c).

68 See *Kamanakao v Attorney-General* 2001 2 BLR 54 para 15, where the Court stated that 'the rights declared in section 3 of the Constitution inhere in every person in Botswana without exception or discrimination'.

69 My emphasis.

70 Para 212.

of the legal position in Botswana and elsewhere, the Court came to the conclusion that the Ngwaketse rule of inheritance, based on ultimogeniture, differentiated between men and women. This differentiation is based on the ground of gender, which is prohibited in terms of section 3(a) of the Constitution, and is thus unfair. On the authority of a South African case, *Harksen v Lane*,⁷¹ known for its formulation of the two-stage enquiry to determine equality, the Court came to the conclusion that culture could not be any justification for the discrimination,⁷² because such an approach would 'amount to the most glaring betrayal of the express provisions of the Botswana Constitution and the values it represents'.⁷³

Consequently, the Court set aside the judgment of the customary court of appeal and made the following order:⁷⁴

- 1 The Ngwaketse customary law rule that provides that only the last-born son is qualified as intestate heir to the exclusion of his female siblings is *ultra vires* section 3 of the Constitution of Botswana, in that it violates the applicants' rights to equal protection of the law.
- 2 The judgment of the Customary Court of Appeal under Civil Case Number 99 of 2010 and dated 22 September, 2010, to the extent that it applied such rule, is hereby reviewed and set aside.

The Court, however, did not make a ruling as to who was competent to inherit if the rule of ultimogeniture did not apply. The Court of Appeal⁷⁵ was highly critical of the fact that the High Court did not determine what remedy the respondents had. It was not clear whether or not they were supposed to go back to the customary law structures to ask for a remedy. The fact that the Court created a *lacuna* which should have been filled was also disapproved of by Fombad, who argues that a *clearly established* rule of customary law must be enforced by the courts except if it is 'incompatible with the provisions of any written law or contrary to morality, humanity or natural justice', as directed by section 2 of the Customary Law Act.⁷⁶ If the customary rule is uncertain, the situation must be resolved by applying section 10(2) of the Customary Law Act, which lays down that the 'courts shall determine the matter in accordance with the principles of justice, equity and good conscience'.

A few other aspects of Dingake J's reasoning also warrant mentioning. First, he believed that it was the functioning of judges to treat the Botswana Constitution as a 'living organism' which must be 'constantly shaped to become a suitable tool to address contemporary challenges'. In poetic fashion, he declared that judges must 'assume the role of judicial midwives' to assist in the 'birth of a new world

71 1998 (1) SA 300 (CC).

72 *Mmusi* case paras 189-215, and more specifically para 200.

73 Para 201.

74 *Mmusi* case para 222.

75 *Ramantele* case (main judgment) para 39.

76 Fombad (n 12 above) 475 482-483.

struggling to be born, a world of equality between men and women as envisaged by the framers of the Constitution'.⁷⁷

The words of the judge finds considerable resonance in the transformative constitutionalism jurisprudence of the South African Constitutional Court.⁷⁸ The South African Constitution has been described as a 'transformative document' and the process of transformation as envisaged by the Constitution as 'transformative constitutionalism'. Transformative constitutionalism and everything it entails have been enthusiastically embraced by the South African judiciary. In general terms, it refers to the mammoth task placed on the shoulders of the Constitution to effect transformation from the old, and everything bad associated with it, to the new and idealistically good.

In some cases, the South African Constitutional Court has applied the notion of transformative constitutionalism in dealing with the complexities created by a pluralistic legal system.⁷⁹ The late Chief Justice Langa explained it as follows:⁸⁰

The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

Transformative constitutionalism provides South African courts with reasons and opens their eyes to the significance of dialogic constitutional reasoning. An animated and eloquent common law style of writing judgments has entered into and established itself in the constitutional sphere, also with regard to customary law. Deputy Chief Justice Moseneke points out that 'courts have a constitutional obligation to develop customary law in order to align it with constitutional dictates'.⁸¹

In light of the overarching importance of the South African Constitution in the development of customary law, it is surprising that

77 Para 67.

78 The term 'transformative constitutionalism' was used for the first time by K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146-188, but has since then found a solid place in the legal scholarship and judgments of the courts, eg *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 232; *S v Mhlungu* 1995 (3) SA 867 (CC) para 8; *Hassam v Jacobs* 2009 (5) SA 572 (CC) para 28; and *Road Accident Fund v Mdeyide* 2011 1 BCLR 1 (CC) para 125.

79 For a discussion of some of these cases, see C Rautenbach & W du Plessis 'African customary marriages in South Africa and the intricacies of a mixed legal system: Judicial (in)novatio or confusio' (2012) 57 *McGill Law Journal* 749 772.

80 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit* 2001 (1) SA 545 (CC) para 21.

