

Gender equality in Botswana: The case of *Mmusi and Others v Ramantele and Others*

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Summary

On 12 October 2012, the High Court of Botswana declared the Ngwaketse rule of customary law, which provides that only the last-born son may inherit his parents' dwelling house, as unconstitutional. The rule excludes women from inheriting their parents' dwelling house regardless of their rank in the birth order. This article examines the decision of the Court. It notes with commendation that, although the decision will not of itself stop the disempowerment of women in Botswana, it constitutes a critical step towards gender mainstreaming in the country. The article also lauds the Court for its extensive use of comparative human rights jurisprudence and international human rights law in the determination of the claim. The advantage of this approach is that it sets the growth of Botswana's human rights jurisprudence in line with international standards and best practices. Nevertheless, this article notes that the judge failed to reconcile the two conflicting constitutional provisions that were at issue in the case: section 3, which affords the applicants equal protection of the law, and section 15, which permits discrimination in inheritance and other matters governed by one's personal law. The article suggests that the judge should have adopted and applied the harmonisation approach to settle this tension. Further, the article notes that the judge misapplied precedents on the question of the role of public opinion in the determination of constitutional disputes before him. Be that as it may, the abolition of the concerned Ngwaketse rule of customary law is cause for celebration for women of Botswana, Africa and beyond.

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1 Introduction

Custom and tradition are often used to justify the oppression of women. The Botswana case of *Mmusi and Others v Ramantele and Others (Mmusi case)*¹ demonstrates in a spectacular fashion how custom and tradition may be deployed to undermine women's rights. In this case, custom was invoked to disinherit the applicants on the grounds of their gender. The High Court of Botswana ruled that a rule of customary law emanating from this custom was unconstitutional.

The courts of Botswana have always sought to protect the human rights of women whenever the opportunity presented itself. In 1992 both the High Court and Court of Appeal of Botswana held as void sections 4 and 5 of the Citizenship Act² in the celebrated case of *Attorney-General v Dow (Dow case)*,³ for being inconsistent with the Constitution of Botswana.⁴ The said provisions were giving a right to Botswana men who are married to non-Batswana women to pass Botswana citizenship to their children, but denied Botswana women who were married to non-Batswana men the right to pass citizenship to their children. Both courts held that these provisions undermined women's equality, dignity and freedom from discrimination. Commenting on the significance of the case, Seng stated that the case gave great satisfaction not only to the applicant in the case, but also to 'women's rights movements worldwide'.⁵ Perhaps the *Mmusi* decision takes over from where *Dow* left off in pushing back the frontiers of emancipation for the women of Botswana, Africa and the world. This article critiques the *Mmusi* decision, identifying its strengths and weaknesses. It singles out for commendation the way in which Justice Key Dingake utilised international law, human rights law and comparative jurisprudence to decide the matter. Nevertheless, it criticises the judge for failing to adopt and apply proper interpretation techniques to settle the tension between the conflicting provisions of the Constitution. It also critiques the judge's failure to locate the place of public opinion in the adjudication of constitutional disputes, especially those touching on human rights. The article concludes that, although the judgment has shortcomings, its practical value is monumental.

1 MAHLB-000836-10.

2 Citizenship (Amendment) Act 17 of 1984.

3 1992 BLR 119.

4 Cap 01:01, Laws of Botswana.

5 MP Seng 'In a conflict between equal rights for women and customary law: The Botswana Court of Appeal chooses equality' (1993) 24 *Toledo Law Review* 564.

