

# Women's Movements, Plural Legal Systems and the Botswana Constitution

## How Reform Happens

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## Abstract

Collective action by women's networks has been a strong driver of legislative change in many countries across the world. Women's groups in Botswana have used advocacy tools such as testing the implementation of gender equality principles in the national court system. In 1992, women's legal networks in the *Unity Dow case* successfully challenged discriminatory statutory citizenship laws. This victory triggered far-reaching reforms of the citizenship law, family law, and even the Constitution itself. Two decades later, another successful "test" case, the *Mmusi case*, has challenged the customary law practice of favoring male heirs as contrary to constitutional principles of equality. The paper explores the role that judges and national courts play in implementing gender

equality principles and upholding state commitments to the Convention on the Elimination of Discrimination against Women. The paper also highlights the role of governments in taking on the concerns of their citizens and cementing the principle of equality in national legal frameworks. The backdrop to this process is a plural legal system where both customary and statutory laws and courts exist side by side. How women negotiate their rights through these multiple systems by coalition building and using "good practice" examples from other countries is important to understand from a policy perspective and how this "bottom-up" approach can contribute to women's economic empowerment in other national contexts.

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## **Women's Movements, Plural Legal Systems and the Botswana Constitution: How Reform Happens**

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## Women’s Movements, Plural Legal Systems and the Botswana Constitution: How Reform Happens

*“The Constitutional values of equality before the law and the increased leveling of the power structures with more and more women heading households and participating with men as equals in the public sphere and increasingly in the private sphere, demonstrate that there is no rational and justifiable basis for sticking to the narrow norms of days gone by when such norms go against current value systems.”*

*Justice Lesetedi, J.A of the Botswana Court of Appeal in the Mmusi case (September 2013)*<sup>2</sup>

### Introduction

Botswana’s constitutional approach to principles of gender equality and non-discrimination is reflective of the wider discourse over the interplay of plural legal systems in the region, and the legacy of the colonial experience in Southern Africa. The post-independence framework built on the institutional infrastructure put in place under the British Bechuanaland Protectorate. The different communities were governed by separate laws: Roman-Dutch law was the body of law governing non-Africans, while uncodified customary law regulated indigenous Batswana. This dual system in marriage laws continues today with the statutory marital property regime automatically applying only to the non-African Botswana community.<sup>3</sup> Indigenous Batswana have to opt into the statutory system; otherwise customary law automatically applies.<sup>4</sup>

There is a gender equality clause in the Constitution but the non-discrimination clause specifically exempts personal laws (including statutory and customary laws) in the realm of marriage and inheritance laws from its application.<sup>5</sup> Moreover, prior to 2004, the non-discrimination clause in the Constitution did not cover discrimination on the grounds of sex. Despite the shortcomings of the Constitution, women’s groups have still used it, in particular the Preamble, as a tool for change notably in the two landmark Court of Appeal cases of *Attorney General v Unity Dow*<sup>6</sup> in 1992 and the recent case of *Mmusi v Ramentele* in 2013.<sup>7</sup> While the Unity Dow case concerned discriminatory statutory citizenship laws and the *Mmusi* case centered on discriminatory customary inheritance laws, the approach taken by the court in these

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<sup>2</sup> <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/07/Mmusi-Court-of-Appeal-Judgment.pdf> at page 51

<sup>3</sup> Indigenous Batswana are 93% of the total population while non-Africa Botswana citizens constitute 7%. CIA World Fact book <https://www.cia.gov/library/publications/the-world-factbook/geos/bc.html>

<sup>4</sup> Hallward-Driemeier and Hasan 2012

<sup>5</sup> While Article 15, specified the basis on which discrimination is not permitted, namely “tribe, place of origin, political opinions, colour or creed...”15(3)). It was striking that the category of “sex” was originally absent from this provision but was added in 2005. Article 15(4) goes on to explicitly exempt laws dealing with “adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law” from the ambit of the Article 15 non-discrimination provision.

<sup>6</sup> AG v Dow (2001) AHRLR 99 (BwCA 1992)

<sup>7</sup> Customary Court of Appeal, 22 November 2011, Civil Appeal Case 121/2007 and <http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2013/07/Mmusi-Court-of-Appeal-Judgment.pdf>

cases was fundamentally the same (Box 1). The constitutional principles of equality and non-discrimination were seen as paramount and did not allow for discriminatory treatment of women.