81 *Gumede v President of Republic of South Africa* 2009 (3) SA 152 (CC) para 166.

the Botswana Court of Appeal⁸² and other legal scholars⁸³ are opposed to the constitutional approach of the Botswana High Court. Although one has to concede that the Botswana Constitution does not have the same wording as the South African Constitution, the Botswana Constitution is certainly also supreme law⁸⁴ against which all laws should be tested. In *Attorney-General v Dow*,⁸⁵ the Court cited with approval the *dictum* from *Petrus v The State*:⁸⁶

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

The Botswana Interpretation Act⁸⁷ defines 'written law' as 'the Constitution, Acts and statutory instruments', thus clearly distinguishing the Constitution from other types of statutes. The fact that the Customary Law Act only recognises the laws of a community as customary law if they are 'not incompatible with the provisions of any *written law* or contrary to morality, humanity or natural justice'⁸⁸ means that customary law which is inconsistent with the Botswana Constitution should not be recognised. This implies that the Constitution could, or even should, be applied to each and every customary rule to determine its constitutionality.

The second aspect of Dingake J's judgment is his favourable approach towards foreign and international law, which is also in line with many other jurisdictions, including South Africa, where the

82 *Ramantele* case (main judgment) para 37: 'It is important to note that a court should not be too quick to consider the constitutionality of a customary law unless it is possessed of sufficient evidence regarding the existence and content of such custom, its application and the rationale thereof. Should a court do so, it is likely to find itself making decisions which have got no contextual and factual foundation, yet with far-reaching consequences.'

83 Fombad (n 12 above) 482 argues that '[i]n dealing with customary law, a court must not easily or hastily rush to the conclusion that it is invalid merely because it appears to be inconsistent with modern law – whether this be the constitution, statutory law, common law or even international human rights instruments'. However, elsewhere the author argues that '[t]he Bill of Rights in the Constitution provides more than enough safeguard that should ensure that any customary laws that are contrary to morality, humanity and natural justice will be invalidated'. It is difficult to imagine how this can be done, without a constitutional investigation of the constitutionality of the customary laws. See Fombad (n 1 above) 90.

84 This can be inferred from sec 86 of the Botswana Constitution which gives legislative powers to the Botswana Parliament subject to the Constitution. See Fombad (n 1 above) 68.

85 (2001) AHRILR 99 (BwCA 1992) para 19.

86 (1984) BLR 14 34 (my emphasis). This quote is from Higgins J in the Australian High Court in *Attorney-General for New South Wales v Brewery Employees Union of New South Wales* (1908) 6 CLR 469 611-612.

87 20 of 1984.

88 My emphasis. See sec 2 of the Act.

courts regularly engage in constitutional dialogue.⁸⁹ The value of comparative law, according to Dingake J, is that it can 'offer much richer range of model solutions'.⁹⁰ There is no need to reinvent the 'wheel of justice' if other systems around the world can offer a great variety of solutions.⁹¹ He was of the opinion that the jurisprudence of other jurisdictions should be 'interrogated and if relevant, applied'.⁹² Fombad is not impressed by the Court's use of foreign precedents. According to him, the 'use of foreign authorities could thus hardly be justified – and, if anything, was a futile attempt to display legal erudition which only obscured the issues which should have been addressed'.⁹³ There is, however, nothing in the judgment of Dingake J to indicate that he was persuaded by foreign cases to reach the conclusion that he did. Citing foreign cases is what judges do, even though they do not always find themselves bound by the ruling of a foreign court. As explained by former Justice Ackermann of the South African Constitutional Court:⁹⁴

[F]oreign law is not in any sense binding on the court referring thereto ... One may be seeking information, guidance, stimulation, clarification, or even enlightenment, but never authority binding on one's own decision. One is doing no more than keeping the judicial mind open to new ideas, problems, arguments, solutions, etc ... Of course, the right problem must, in the end, be discovered in one's own constitution and jurisprudence, but to see how other jurisdictions have identified and formulated similar problems can be of great use.

One more aspect, likely the more critical one, is the constitutional gymnastics performed by the Court to circumvent the effects of section 15 of the Botswana Constitution. For one, Dingake J was of the opinion that it was the prerogative of the applicants to decide in terms of which constitutional provision they wanted to proceed and if they wanted to rely on section 3 and exclude section 15, they could do so. Second, he referred with approval to the judgment of *Dow v Law Society of Botswana*,⁹⁵ where the court examined both sections 3

89 Fombad (n 12 above) 483 identified 22 cases from nine different jurisdictions. For a discussion of this phenomenon, also referred to as 'comparative constitutional jurisprudence', see Rautenbach (n 35 above) 185-209; C Rautenbach & L du Plessis 'In the name of comparative constitutional jurisprudence: The consideration of German precedents by South African Constitutional Court judges' (2013) 14 *German Law Journal* 1539-1578.

90 Para 116.

91 As above.

92 Para 214.

93 Fombad (n 12 above) 483.

94 LWH Ackermann 'Constitutional comparativism in South Africa: A response to Sir Basil Markesinis and Jörg Fedtke' (2005) 80 *Tulane Law Review* 169 183-184.