2 Litigation in the *Mmusi* case

2.1 Background of the case

The material facts of the case may be stated briefly as follows: On 15 May 2007, the first applicant sued the first respondent before the Lower Customary Court in the *Ngwaketse* area for an order declaring, among other things, that she was entitled to inherit the dwelling house forming part of her late father's estate, who had died intestate. The Customary Court dismissed the applicant's claim on the ground that under *Ngwaketse* customary law,⁶ a woman cannot inherit her father's dwelling house. Dissatisfied with the ruling of the Lower Customary Court, the applicant appealed to the Higher Customary Court, where Kgosi Lotlaamoreng⁷ ordered that the parties' elders must convene a meeting where they should identify the child who will remain in the dwelling house. On further appeal, the decision of Kgosi Lotlaamoreng was overturned by the Customary Court of Appeal, holding that, according to long-standing traditions and customs of the *Bangwaketse*,⁸ if the inheritance is distributed, the family home is given to the last-born son.⁹ Thus, the Customary Court of Appeal entered judgment in favour of the first respondent and ordered the applicant to vacate her father's dwelling house within 30 days from the date of the order. Dissatisfied by the decision of the Customary Court of Appeal, the applicant, this time joined by a further two of her sisters, brought an application before the High Court of Botswana challenging the rule of *Ngwaketse* customary law,¹⁰ which denies women the right to inherit a family residence forming part of their late father's estate solely on the basis of their sex. They argued that the rule violated their right to equality under section 3(a) of the Constitution of Botswana.¹¹ The applicants' application was fiercely opposed by their nephew and the Attorney-General, who maintained that the rule that excludes the applicants from inheriting their father's dwelling house was part of the *Ngwaketse* culture and thus must remain undisturbed. The effect of the judgment of the Customary Court of Appeal is that, no matter where women are located in the birth order, they are not entitled to inherit from their parents the

6 The *Bangwaketse* are one of the largest ethnic groups found in the southern part of Botswana.

7 *Kgosi* means chief; a tribal leader.

8 One of the largest tribes in Botswana situated in the southern part of the country and which has Kanye Village as capital.

9 *Mmusi* case (n 1 above) para 10.

10 *Ngwaketse* customary law is the customary law of the *Bangwaketse*.

11 Sec 3(a) thereof states: 'Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his place of origin, political opinion ... 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 ...'

family home through intestate inheritance, despite the fact that their brothers enjoy the right of such inheritance.¹²

Before the High Court the applicants argued that the customary rule in question undermined their rights to equality or equal protection of the law under section 3(a) of the Constitution of Botswana. On the other hand, the respondents' central argument was that, since Botswana was a 'culturally-inclined nation', the rule must be saved as it formed an integral aspect of the *Ngwaketse* inheritance customs and traditions. The respondents argued that the time had not yet arrived to upset the rule in question. More critically, the Attorney-General argued that, although the Constitution of Botswana contained provisions on non-discrimination and equality, in terms of its section 15(4)(c), discrimination could be permitted in relation to devolution of property upon death or other matters of personal law. Naturally, the presiding judge was being called upon to employ interpretation techniques that will enable section 3(a) (guaranteeing applicants' rights to equality and protection of the law) to co-exist within a single unitary constitutional scheme with section 15(4)(c), which permits discrimination on matters of inheritance and personal law. As will be shown during the course of this article, the judge avoided dealing with the conflict between these two provisions.

2.2 Judgment of the High Court

After surveying relevant decisions of foreign municipal and international tribunals and provisions of relevant international human rights instruments, the judge entered judgment in favour of the applicants. His view was that the rule of *Ngwaketse* customary law concerned violated the applicants' rights to equality and dignity guaranteed under section 3(a) of the Constitution. He argued that the differential treatment embodied in the rule of *Ngwaketse* customary law was offensive to modern thinking and unjustifiable. He criticised the rule as perpetuating an unacceptable culture of male dominance that reserves for women positions of subordination and subservience. The judge held that the exclusion of women from inheritance in the manner that the impugned rule sought to do was fundamentally unjust and constituted degrading treatment and an assault on the dignity of women. He also stressed that courts of law, as the conscience and voice of contemporary society, must do their part to ensure that the ideal of gender parity is achieved. In this regard, the learned judge remarked:¹³

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

12 *Mmusi* case (n 1 above) para 24.

13 *Mmusi* case (n 1 above) para 217.

More critically, the learned judge concluded his judgment by calling upon the government of Botswana to repeal all discriminatory laws which may in themselves or by their effect undermine the rights of women. In this connection, the Court assertively delivered itself thus:¹⁴

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

3 General observations on the judgment

3.1 Strengths of the judgment

As indicated above, perhaps the *Mmusi* decision is the most seminal and comprehensive judgment where a court in Botswana has sought to advance the agenda of gender parity after the watershed *Dow* case. The *Mmusi* decision has been described by the Deputy-Director of the Southern Africa Litigation Centre, Priti Patel, as 'the best judgment ever'.¹⁵ Although it is not necessarily correct that the *Mmusi* decision is 'the best judgment ever', it is, however, an important judgment that contributes in a significant way to the growth of the human rights jurisprudence and praxis of Botswana and beyond. Some of the strongest points or aspects of the judgment are the use of comparative jurisprudence and principles of international human rights law.