**Box 1. Catalyzing Change: One Case at a Time.**

- In the case of *Attorney-General v Dow* in 1992, Unity Dow, a Botswanan citizen married to a non-national, successfully challenged discriminatory statutory citizenship laws that prevented her from passing her citizenship to her children on the grounds that the law was unconstitutional<sup>1</sup>. There was no restriction in the Act for men married to non-nationals passing on citizenship to children. This landmark case ushered in a period of legislative reform, with revisions to the Citizenship Act and amendment of the text of the Constitution to include an explicit prohibition of discrimination on the basis of sex in 2004. While the Judge in the *Dow* case made bold pronouncements about the hegemony of the Constitution over customary law, the facts of the case did not deal directly with customary law, and in reality left customary norms and institutions undisturbed. The subsequent reforms while sweeping, were nevertheless incomplete, and most glaring was the almost total exclusion of customary marriage and customary laws of inheritance from the ambit of the legislative reforms.
- In May 2012, the case of *Mmusi v Ramantele* was heard by the Botswana High Court. The applicant, Edith *Mmusi* and her sisters were challenging the *Ngwaketse* customary rule that only the youngest son can inherit the family home on the basis that they contributed to its upkeep and expansion, and that the rule violated their right to gender equality. The High Court held that the customary law was biased against women and as such unconstitutional.

“This gross and unjustifiable discrimination cannot be justified on the basis of culture...It cannot be an acceptable justification to say it is cultural to discriminate against women...Such an approach would...amount to the most glaring betrayal of the express provisions of the Constitution and the values it represents... [the law at issue] has no place in a democratic society that subscribes to the supremacy of the Constitution---a Constitution that entrenches the right to equality.”

In September 2013, the Court of Appeal, the highest court in the country, definitively upheld this decision establishing it as a clear benchmark for future disputes in this area.

Source: Hallward-Driemeier and Hasan (2012) and Southern Africa Litigation Center (2012 & 2013)

The case of *Mmusi* means that the constitutional exemption for personal laws no longer seems to offer protection for discriminatory customary practices. The court pleadings reflect changing and sometimes conflicting social and legal justifications for both retention and reform of customary law in Botswana. This takes place in an arena where basic jurisdictional questions are still being negotiated and where customary laws and courts enjoy legitimacy among the vast majority of the population. While there is some evidence that the gap between customary and statutory laws and institutions is increasing because statutory courts are refusing to accept

appeals from customary law courts, and vice versa,<sup>8</sup> the *Mmusi* case, recently endorsed by the Court of Appeal<sup>9</sup>, could serve as the harbinger of a new era of legislative reform and constitutional oversight over discriminatory customary laws.

The case is indicative of a broader trend in the Sub-Saharan region. A 2013 study tracks legal constraints across 100 countries, including 33 countries in Sub-Saharan Africa, over the last 50 years. The analysis shows that countries in Sub-Saharan Africa, which had the highest number of constraints in 1960, have reformed more than fifty percent of these constraints.<sup>10</sup> The reform of these discriminatory laws can lead to transformative change. Inheritance law reform in India equalizing unmarried daughters' rights to ancestral land increased investment in girls' education and delayed the age of marriage.<sup>11</sup> In Ethiopia, reform of the family code, including removing the husband's control over marital property, increased female labor force participation overall and in more productive sectors.<sup>12</sup> There are health consequences as well; equal inheritance and property law for women and girls can help to mitigate the economic and social burdens of HIV.<sup>13</sup>

### *Post-Independence Gender Equality and Family Law*

Since its independence in 1966, Botswana has consistently held unfettered elections, was fortunate to have discovered an abundance of diamonds and the average income has tripled. It has become one of the fastest growing economies in the world with an average growth rate of 9 percent, joining the ranks of upper middle-income countries. Yet Botswana's track record of good governance and economic growth contrasts with its high levels of poverty and inequality and the generally low performance on human development indicators.<sup>14</sup> It ranks 119 of 187 countries in the 2012 Human Development Index and ranks 77 of 135 countries in the 2012 Global Gender Gap Index. Significant and persistent pockets of poverty remain especially in rural areas.<sup>15</sup> Many of Botswana's poor are women and there is widespread poverty among rural women.<sup>16</sup>

The first laws passed post-independence with respect to marriage set out a system of Roman-Dutch statutory law to regulate civil marriage. All civil marriages were presumed to be in community of property, unless the spouses agreed in writing before the marriage to opt out. Spouses owned the property jointly, but the husband had exclusive power over the administration of the estate. The wife had to obtain the consent of her husband before she could deal with family property. There was a minor exception to these broad provisions to allow the wife to buy