95 *Attorney-General v Dow* 1992 BLR 119 (CA) 127H. The appellant argued, amongst others, that the Botswana Constitution had to be construed as a whole, resulting in the application of the exclusionary clause in sec 15 in cases of discrimination based on a person's 'sex'. One important difference between this case and that of *Mmusi* is the fact that the former dealt with the omission of the word 'sex' from sec 15(3), whilst the latter dealt with the explicit exclusion of the customary rules of succession from the discrimination clause.

and 15 of the Botswana Constitution. It held that section 3 was a substantive provision and that the fundamental rights entrenched in section 3 could not be abridged by section 15:

In South Africa, it is a well-known principle of constitutional interpretation that individual constitutional provisions must not be considered in isolation but in light of a constitution as a whole.⁹⁶ However, in defence of Dingake J, it is important to remember that the South African Constitution is a modern one where similar provisions excluding customary law from the equality provisions are unlikely to be found. It is thus understandable that the Botswana courts would look for alternative ways to circumvent ostensibly unfair provisions in an outdated Botswana Constitution. The role of the judiciary in developing an out-of-date constitution, such as that of Botswana, was explained as follows by Amissah P:⁹⁷

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

The *Mmusi* case received worldwide acclaim and was particularly welcomed by organisations and individuals striving for the protection of human rights and gender equality.⁹⁸ The jubilation was shortlived,

96 *Matatiele Municipality v President of the Republic of South Africa* 2007 (6) SA 477 (CC) para 36; and *Jaga v Dönges* NO 1950 (4) SA 653 (A) 664H.

97 *Dow* (n 95 above) 166.

98 'Botswana women allowed to inherit' *BBC News* 12 October 2013, <http://www.bbc.com/news/world-africa-19924723> (accessed 6 May 2014). On 18 June 2013 the Women's Link Worldwide gave a Bronze Gender Justice Uncovered Award to the High Court of Botswana for its decision in the *Mmusi* case, in recognition of its significant contribution to promoting gender equality.

however.⁹⁹ Molefi appealed to the Court of Appeal of Botswana, which was highly critical of Dingake J's handling of the case, and his ruling was finally set aside. The substance of the Court of Appeal's concerns had to do with the handling of the court *a quo* of both the facts and certain matters of law, especially its constitutional approach.¹⁰⁰

2.7 Botswana Court of Appeal: Back to the drawing board

As already explained, the judgment of the High Court was set aside in the Court of Appeal in the *Ramantele* case (both main and separate judgments). The Court of Appeal took a totally different direction from that of the High Court, though the outcome was essentially the same.¹⁰¹ The Court of Appeal was of the opinion that the determination of the constitutionality of the rule of ultimogeniture was irrelevant to the real dispute between the parties, which had to do with the question whether Molefi was the rightful heir to the homestead or not. This question needed to be answered on the facts alone and not within the realm of the Botswana Constitution.¹⁰²

The facts that needed to be proven in order for Molefi to succeed with his claim were, according to Lesetedi JA, as follows:¹⁰³ that Banki (the last-born son) had inherited the homestead from his deceased parents; that such inheritance was in accordance with the Ngwaketse custom of ultimogeniture; that the custom entitled the last-born son to do with the homestead as he pleased; that the custom was indeed 'law' that falls under the definition of 'customary law' contained in section 2 of the Customary Law Act; and that there was indeed an agreement between Banki and Segomotso in terms of which Segomotso obtained ownership of the homestead. According to the Court, there was evidence of Edith's possession of the homestead for over 20 years and no evidence that Banki had obtained ownership that could be transferred to Molefi. As a result, Molefi's case had to fail

99 Legal scholars were less enthusiastic about the approach taken by Lesetedi J. See eg GR Lekgowe '*Mmusi & Others v Ramantele & Another: An opportunity missed to begin the burial of Attorney-General v Unity Dow?*' (2012) *University of Botswana Law Journal* 81-90, which criticises the Court's failure to appreciate the important differences between secs 3 and 15 of the Constitution.

100 The Court of Appeal (both the main and separate judgments) was highly critical of Dingake J's consideration of secs 3 and 15 of the Constitution in isolation. See *Ramantele* case (separate judgment) paras 11-13 and *Ramantele* case (main judgment) paras 58-65.

101 The Court of Appeal came to the conclusion that the order of the court *a quo* had to be set aside and replaced, but that its outcome 'namely that the respondents retain the family homestead will remain the same'. According to the Court, this also meant that Molefi (the appellant) essentially lost his case and he had to pay the costs of the application in both the Court of Appeal and the court *a quo*. See *Ramantele* case (main judgment) paras 103-105.

102 *Ramantele* case (main judgment) paras 37, 41-42. According to Lesetedi JA, '[i]t is a well-recognised general rule of decision making that where it is possible to decide a case before the court without having to decide a constitutional question, the court must follow that approach'. See para 41.

103 *Ramantele* case (main judgment) para 43.

on this fact alone and it was thus unnecessary to look at the other facts to resolve the dispute.¹⁰⁴

There were also other hurdles which Molefi could not overcome, which will not be discussed here,¹⁰⁵ and the Court finally set aside the order of the High Court, declaring that the Ngwaketse law of inheritance did not exclude female or other siblings from inheriting their deceased parents' homestead. In addition, the Court declared the decision of Kgosi Lotlaamoreng II¹⁰⁶ to be valid, but added that if the surviving children of Silabo and Thwesane were unable to agree who amongst them was responsible for taking care of the homestead, the matter had to be referred to the elders and uncles for resolution and, failing this, the children had to be assisted by a person appointed by Kgosi Malopi II of the Bangwaketse community. After a long battle in the courts, the matter was referred back to the family members to resolve the dispute between the parties, thus right back to where it all began. This has to be a rather frustrating situation for Edith and her sisters, and I agree with Fombad that the final decision of the Court of Appeal is rather disappointing in this respect.¹⁰⁷ Given the fact that similar situations are likely to arise again, it would have been judicious for the Court, as highest court in legal matters, to have provided guidelines to be followed by the lower courts.¹⁰⁸

Regardless of the fact that the case was finally resolved by a proper interpretation of the facts, the case and its progress through the various levels of dispute resolution illustrate some of the intricacies a pluralistic legal system foregrounds. These issues primarily have to do with the status and application of indigenous laws in relation to the transplanted colonial laws, the developmental function of the judiciary in the context of indigenous laws, and the influence of constitutionalism on these laws. On each of these issues the Court of Appeal had something to say, and in the light of the importance of these statements for future litigation, it would be interesting to discuss some of these.