3.1.1 Use of comparative jurisprudence

The importance of the eclectic application of judicial decisions of foreign municipal courts by other local courts cannot be over-emphasised. In this regard, the inimitable Aguda JA stated in his separate opinion in the *Dow* case:¹⁶

At this juncture, I wish to take judicial notice of that which is known the world over that Botswana is one of the few countries in Africa where liberal democracy has taken root. It seems clear to me that all the three arms of government – the legislature, the executive and the judiciary – must strive to make it remain so, except to any extent as may be prohibited by the Constitution in clear terms. It seems clear to me that in so striving, we cannot afford to be immune from the progressive movements going on around us in other liberal and not so liberal democracies, such movements manifesting themselves in international agreements, treaties, resolutions, protocols and other similar understandings as well as in the respectable

14 *Mmusi* case (n 1 above) para 218.

15 See R Moyo 'Botswana women granted right to inherit' *IOL News* 13 October 2012 <http://www.iol.co.za/news/africa/botswana-women-granted-right-to-inherit-1.1402244> (accessed 30 April 2013).

16 *Attorney-General v Dow* [1992] BLR 119 (CA) 168.

and respected voices of our learned brethren in the performance of their adjudicatory roles in our jurisdictions.

Similar sentiments were repeated by Collins AJ (as he then was) in the local case of *Ahmed v Attorney-General*,¹⁷ where he stated that it was necessary for the courts of Botswana 'to join hands and share our progressive liberal democracy with like-minded countries, especially through paying close attention to each other's judicial pronouncements on constitutional issues dealing with fundamental rights and freedoms',¹⁸ warning against the 'dangers of any attempt to inculcate a culture of isolationism against the unstoppable juggernaut of globalisation'.¹⁹ Dingake J, himself, was fully aware of the value of comparative jurisprudential analysis in the *Mmusi* case. He relevantly and correctly observed therein that comparative law offers richer and wider model solutions to legal problems.²⁰ He further stated that the matrix of world jurisdictions can offer diverse solutions than can be thought up in a lifetime, even by the most distinguished jurist.²¹ He crisply observed that the use of comparative law in judicial decision making makes it unnecessary to re-invent the wheel of justice each time a new situation arises for judicial determination in a particular jurisdiction.²² In line with the views espoused above, in the *Mmusi* case, Dingake J impressively engaged in an explorative journey, traversing foreign jurisdictions, borrowing and adapting perspectives from them on how to deal with the matter before him. He interrogated how superior courts of Ghana,²³ Kenya,²⁴ India,²⁵ Nigeria,²⁶ South Africa,²⁷ Tanzania,²⁸ the United States²⁹ and the United Kingdom³⁰ had interpreted provisions of their respective constitutions dealing with the rights to equality, dignity and freedom from discrimination. Given the authoritativeness and eminence of some of the judges who presided over some of the foreign cases relied upon in *Mmusi*, there can be no doubt that these foreign decisions

17 [2002] 2 BLR 431 (HC).

18 *Ahmed* (n 17 above) 440.

19 As above.

20 *Mmusi* case (n 1 above) 33.

21 As above.

22 As above.

23 The learned judge relied on the following Ghanaian cases: *Fianko v Aggrey* [2007-2008] GLR (SC) 1135 1145; *Nartey v Nartey & Another* [1962] 1 GLR 184; *Akrofi v Akrofi* [1965] GLR 13.

24 From Kenya he cited *Re Wachokire Succession Cause 192 of 2000* discussed in UNDP *The role of the judiciary in promoting gender justice in Africa* (2008) 19.

25 From the Supreme Court of India he relied on *Madhu Kishwar v State of Bihar* [1996] AIR (SC); *Cracknell v State of Uttar Pradesh* AIR [1952] AK 746.

26 See *Mojekwu v Mojekwu* [1997] 7 NWLR 283.

27 See *Bhe v Magistrate, Khayelitsha & Others* 2005 1 SA 580 (CC).

28 See *Nothman v Borough of Barnet* [1978] 1 ALL ER 1243.

29 *Brown & Others v Board of Education* 347 US 483 (1954); *Plessy v Ferguson* 163 US 537 1896).

30 *Ephraim v Pastory* (2001) AHRLR 236 (TzHC 1990).

influenced the learned judge in no small measure. The jurisprudence of Botswana was made richer.