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<sup>8</sup> Kumar 2010

<sup>9</sup> Southern Africa Litigation Center 2013

<sup>10</sup> Hallward-Driemeier, Hasan and Rusu 2013

<sup>11</sup> Deininger, Goyal and Najaran 2010

<sup>12</sup> Hallward-Driemeier and Gajigo 2010

<sup>13</sup> UN Global Commission on HIV and the Law 2012

<sup>14</sup> World Bank 2012

<sup>15</sup> World Bank 2012

<sup>16</sup> CEDAW Committee on Botswana CEDAW/C/BOT/3 at para 39 ( February 2010)

household necessities or to function as a public trader.<sup>17</sup> The husband's marital power extended to beyond administration of the marital property. The wife needed her husband's permission to work outside the marital home, enter into contracts or open a bank account and the husband could choose where to live.<sup>18</sup> Where the spouses opted for a separate property regime, spouses owned and controlled their respective property separately. Although customary and civil marriages were regulated separately, and came from different continents and contexts, there was a striking similarity in that wives in both marriages were subject to the husband's marital power over joint marital property and in their everyday lives.

The customary law relating to marriage remained uncodified and did not change post-independence. Women under customary law were considered to be "perpetual minors" and were subject to the guardianship of their husbands upon marriage. The husband was considered the head of the household and had final decision-making power on family matters, as well as personal matters. This meant that a wife in a customary marriage had no legal capacity to engage in legal proceedings without her husband's assistance and she forfeited the capacity to acquire a domicile of her own choice.<sup>19</sup>

As the proprietary consequences of a customary marriage were never codified, there is some variance in its interpretation. There is agreement that underlying customary norms was the promotion and maintenance of men's control over productive resources, particularly land, and that women were overlooked when it came to inheritance.<sup>20</sup> The premise was that men were under an obligation to maintain female family members. Yet, according to writers such as Quansah, the limitation on female ownership under Tswana customary law was not absolute, and any property a woman possessed at the time of her marriage, or acquired during the marriage, constituted her own personal property over which she had full and exclusive rights.<sup>21</sup> She characterizes the marital regime in a customary law marriage as similar to a separate property regime.

However, other authoritative sources, most notably the Government of Botswana itself, have characterized the proprietary consequences of a customary marriage as in community of property with marital power, which essentially means that the husband is the sole administrator of the estate and the law permits the husband to bind the estate, lease or sell movable assets without the consent of the wife, regardless of the extent to which the wife has contributed to the estate. The

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<sup>17</sup> The term "public trader" referred to a woman who carries on any business, trade or profession in her own name, with the public

<sup>18</sup> World Bank 50 Years of Expanding Legal Rights Across the World 2013. This meant that the husband could unilaterally decide to relocate to a place which might not be conducive to the wife's existing business or location of employment.

<sup>19</sup> Government of Botswana CEDAW Report 2008

<sup>20</sup> Kumar 2010 Also M Athalia & Schapera cited footnote 54. See also Kalabuma (2005) for detailed description of land vesting in jural communities, which in practice excluded women from ownership and participation in the administration of the land.

<sup>21</sup> Quansah (date). See also Shapera 1984

wife, on the other hand, does not have the ability to make legally binding transactions such as obtaining credit from a bank or other financial institutions to start a business of her own without her husband's consent.<sup>22</sup>

In 1970, the Married Persons Property Act changed the default marital regime in a civil law marriage from community of property to a separate property regime.<sup>23</sup> The husband's marital powers under the optional community of property regime remained in place. In the 1980s, the Law Commission explored the possibility of legislation that would codify the consequences of customary law marriages, and recommended that such marriages would be in community of property but this did not materialize.<sup>24</sup>

In 1986 the Botswana Law Reform Commission undertook an extensive tour of the country in order to gauge public opinion on the integration of customary and civil law marriage, and on a new amendment to the Citizenship Act that had recently been passed, which restricted Botswana women married to foreign citizens from passing on citizenship to their children.<sup>25</sup> After interviewing people throughout the country in *Kgotle* style gatherings,<sup>26</sup> it was concluded that people generally wanted a consolidation of customary law and civil law marriage into one statute. They also found that the majority of people interviewed supported the amendments to the Citizenship Act, and only a small group of urban women married to foreigners opposed it.<sup>27</sup>

#### *The Unity Dow Case: Challenging Discriminatory Statutory Law Using the Constitution.*

Opposition to the 1984 Citizenship Act mobilized a small group of educated women called *Emang Basadi* (Stand Up, Women), to become a vocal movement in Botswana.<sup>28</sup> They focused their efforts on challenging the Citizenship Act, which culminated in the case of *Attorney General v Dow* (1992), a milestone judgment delivered by the Botswana Court of Appeal, the highest court in the land.<sup>29</sup> The court set in place a progressive approach to constitutional interpretation, where the Preamble, containing the only textual mention of gender, was determined to be justiciable and where the court affirmed its obligation to interpret domestic law in a manner consistent with international law.