2.7.1 Meaning, status and ascertainment of customary law in Botswana

The first point the Court of Appeal deliberated on,¹⁰⁹ which is equally problematic in South African law,¹¹⁰ is the elusive meaning of customary law.¹¹¹ In line with the approach taken by some legal scholars, most of whom received their legal training in uncoded

104 *Ramantele* case (main judgment) para 29.

105 For more information, see *Ramantele* case (main judgment) paras 45-47.

106 See 2.4 above.

107 Fombad (n 12 above) 485.

108 As above.

109 *Ramantele* case (main judgment) paras 47-48.

110 See Bekker & Rautenbach (n 27 above) 17-23.

111 Legal scholars have been grappling with the same problems. See Nsereko (n 1 above) 25-32 164-202.

mixed legal systems, the first step is to determine whether customary law is statutorily defined. As explained earlier, the definition in section 2 of the Botswana Customary Law Act¹¹² provides some guidance as to the meaning of customary law, but qualifies it by, firstly, linking it to a 'tribe or tribal community'¹¹³ and, secondly, by requiring it not to be inconsistent with other laws, morality, humanity or natural justice.¹¹⁴ Some scholars maintain that customary law refers to 'those established usages and observances that have developed over a period of time and have been generally accepted by the tribe concerned as binding'.¹¹⁵ This is in accordance with Schapera's explanation that the basic source of Tswana law is to be found in the customary usages and observances of the community, which have 'already established themselves in practices and become accepted through tradition'.¹¹⁶

The requirement that the customs on which customary law is based should have longevity certainly presents challenges, as it does not take cognisance of the fact that societies are on the move, and so are their customs. Lesetedi JA in the *Ramantele* case (main judgment) recognised this phenomenon and confirmed the dynamic and flexible nature of customary law as being susceptible to change in accordance with societal changes.¹¹⁷ It is notable that the Lesetedi judgment does not require the prolonged existence of customary law, but regards it merely as 'a comprehensive tapestry of interrelated and interdependent rules, covering every aspect of family and societal life'.¹¹⁸

The indefinable nature of customary law filters through to other important issues, such as its status and ascertainment. The (perceived or real) inferior status of an indigenous legal system versus a transplanted one is indeed a bone of contention in many pluralistic legal orders. Botswana is no exception.¹¹⁹ As a result of Britain's policy of indirect rule, customary law was never replaced by the legal systems of Botswana's colonial powers, but co-existed side by side

112 A similar definition is given in sec 2 of the Customary Courts Act.

113 Sec 2 of the Customary Law Act defines a tribe as 'a section of a tribe' (a definition that makes no sense at all) and a tribal community as 'any community which is living outside a tribal territory but is organised in a tribal manner'.

114 Often referred to as the 'repugnancy clause'. See Nsereko (n 1 above) 31.

115 See Fombad (n 1 above) 85.

116 Schapera (n 6 above) 38-39.

117 *Ramantele* case (main judgment) para 77. In his separate judgment, Kirby JP confirmed that customary law has two outstanding characteristics, namely, its 'evolutionary nature and its flexibility' – see *Ramantele* case (separate judgment) paras 26-28.

118 *Ramantele* case (main judgment) para 25.

119 The theory of legal pluralism and its categories is a highly complex and debated topic. I do not intend engaging in these debates, but accept for the purpose of this discussion the divisions made by Griffiths (n 40 above) 1-55 between deep (or official) pluralism and weak (or unofficial) legal pluralism. This is also the distinction G van Niekerk & C Rautenbach 'The phenomenon of legal pluralism' in Rautenbach & Bekker (n 6 above) 6-7 prefer to make. The narrow interpretation

with it.¹²⁰ After colonialism, legal reforms did not alter the dual nature of the Botswana legal system much. In fact, most of the reforms seem to affect primarily the common law, while very little change has been brought about in the area of customary law.¹²¹ Although Kirby JP was of the opinion that customary law is equal in status to the common law of Botswana, this could hardly be true.¹²² For one, according to Kirby JP, unlike the common law, a court cannot take judicial notice of a rule of customary law; it is a question of fact which must be proven, especially in the mainstream courts, where the judges have little or no knowledge of customary law.¹²³ Secondly, in order for it to be enforceable, it must pass the scrutiny of the repugnancy clause in the definitional provision of the Customary Law Act, which requires that it must not be 'incompatible with the provisions of any written law or contrary to morality, humanity or natural justice'.¹²⁴ Thirdly, the application of customary law is limited by a number of statutes, for example section 10(8) of the Constitution, which provides that '[n]o person shall be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a *written law*'.¹²⁵ As already explained, written law includes the Botswana Constitution and other statutes; customary law is thus excluded. The subsidiary position of customary law is also evident from the statement of Lesetedi AJ in the *Ramantele* case (main judgment), who attached the existence of a customary law to the fulfilment of certain conditions:¹²⁶