3.1.2 Application of principles of international law

Botswana is a dualist state. It has inherited the dualism tradition from her erstwhile coloniser, Great Britain. This means that, in Botswana, provisions of international instruments do not create justiciable rights, and that they are unenforceable within Botswana's legal order unless they are legislatively incorporated in its municipal legal scheme. Owing to Botswana's disinterest in ratifying and domesticating international treaties and conventions, Botswana courts have been hamstrung in applying the provisions of these international instruments. Conservative and strict constructionist judges consider international law as a no-go area in the process of judicial determination of local disputes.³¹ For them, international law could only be resorted to in the limited instances of aiding in the construction of an enactment as required under section 24 of the Interpretation Act.³² However, some judges have cleverly attempted to indirectly rely on provisions of international law to give direction to Botswana's human rights jurisprudence path. For instance, in the *Ahmed* case, the Court asserted that³³

[a]fter all, if Botswana is party to international agreements, treaties, protocols, etc for the sake of far-sighted domestic reward (rather than paying simple lip-service), then the laws of those countries who are parties to such agreements are inextricably part of the process.

On the same point, Aguda JA also stated the following in the *Dow* case:³⁴

I take the view that in all these circumstances a court in this country, faced with the difficulty of interpretation as to whether or not some legislation breached any of the provisions entrenched in chapter II of our Constitution which deal with fundamental rights and freedoms of the individual, is entitled to look at the international agreements, treaties and obligations entered into before or after the legislation was enacted to ensure that such domestic legislation does not breach any of the international conventions, agreements, treaties, and obligations binding upon this country save upon clear and unambiguous language.

In the *Mmusi* case, the judge emphatically rejected the argument by the Attorney-General of Botswana, Ms Athaliah Molokomme, that, since Botswana has not domesticated relevant international

31 See, eg, the views of Tebbutt P in the case of *Kenneth Good v Attorney-General* 2003 (2) BLR 67 CA 345-346.

32 Cap 01:01, Laws of Botswana. Sec 24 provides: 'For the purposes of ascertaining that which an enactment was made to correct and as an aid to the construction of the enactment a court may have regard to any relevant international treaty, agreement or convention and to any papers laid before the National Assembly in reference to the enactment or to its subject matter, but not to the debates in the Assembly.'

33 *Ahmed* case (n 17 above) 440.

34 *Dow* case (n 3 above) 170.

instruments guaranteeing gender parity, it was not competent for the Court to consider them for purposes of the determination of the matter. The Court observed that it would not limit the use of international law to a construction of enactments only as required by section 24 of the Interpretation Act, observing that 'though not binding, [international law] is persuasive and can offer useful guidance on the nature and scope of existing constitutional rights'.³⁵ He continued:³⁶

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

The judge proceeded to survey the provisions of international instruments such as the International Covenant on Civil and Political Rights (ICCPR),³⁷ the African Charter on Human and Peoples' Rights (African Charter),³⁸ and decisions of adjudicatory organs of these instruments, namely, the Human Rights Committee and the African Commission on Human and Peoples' Rights (African Commission). The judge went beyond using the provisions of international treaties as mere guides in interpretation and cited them to bolster the provisions of the Constitution of Botswana that guarantee human rights.³⁹ It is safe to say this is the first case to deal extensively with the question of the influence of international law and decisions of its bodies on Botswana's legal landscape. Finally, and most crucially to women generally, the decision underscores the fact that their rights to equality, dignity and freedom from discrimination are irreducible and non-negotiable. The judgment proclaims in no uncertain terms that women's rights are human rights and must be respected by all and sundry.

Although all Southern African countries have adopted constitutions with appreciably comprehensive bills of rights, they also practise customary law which is wrought with harmful practices that violate the rights of women. As indicated above, these human rights violations are rampant in rural areas where they are justified on the basis of custom, culture or religion. In most African settings, custom readily translates itself into law. Thus, in many instances,

35 *Mmusi case* (n 1 above) para 56.

36 *Mmusi case* (n 1 above) para 187.

37 International Covenant on Civil and Political Rights, 16 December 1955, opened for signature 16 December 1966, entry into force 23 March 1976 <http://www2.ohchr.org/english/law/ccpr.htm> (accessed 1 May 2013).

38 African Charter on Human and Peoples' Rights, adopted 27 June 1981, OAU Doc CAB/LEG/67/3 Rev 5, reprinted in C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2010) 29.

39 Eg, see para 184 where the judge relies on the equality clause of the African Charter.

discriminatory customary practices and traditions against women, such as the impugned rule of *Ngwaketse* customary law, find legal validity and legitimacy on the basis of customary law. Given the entrenched patriarchal character of customary law and its institutions and the discriminatory societal relationships in traditional set-ups, women's rights are always subordinated to the interests of men. Since most African societies are governed by customary law, especially in rural areas, stemming the tide of violations of the rights of women in these areas presents a serious challenge. These challenges exist largely due to the inaccessibility of institutions for recourse such as courts of law and women's general lack of knowledge about their rights.

As the *Mmusi* case bears testimony, one area where the rights of women are often trampled is that of the law of inheritance. Inheritance is an important issue touching on the question of the distribution of resources in society. It also partly accounts for relational power differences between men and women because of the exclusion of women from inheriting property which mostly define the social status of a person in an African community. Although the movement for the recognition of women's rights is gaining currency on the continent and the language of women's rights is inching itself into constitutions and statutes of many Southern African states, there remains a yawning chasm between legal policy and actual practice.⁴⁰ Whereas statutes guarantee equal rights and opportunities between men and women, discrimination against women is still endemic in the villages, fields, cattle posts and other obscure corners of African countries. *Mmusi* has not abolished the oppression of women in Botswana, but most certainly it is a critical step in that direction.

3.2 Shortcomings of the judgment

3.2.1 Failure to apply the harmonisation principle

Whereas the applicants invited the Court to nullify the *Ngwaketse* customary law rule concerned on the ground that it is *ultra vires* section 3 of the Constitution, on the other hand the respondents wanted the rule to be saved on the basis that, although section 3 of the Constitution prohibits discrimination and promotes equality between sexes, discrimination is permissible 'with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law' in terms of section 15(4)(c) of the Constitution. A few observations are worth noting here: It is clear that the *Ngwaketse* customary law rule that was under attack permitted differential treatment between men and women insofar as inheritance is concerned. *Ex facie* this, it will be in contravention of section 3 of the Constitution which guarantees fundamental rights and freedoms

40 AM Richardson 'Women's inheritance rights in Africa: The need to integrate cultural understanding and legal reform' (2004) 11 *Human Rights Brief* 19.

and specifically lists sex as a prohibited ground for discrimination.⁴¹ Section 15(3) also expressly prohibits discrimination on the basis of sex. On the other hand, section 15(4)(c) of the same Constitution, being part of the same Bill of Rights as section 3, permits discrimination on issues of inheritance and personal law. Indeed, the learned Attorney-General impressed upon the judge that he must save the offensive rule on the basis of the said section 15(4)(c).

It appears that the Constitution of Botswana gives a right with one hand and takes it away with the other. Whereas the Constitution prohibits discrimination in some of its clauses, it entrenches discrimination in other provisions. Thus, a conflict arose in the case. This tension can only be settled by the application of the doctrine of harmonisation, which requires that the provisions of the Constitution must be interpreted in a manner that ensures their peaceful co-existence. Surprisingly, the judge did not acknowledge the existence of conflict between the provisions of the Constitution and proceeded to deal with the matter as if all the relevant constitutional provisions were converging. Although the judge did not acknowledge the tension between the constitutional provisions in his judgment, the fact that sections 3 and 15 of the Constitution sat ill with one another prompted him to say the following:⁴²

I am conscious of the argument advanced by the respondents that I must apply section 15 to the dispute and not section 3(a) of the Constitution. I am unable to understand the logic of such argument. Section 3(a) is a substantive section that confers rights. It is distinct from section 15. If a litigant, as in this case, chooses to proceed in terms of section 3(a), and succeeds to meet the requirements of the said section, then his/her challenge is entitled to succeed. (See *Stratosphere Investments (Pty) Ltd t/a Club Havana and Others v Attorney-General* Case No MAHLB-000576-08 (HC)). The applicant in this case has met all the requirements of section 3(a).

With respect, dealing with conflicting constitutional provisions in this manner is jurisprudentially and conceptually unsound. The judge was being called upon to explain why he would choose one provision of the Constitution and ignore similar provisions of the same Constitution. As explained above, the situation required him to harmonise the relevant conflicting provisions to give effect to the Constitution as a whole. Where harmonisation fails, the judge was required to give precedence to the provision that guarantees a right over the one which attenuates it.

In the case of *Kamanakao I v Attorney-General*,⁴³ the High Court of Botswana (*per* Nganunu CJ and Dow and Dibotelo JJ) ruled that the provisions of the Constitution of Botswana have no hierarchical ranking. This is to say, no provision(s) of the Constitution of Botswana

41 This provision also prohibits discrimination on the basis of sex.

42 *Mmusi* case (n 1 above) 212.