A customary rule to receive the status of a law and thus be enforceable by the courts must not be inconsistent with the values of or principles of natural justice. It must not be unconscionable either of itself or in its effect. Nor should it be inhuman. Customary law must be applied in accordance with the set out principles of morality, humanity or natural justice with the object of achieving justice and equity between the disputants.

of legal pluralism in the context of family law is the co-existence of officially-recognised state laws, whilst deep legal pluralism can be regarded as the factual situation which reflects the realities of a society in which various legal systems are observed, some officially and others unofficially. See also C Rautenbach 'Deep legal pluralism in South Africa: Judicial accommodation of non-state law' (2010) 60 *Journal of Legal Pluralism* 143-178.

120 Although this could hardly be described as an equal relationship. See also Fombad (n 1 above) 59-62.

121 Some of the developments are discussed by Fombad (n 1 above) 62-65.

122 *Ramantele* case (separate judgment) para 25. Kirby JP drew an analogy to the well-cited South African case of *Alexkor Ltd v The Richtersveld Community* 2004 (5) SA 460 (CC), which held that the South African common law and customary law are on a par with each other.

123 It must be proven by means of expert evidence. See *Ramantele* case (separate judgment) para 29.

124 See sec 2 of the Customary Law Act, and also *Ramantele* case (main judgment) para 47. Fombad (n 1 above) 90 is highly critical of the repugnancy clause and argues that it has no place in modern Botswana law, where the Constitution should provide more than enough safeguard against human rights abuses.

125 My emphasis. See the definition of 'written law' at 2.6 above.

126 Para 49.

Lesetedi JA found that the customary rule that denied Edith and her sisters the right to share in the deceased estate 'goes against the notion of fairness, equity and good conscience' and that, therefore, it did not 'qualify to be given the status of a law'.¹²⁷ There was thus no customary rule which could have been subjected to constitutional scrutiny. It therefore seems that the test for the existence of a customary law rule in Botswana is different from the test in South African law. In *Shilubana v Nwamitwa*,¹²⁸ Van der Westhuizen J summarised the modern approach to ascertaining customary law:

Where there is a dispute over the legal position under customary law, a court must consider both the traditions and the present practice of the community. If development happens within the community, the court must strive to recognise and give effect to that development, to the extent consistent with adequately upholding the protection of rights. In addition, the imperative of s 39(2)¹²⁹ must be acted on when necessary, and deference should be paid to the development by a customary community of its own laws and customs where this is possible, consistent with the continuing effective operation of the law.

More recently, in *Mayelane v Ngwenyama*,¹³⁰ the South African Constitutional Court also explained what the requirements for dealing with customary law are:

- (a) Customary law must be understood in its own terms, and not through the lens of the common law.
- (b) So understood, customary law is nevertheless subject to the Constitution and has to be interpreted in the light of its values.
- (c) Customary law is a system of law that is practised in the community, has its own values and norms, is practised from generation to generation and evolves and develops to meet the changing needs of the community.
- (d) Customary 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.
- (e) Customary law will continue to evolve within the context of its values and norms, consistently, with the Constitution.
- (f) The inherent flexibility of customary law provides room for consensus seeking and the prevention and resolution, in family and clan meetings, of disputes and disagreements.
- (g) These aspects provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility and belonging in its members, as well as the nurturing of healthy communitarian traditions like *ubuntu*.

¹²⁷ *Ramantele* case (main judgment) para 50.

¹²⁸ 2009 (2) SA 66 (CC) para 49.

¹²⁹ Sec 39(2) of the Constitution provides: 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

¹³⁰ 2013 (4) SA 415 (CC) para 24 (footnotes omitted). See also Bennett (n 10 above) 51.

However, in order to prove what the customary rules are, the Court accepted well-established rules of evidence, namely, testimony and affidavits from individuals living in accordance with Tsonga law, an advisor to traditional leaders, traditional leaders and other experts.¹³¹ Regardless of the customary law so found, it must be brought 'into line with the values of the Constitution'.¹³²

This brings us to the third issue. How is customary law, consisting of flexible unwritten rules, determined in Botswana? In other words, considering that customary law has to remain relevant to the lives of people and, therefore, must constantly adapt to changing circumstances, how can it be ascertained? Lesetedi JA alluded to this problem and acknowledged that it would not be an easy task for a court to 'identify a firm and inflexible rule of customary law for the purpose of deciding upon its constitutionality or enforceability'.¹³³ Although customary law is recognised in terms of the Constitution and the Customary Law Act, Lesetedi AJ held, on the basis of the definitional provisions in the Customary Law Act read with section 10(2),¹³⁴ that the party relying on a customary law rule still has the onus to prove not only that the rule exists, but also that it is an enforceable rule and that it is not repugnant to statutory law, morality, humanity or natural justice.¹³⁵

As already explained, section 11 of the Botswana Customary Law Act provides guidelines for the ascertainment of customary law, but this provision becomes operational only after a court has doubts as to the existence of a rule of customary law in spite of evidence led by the parties. Section 11 stipulates as follows:¹³⁶

If any court entertains any doubt as to the existence or content of a rule of customary law relevant to any proceedings, after having considered such submissions thereon as may be made by or on behalf of the parties, *it may consult reported cases, textbooks and other sources, and may receive opinions either orally or in writing to arrive at a decision in the matter:*

Provided that -

- (i) the decision as to the persons whose opinions are to be consulted shall be one for the court, after hearing such submissions thereon as may be made by or on behalf of the parties;
- (ii) any cases, text books, sources and opinions consulted by the courts shall be made available to the parties;

131 Para 131.

132 Para 54.

133 *Ramantele* case (main judgment) para 29.