43 [2001] (2) BLR 54.

is or are superior to others⁴⁴ and, thus, that in interpreting them, an interpretation that gives harmony to all provisions of the Constitution must be preferred over that which causes dissension between them. In other words, conflicting provisions must be reconciled. The Court further observed that it was not permissible to strike out a provision of the Constitution on account that it is in conflict with another provision of the same Constitution. The principle of harmonisation or reconciliation of provisions of the Constitution was canvassed in detail by Lugakingira J in *Christopher Mtikila v Attorney-General*.⁴⁵ In that case, the judge stated that when a tension exists between two provisions of a constitution, the principle of harmonisation must be called to aid. In terms of this principle, the entire constitution must be read as a single, integrated compact, and provisions must not be interpreted in a mutually-destructive manner that one provision sustains the other. If this balancing exercise is to succeed, the Court is required to give effect to all the contending provisions. The Court further observed that, where harmonisation proves difficult, the Court must purposively interpret the right-guaranteeing provision and, to that end, disregard the clear words of a countervailing provision, if their application would result in a failure of justice.⁴⁶ In this connection, Chitaley and Rio render the position thus:⁴⁷

[I]t must be remembered that the operation of any fundamental right may be excluded by any other article of the Constitution or may be subject to an exception laid down in some other article. In such a case it is the duty of the Court to construe the different articles in the Constitution in such a way as to harmonise (*sic*) them and try to give effect to all the articles as far as possible and it is only if such reconciliation is not possible, one of the conflicting articles will yield to the other.

The propositions set out above are part of the common law and thus are part of Botswana law.⁴⁸ The ideology of the harmonisation approach rests in the realisation that, in the end, the law must guarantee fundamental rights and freedoms in their full breadth unless a restriction is justifiably necessary and this restriction is permissible in a democratic society. However, if reconciliation proves futile, then a right-giving provision must be retained and the one that unjustifiably limits a right must give way. In the famous case of *Sturges v Crownshield*,⁴⁹ Marshall CJ of the Supreme Court of the United States contended that 'where the different clauses of an instrument bear upon each other and would be inconsistent unless the natural meaning and common words be varied, construction becomes necessary, and a departure from the obvious meaning of

44 *Kamanakao* (n 43 above) 666.

45 Civil Case 5 of 1993 (High Court of Tanzania).

46 *Mtikila* (45 above) 9.

47 VV Chitaley & S Rio *The Constitution of India* (1970) 716.

48 The common law is part of Botswana law. See EK Quansah *Introduction to Botswana legal system* (2005) 4.

49 17 US 122 (1819).

words is justifiable' and that this model of construction is the more instructive where the injustice occasioned by the application of a countervailing provision is 'so monstrous that all mankind would, without hesitation, unite in rejecting the application'.⁵⁰

In South Africa, the harmonisation principle was applied by Nugent J in *Midi Television (Pty) Ltd v Director of Public Prosecutions (Western Cape)*.⁵¹ In this case, the Court was asked to reconcile the provision guaranteeing the right to press freedom, on the one hand, and the one guarding against potential harm or prejudice to the administration of justice which would possibly have been occasioned by a television broadcast of a particular programme, on the other. After commenting on permissible limitations of rights under the South African Constitution, the learned judge observed that, where constitutional provisions are mutually discordant, a court must adopt an interpretation that is aimed at harmonising them. The judge stated that they could not be weighed against one another but should be interpreted in a manner that enables their peaceful coexistence within the constitutional scheme in line with the dictates of justice.⁵²

To achieve harmonisation, a creative and dynamic interpretation of the Constitution is required. Given that constitutions are not amended regularly, it is the duty of the courts to interpret their provisions, taking into account the ever-changing circumstances of modern life, bearing in mind at all times that the overriding and guiding rule is the protection of fundamental rights and not whittling them down. Commenting on the art of interpretation of constitutional provisions within the context of the Constitution of Botswana, Aguda JA (as he then was) stated the following in *Dow*:⁵³

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 ... stultification of the Constitution must be prevented if this is possible without doing extreme violence to the language of the Constitution. The ... primary duty of 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 above sentiments were echoed by the Supreme Court of Zimbabwe (*per* Gubbay CJ) in the watershed Zimbabwean case of *Zimnat Insurance Co Ltd v Chawanda*.⁵⁴ In that case, the learned Chief Justice observed that the expectations of the masses for a better life were surging to the fore all over the world and that judges are duty

50 *Sturgesd v Crownshield* (n 49 above) 23.

51 [2007] SCA 56 (RSA).

52 *Midi Television* (n 51 above) paras 8 & 9.

53 *Dow* case (n 3 above) 166.

54 1991 2 SA 825.

bound to assist in the realisation of these aspirations by 'moulding and developing the process of social change'.⁵⁵ In yet another decision of the Supreme Court of Zimbabwe, penned by Gubbay CJ, the Court observed that courts of law must at all times interpret right-rendering provisions of statutes in a manner that expands their reach rather than one which diminishes their meaning and content. The learned judge observed that linguistic treatment of a right-enacting statute must have an eye on the 'spirit as well as the letter of the provision, and taking full account of changing conditions, social norms and values, so that the provision remains flexible enough to keep pace with and meet the newly emerging problems and challenges'.⁵⁶ In *Attorney-General, The Gambia v Jobe*,⁵⁷ Lord Diplock said:⁵⁸

A constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.

The Supreme Court of Swaziland had occasion to deal with a situation where relevant and applicable constitutional provisions were conflicting in the case of *Jan Sithole and Others v Government of the Kingdom of Swaziland*.⁵⁹ One of the questions that the Court had to determine was how sections 25 and 79⁶⁰ of the Constitution of Swaziland⁶¹ may be accommodated within a unitary constitutional scheme. The Court settled this tension by applying the harmonisation principle. The Court in *Mmusi* should have also adopted and applied the harmonisation principle as comprehensibly set out above and, failing this approach, the judge should have placed precedence over a provision that gives a right (section 3(a)) rather than the one which takes it away (section 15(4)(c)). This is the principled way of settling the tensions within a constitutional scheme such as those presented by sections 3 and 15 of the Constitution of Botswana. It was a bit mechanical and slipshod for the judge to simply say that because the applicants had succeeded in meeting the requirements of section 3, it was not necessary to deal with section 15 as urged by the respondents. One cannot help but observe that the respondents had also met the requirements of the defence to the applicants' case under section 15. It is therefore submitted that the judge erred in ignoring the urge of the respondents on the applicability of section 15

55 Chawanda (n 54 above) 832.

56 *Smith v Ushewokunze & Another* 1998 2 BCLR 170 (SC).

57 [1985] LCR (Const) 556.

58 *Jobe* (n 57 above) 565.

59 Appeal 59/08 (unreported), judgment delivered on 21 May 2009. In this connection, see the powerful dissenting opinion of Justice Masuku.

60 Sec 25 of the Constitution of Swaziland guarantees the right to freedom of association. However, sec 79 prohibits individuals from using political parties to be elected to public office. It prescribes that every individual will be elected to public office on merit.

61 Act 001 of 2005.

because the applicants had in his view met the threshold for protection under a different provision of the Constitution. Since section 3 guarantees fundamental rights and section 15 seeks to limit them for no policy reasons whatsoever (at least within the context of *Mmusi*), then it is submitted that the latter section must yield.

3.2.2 Role of public opinion in judicial decision making

In an attempt to urge the Court to save the impugned rule of *Ngwaketse* customary law, the Attorney-General of Botswana, who appeared *amicus curiae* before the Court, ironically⁶² sought to argue, *inter alia*, that it 'would be absurd to declare the rule sought to be impugned unconstitutional because such law is recognised or practised by the overwhelming majority of the population of Botswana'.⁶³ The learned Attorney-General further argued that the rule under attack was being practised by over 91 per cent of the population of Botswana, them being descendants of the Tswana and Kalanga tribes. She submitted that it would therefore be out of order for the Court to nullify a rule of law that enjoys such wide practice. Specifically addressing this argument, the learned judge referred to the case of *S v Makwanyane*, where the following appears:⁶⁴

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

Relying on the aforesaid passage in the *Makwanyane* case, the Court reasoned that public opinion has no room in constitutional interpretation in Botswana:⁶⁵

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

62 'Ironically' because prior to her appointment as Attorney-General in 2005, she was a fierce gender activist. Thus, one would have ordinarily expected her to argue for the abolition of the gender-biased rule, more so because as an *amicus*, she was not required to defend the government which has sanctioned the rule through its customary courts, but rather to impartially and dispassionately advise the court. The role of an *amicus* is not to argue a matter on behalf of any party to the *lis*, but rather to broaden perspectives of the court on controversial matters because it is expected to raise new contentions which are relevant to the court, which are usually beyond the expertise of the court and the parties. For a discussion on this, see O Jonas 'Human rights enforcement and the question of standing before the High Court of Botswana: A comparative analysis' 2012 (2) *East African Journal of Peace and Human Rights* 409-411.