134 This provision stipulates that '[i]f 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'.

135 *Ramantele* case (main judgment) paras 45-47. Fombad (n 1 above) 90 finds it surprising that the repugnancy clause was retained in the Botswana legislation after independence, because of its evident bias against customary law.

136 My emphasis.

- (iii) any such oral opinion shall be given to the court in the same manner as oral evidence.

It is important to consider that, although the court must seek the answer in written sources, customary law does not become a written law; it remains unwritten. Therefore, the written sources are merely records 'of the position of a given custom as it prevailed at a particular point in the life or history' of a traditional community, but not afterwards.¹³⁷ Although these sources may be useful to demonstrate how a rule of customary law developed, the content of the rules must be determined by the 'prevailing societal ambience of the concerned community', which can be found in contemporary records such as recent case studies and oral evidence.¹³⁸

The conundrum created by ever-changing customary rules and the inflexibility of a written rule illustrates the problem the courts are faced with. A written rule cannot easily be changed. It is certain, but it does not allow for transformation in accordance with societal changes. On the other hand, flexible, unwritten customary rules relinquish certainty but keep up with contemporary changes in society.

Of course, the common law¹³⁹ is not indifferent to or detached from society. It is also described as an age-old but 'living' legal system that constantly adapts to changes in society.¹⁴⁰ Therefore, the courts of Botswana have never shied away from adapting the common law to contemporary changes.¹⁴¹ Both legal traditions are rooted in the value systems of the communities from which they originated: The common law is rooted in Western values and the customary law in African values. Although scholars usually focus on the differences

137 *Ramantele* case (main judgment) para 77.

138 As above.

139 The concept 'common law' is equally ambiguous, especially to scholars not familiar with the legal history of Botswana and South Africa. Fombad (n 1 above) 72-74 points out that the expression 'common law' may have at least three meanings. First, it may be used to refer to the law of Botswana in general, in other words the law 'common' to Botswana. Second, it may refer to those legal systems (Botswana inclusive) that have been influenced by English common law, and thirdly it may be used to refer to the unwritten laws (excluding customary law) of Botswana. The latter includes the transplanted combination of Roman-Dutch and English rules. For the purpose of this discussion, the latter explanation of the meaning of the common law is followed.

140 Also AJ Kerr 'The reception and codification of systems of law in Southern Africa' (1958) 2 *Journal of African Law* 82 100 declared: 'Southern African experience then shows that with a textbook or textbooks of persuasive authority, with legislation where necessary for reform and regulation, with the beneficial work of the courts and with particular custom allowing changes to be made directly by the people themselves, a body of law rich in material and capable of development may be built up.'

141 In *Silverstone (Pty) Ltd v Lobatse Clay Works (Pty) Ltd* [1996] BLR 190 (CA) 7, the court quoted with approval the classic passage in *Pearl Assurance Co v Union Government* 1934 AC 570 (PC): 'Roman-Dutch law is a virile living system of law, ever seeking, as every system must, to adapt itself consistently with its inherent basic principles to deal effectively with the increasing complexities of modern organised society.'

between the values or norms of the common and customary law, the fact that both are flexible and adaptable legal systems cannot be ignored.

2.7.2 Application of the Constitution to customary law

The application of customary law in the mainstream courts of Botswana is regulated in terms of the Customary Law Act and, although the provisions dealing with application are not formulated in altogether clear language, the issue of application does not seem to create much difficulty in the courts.¹⁴²

More controversial, however, is the question whether or not the Botswana Constitution is applicable to customary law. Both the main and the separate judgments of the Court of Appeal agreed that the court *a quo* erred in its application of the Constitution to resolve the dispute.¹⁴³ Both judges followed the conservative approach taken in some South African judgments, where the viewpoint was that 'where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'.¹⁴⁴

Although the starting point in the Court of Appeal was that the Botswana Constitution did not apply, Lesetedi AJ was at pains to explain what the approach should be if it was indeed a constitutional issue. According to Lesetedi AJ,¹⁴⁵ a proper constitutional analysis commences with an inquiry about the content of a legal rule. When the content of the rule has been ascertained, the next step is to consider whether the rule can be construed in accordance with the Constitution. Only if it could not would it be in violation of the Constitution and thus unconstitutional. The onus is on the party alleging the violation to provide *prima facie* proof of the violation, after which the onus rests on the other party to prove either that there is no such violation, or that the violation is in the public interest. Sections 15(4)(c) and (d) of the Botswana Constitution contains permissible derogations from the absolute prohibition against discrimination contained in section 15(1).¹⁴⁶ However, section 15 must be read with section 3 of the Constitution,¹⁴⁷ which is an umbrella provision that qualifies the other human rights provisions in

142 See sec 4 (customary law must be applied where it is proper to apply it); sec 4 (customary law must be applied in civil cases and other proceedings where the parties are tribesmen); and sec 5 (customary law must be applied in accordance with an agreement).