63 *Mmusi* case (n 1 above) para 195.

64 1995 3 SA 391 (CC) paras 77-88.

65 *Mmusi* case (n 1 above) para 197.

He continued to emphatically indicate that his Court 'shun[s] the apologetic value-oriented model that derives its substance from moral choices of the majority or the public mood or opinion'.⁶⁶ With respect, it is submitted that the judge was in error to interpret the above passage to mean that the Constitutional Court of South Africa 'shuns' public opinion in the determination of constitutional claims. What that passage seems to be saying is this: In interpreting the Constitution, the Constitutional Court will take into consideration the norms and aspirations of society, but that the language and spirit of the Constitution should not be compromised thereby. This is to say, the Constitutional Court will reject public opinion where it is at variance with the Constitution. Du Plessis argues in a similar fashion that courts of law should not and cannot be indifferent to popular opinion. He argues that whenever public opinion is ascertainable and strong, the courts must acknowledge this and, to the extent possible, deal with these opinions, explaining why they are in line or inharmonious with the spirit and values of the Constitution.⁶⁷ In the *Mmusi* case, the Court seems to suggest that public opinion has no room whatsoever in constitutional adjudication. If this was the position of the Court, then perhaps the Court went a bit off the mark. Courts of law cannot be insulated from the aspirations of people; however, these aspirations cannot replace principle and be the basis of decisions of courts. In this connection, Du Plessis correctly argues that a delicate balance must be struck between apology (judicial reliance on public opinion) and utopia (the absolute rejection of public opinion).⁶⁸ Given the indeterminacy of the question of the possible role of public opinion in the determination of constitutional claims, perhaps Dingake J's views on the matter cannot be rejected outrightly.⁶⁹ However, the point that is being made here is that the aforesaid passage in *Makwanyane* does not support the view that courts must 'shun' public opinion in the adjudication of constitutional matters.

4 Conclusion

Despite its weaknesses, the decision in *Mmusi* has no doubt made a significant contribution to the discourse of human rights in Botswana and beyond. It is a great stride for the emancipation of women, generally, and within the rules of inheritance in particular. Principally,

66 *Mmusi* case (n 1 above) paras 83 & 197.

67 M du Plessis 'Between apology and utopia: The Constitutional Court and public opinion' (2002) 1 *South African Journal on Human Rights* 12.

68 Du Plessis (n 67 above) 37-40.

69 For a comprehensive treatment of public opinion on judicial decision making in constitutional claims, see A Abebe 'Abdication of responsibility or justifiable fear of illegitimacy? The death penalty, gay rights and the role of public opinion in judicial determinations in Africa' (2012) 60 *American Journal of Comparative Law* 603.

the case has bolstered the movement of the empowerment of women and gender parity both at home and abroad. It restates the fundamental argument that it is no longer acceptable (if ever it once was) to subjugate the human rights of women under the cloak of culture. Whereas it is desirable that Africans must preserve their Africanness and cultural heritage, it is important that this must be done within a normative framework of human rights and international best practice.⁷⁰ So much of culture will still be left even when gender-based discrimination under customary law were outlawed. Activists and advocates of the human rights of women should attempt to deconstruct the current social paradigm that holds that women's rights are inimical to Africanness and traditional culture and also redefine patriarchal notions of traditional culture in line with human rights law and international standards and practice. Whereas it is important that these issues be legislated upon, it is also important to acknowledge that harmful or prejudicial practices are engraved in the psyche of many African people as core beliefs and praxis. The enforcement of legislation alone, therefore, cannot yield much. People must be sensitised about the need to achieve gender parity so that they, themselves, can accept and respect the laws enacted to achieve this end. Ultimately, the rights of women to inherit can be meaningful only when all cultural constructs encompass and incorporate notions of women's rights. It makes little difference if women are liberated insofar as inheritance is concerned but still continue to live lives characterised by the deprivation of fundamental freedoms and rights.

70 O Jonas 'The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A critical appraisal' (2012) 4 *Journal of African Studies and Development* 146.