143 *Ramantele* case (main judgment) paras 58-48 and *Ramantele* case (separate judgment) paras 21-30. This viewpoint is contrary to the South African Constitution, which applies to all law including customary law. See Rautenbach (n 3 above) 107-114 for a discussion of the status of customary law in relation to the South African Constitution.

144 This was the viewpoint of Kentridge AJ in *S v Mhlungu* 1995 (3) SA 867 (CC) para 59.

145 *Ramantele* case (main judgment) paras 48-58.

146 See 2.6 above for the wording of this section.

147 As above.

chapter II (the Bill of Rights), including the right to equality in section 15. In other words, section 3 is a general provision that affords the rights and freedoms in chapter II to everyone, but subject to general limitations based on 'respect for the rights and freedoms of others and for the public interest to each and all'. Section 15, on the other hand, is a specific clause that sets out the right to equality explicitly, including its particular limitations. In addition, section 15 must be tested against the general limitation clause contained in section 3. Thus, even the derogations in sections 15(4)(c) and (d) must be checked against the Constitution to determine if they are¹⁴⁸

rational and justifiable either as being intended to ensure that the rights and freedoms of any individual do not prejudice the rights and freedoms of others or as being in the public interest.

In its interpretation of the Botswana Constitution, in general, and the Bill of Rights, in particular, the Court must adopt a generous and purposive approach in line with Botswana's liberal democratic values and in line with international guidelines.¹⁴⁹ On the other hand, derogations such as those contained in section 15(4) must be construed in a strict and narrow manner, having regard to the exceptions contained in section 3 of the Constitution.¹⁵⁰

Kirby JP, who agreed entirely with the reasoning and order made by Lesetedi JA, also gave his viewpoint on what the proper approach should be when a court is faced with a challenge to the constitutionality of a rule of customary law.¹⁵¹ As already explained, according to him the first rule is to try and decide the case without applying the Constitution.¹⁵² As a corollary to this rule, the second rule is to try and solve the case by an appeal or review proceedings without bringing an application under section 18(1) of the Constitution for constitutional relief.¹⁵³ There was no need to measure the customary rule of ultimogeniture against the Constitution, because the existing legal framework provided for in the Customary Law Act¹⁵⁴ was sufficient to determine whether the rule was 'contrary to morality, humanity or natural justice'.¹⁵⁵ The customary rule excluded women from inheritance solely on the ground of gender, and there was no doubt in the mind of Kirby JP that it was, therefore, not in accordance with humanity, morality or natural justice.¹⁵⁶ There might nevertheless be circumstances justifying the discrimination, such as 'family cohesion, certainty of succession, support of the widow and provision of a home of last

148 *Ramantele* case (main judgment) para 72.

149 *Ramantele* case (main judgment) para 69.

150 *Ramantele* case (main judgment) para 71.

151 *Ramantele* case (separate judgment) para 21.

152 *Ramantele* case (separate judgment) para 22.

153 See 2.5 above for the wording of this provision.

154 See secs 2, 7, 10 & 11.

155 *Ramantele* case (separate judgment) para 35.

156 *Ramantele* case (separate judgment) para 36.

resort to indigent family members' which would render the rule unobjectionable.¹⁵⁷ However, Kirby JP was unable to find any evidence *in casu* which justified the rule of ultimogeniture, and agreed with the main judgment that the judgment of the court *a quo* had to be set aside.¹⁵⁸

2.7.3 Role of the judiciary in the development of customary law

The South African judiciary's approach to legal pluralism issues¹⁵⁹ is determined within the parameters of the supreme South African Constitution.¹⁶⁰ One notable influence on their approach is inspired by section 39(2), which requires a court to 'promote the spirit, purport and objects of the Bill of Rights when it interprets any legislation, or when it develops the common law or customary law'. There is thus no escaping the constitutional democratic values of human dignity, equality and freedom, regardless of the type of law being interpreted.¹⁶¹ Another factor is the influence of the values of the South African Constitution on the *boni mores* (public policy) of South African society, which requires a transformation from a divided, pluralistic society to one that is united in its diversity. The South African Constitutional Court has reiterated that the content of *boni mores* must be 'determined with reference to the founding values underlying our [the South African] constitutional democracy', which is based on the values and beliefs of the greater sector of South African society.¹⁶² Both the common and customary law of South Africa must be developed and legislation interpreted to be consistent with the Bill of Rights¹⁶³ and international obligations to reflect the 'change in the legal norms and values of our [South African] society'.¹⁶⁴

That the law should develop in line with modern demands was recognised by Dingake J, who perceived the function of the judiciary to¹⁶⁵

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

157 *Ramantele* case (separate judgment) para 28.

158 *Ramantele* case (separate judgment) paras 41-42.

159 For a discussion of the South African judiciary's approach, see Rautenbach (n 118 above) 143-177.

160 Sec 2 of the South African Constitution stipulates: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.' The terms 'law' and 'conduct' are wide enough to include legal and social norms (eg customs).

161 For the values of the South African Constitution see, amongst others, the Preamble and secs 1 & 8.

162 *Amod v Motor Vehicle Accident Fund (Commission for Gender Equality Intervening)* 1999 (4) SA 1319 (SCA) para 26.

163 Contained in ch 2 of the South African Constitution.

164 *Daniels v Campbell* 2004 (5) SA 331 (CC) para 56.

165 *Mmusi* case para 211.

His observations are in accordance with the viewpoint of many South African judges that the South African Constitution is supreme law to which all others laws, even customary law, must yield.¹⁶⁶

It is somewhat disappointing that the Court of Appeal of Botswana did not share Dingake J's sentiments regarding its role in the development of customary law in line with liberal constitutional values. According to Lesetedi JA, the primary role of a judge is to resolve disputes and to interpret the law to be applied to disputes before the court. Lesetedi JA was of the opinion that, although the judiciary is renowned for its enforcement of constitutional values in cases where it was necessary, '[n]o rebirth was called for in this case'.¹⁶⁷

In defence of Lesetedi JA, one must acknowledge that he did qualify his assertion that a court should not be quick to consider the constitutionality of a customary rule with the qualification that it should do so only when there is sufficient evidence regarding the existence and content of such a rule, its application and rationale.¹⁶⁸ Evidently, this was not the position *in casu* and, therefore, the Constitution could not be applied. It is notable that the South African Constitution provides that 'law and conduct inconsistent with it is invalid',¹⁶⁹ elevating it as supreme law above all law and conduct, which could resolve the issue that there was no proof that the rule did indeed exist in the *Ramantele* case.

3 Conclusion

In conclusion, it is important to note that South African and Botswana laws treat customary law differently. In South Africa customary law receives direct constitutional recognition, while in the Botswana Constitution there is no direct recognition. In South Africa, customary law is subject to the South African Constitution, but in Botswana it is subject to the internal repugnancy clause contained in the Customary Law Act. Contrary to the similar status between the common and customary law in South Africa, customary law seems to be subordinate in Botswana. A Botswana litigant who relies on a customary law rule needs to prove two things: that the customary rule exists, and that it is not repugnant to statutory law, morality, humanity or natural justice.

The two opposite judicial approaches to customary law emanate from the facts of the five sisters who fought a battle to keep the family home. The liberal constitutional approach taken by Dingake J in the *Mmusi* case was short-lived. At the end of the day, it was a 45 year-

166 *Mmusi* case paras 143 & 201.

167 *Ramantele* case (main judgment) para 74.

168 *Ramantele* case (main judgment) para 37.

169 Sec 2 South African Constitution.

old repugnancy clause¹⁷⁰ that won the battle against the 48 year-old Botswana Constitution in the Court of Appeal.¹⁷¹ The five sisters seem to have lost their battle. The case was referred back to the family members and, if they failed to reach an agreement, to the elders and uncles and, failing them, back to the customary court of Kgosi Malope II. They are thus back to where they started, and we do not yet know what the family members have decided.

The contribution of the judiciary towards creating a transformed society where the rights and freedoms of individuals, especially women and other vulnerable groups,¹⁷² are protected and promoted, cannot be underestimated. Judges make new law when they hand down a judgment with influential value, especially where the rule of *stare decisis* is one of the prominent features of the legal system. A judgment such as the one of the Court of Appeal of Botswana had the potential to enhance the development of human rights, especially the rights to equality of women who have been excluded from succession in many traditional communities, as illustrated by this case. Edith and her sisters, although they had been the matrons of their parents' homestead for many years, could easily have been denied the right to remain there after the death of their last surviving parent because of a rule that favours a descendent that no longer resided on the property.

The final decision of Lesetedi JA to confirm the order of Kgosi Lotlaamoreng II in the higher customary court in part, namely, that the homestead belonged to 'all the children born to Silabo and Thwesane' to use as they wished whenever they had a common event, surely left a few questions unanswered. If they (presumably 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? Furthermore, the power conferred upon the elders and uncles and, if they fail, on a person appointed by Kgosi Malope II, to decide the fate of the homestead, if the four remaining sisters are unable to reach an agreement as to who is to take care of the property, leaves a feeling of disquiet in one's mind. In the modern era of equal rights and equal worth, the fate of women is once again left in the hands of males. Surely, this could not be what has been described by Dingake J in the *Mmusi* case¹⁷³ as a product of the 'justices of this court view[ing] the Constitution as the "mirror reflecting the national soul"'. A national soul that denies the influence of constitutional values on discriminatory traditional practices must certainly be seen as a step

170 Sec 2 Customary Law Act.

171 *Ramantele* case (main and separate judgments).

172 Rautenbach (n 119 above) 172.

173 *Mmusi* case para 83.

backwards for women's rights in Botswana. The Botswana Constitution is supreme, and there is no reason why it should be avoided in customary law cases. One should take heed of Dingake J's warning:¹⁷⁴

It would be offensive, in the extreme to find, in this modern era, that such a law [ultimogeniture] has a place in our legal system, having regard to the imperative that constitutional provisions should be interpreted generously, to serve not only this generation, but generations yet to be born, particularly recalling that the Constitution should not be interpreted in a manner that would render it a museum piece.¹⁷⁵

174 *Mmusi* case para 204.

175 See, however, the criticism raised against this statement by Lesetedi JA in the *Ramantele* case (main judgment) para 74.