Judge President Amisshah of the Court of Appeal, held that Article 3 of the Constitution was not merely a Preamble providing all people with fundamental rights and freedom, regardless of "race, place of origin, political opinions, color creed or sex" but was to be considered an umbrella proviso under which all the subsequent rights fell. The court stipulated that the Article 15 provisions dealing with non-discrimination could not be read in isolation, but must be read in

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<sup>22</sup> Government of Botswana, submission to CEDAW Committee

<sup>23</sup> DFID time series

<sup>24</sup> Id 39

<sup>25</sup> Quansah (date)

<sup>26</sup> A community council that also functions as a community court. Originally women did not participate in these proceedings but now they are now more inclusive.

<sup>27</sup> Seng 1993

<sup>28</sup> Van Allen 2011

<sup>29</sup> AG v Dow (2001) AHRLR 99 (BwCA 1992)

the light of other constitutional provisions, including the rights and freedoms found in the Preamble. The court rejected the argument that the omission of the word ‘sex’ from the non-discrimination clause was intentional and must be permitted, finding instead, that a “constitutional guarantee cannot be overridden by custom, and custom should as far as possible be read to conform to the Constitution”. He concluded that a constitutional right of non-discrimination could not be taken away by inference and that “any limitations to fundamental rights and freedoms should be strictly constructed.” Similarly, he rejected empirical evidence that the people of Botswana favored the provisions of the Act, finding that such evidence could not assist with the proper construction of the Constitution.

In dealing with the question of whether the Citizenship Act fell within the specific exemption from the non-discrimination provisions given to personal laws, the judge found that citizenship, conferred by statute on a state-wide basis was not a matter for personal law. He urged that in interpreting a Constitution, a judge has to be cognizant that Botswana became part of the “comity of civilized nations” when its Constitution was drawn up, and that it would be wrong for its courts to interpret its legislation in a manner that conflicts with Botswana’s international obligations.

### *The Fruits of Constitutional Challenge: A Wave Of Legal Reform*

The *Dow* case had important political and legislative consequences. In 1996 Botswana signified its willingness to embrace international norms on gender equality by acceding to CEDAW and, a year later, signing the Southern African Development Community Declaration on Gender and Development.<sup>30</sup> This presented two choices: amend the Citizenship Act of 1984 to comply with the Constitution, or amend the Constitution to permit gender discrimination. Ultimately the legislature changed the Citizenship Act as well as a series of far-reaching legislative reforms of the legal and economic status of civil law wives. In 1995, the Citizenship Act was amended to allow women married to foreigners the ability to transfer citizenship to their children. This was followed by legislation passed in 1996 amending subsections 18(3) and (4) of the Deeds Registry Act allowing married women (whether married in community of property or separate property regimes) to execute deeds and documents without their husband’s consent i.e. married women were given the power to acquire and hold immovable property for themselves separate from the joint estate. These provisions did not apply to customary marriages.

This was followed by a second wave of legislation: in 2001 the Marriage Act provided for the registration of customary marriages by district chiefs and headmen serving as registrars of marriage.<sup>31</sup> In 2004, the Abolition of Marital Power Act was passed, providing that women do not require the consent of their husbands to enter into contracts/transactions with banks and other financial institutions. However, this Act does not apply to customary marriages. In 2004, the

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<sup>30</sup> Signatories commit themselves to “Repealing and reforming all laws, amending constitutions and changing social practices which still subject women to discrimination, and enacting empowering gender sensitive laws” see (H) Declaration on Gender and Development 1980.

<sup>31</sup> See section 27, Marriage Act 2001

Constitution was amended adding the word “sex” to the prohibited grounds of discrimination. In 2008, the Domestic Violence Act was passed prohibiting domestic violence against women, and allowing victims to seek protection orders from courts, including customary courts.

### *Case Law in the Aftermath of Unity Dow*

Case law defined the parameters of the principle of gender discrimination in light of the *Unity Dow* decision generally in favor of greater gender equality.

- In *Student Representative Council of Molepolole College of Education v AG* (1995),<sup>32</sup> the court heard a challenge to a Molepolole College of Education regulation which stipulated that women who fell pregnant would have to leave college for at least a year.<sup>33</sup> The court found that these provisions were not designed to benefit the pregnant female student, but to ensure that she stayed away from college for a year. The purpose was purely punitive and therefore contrary to Article 3 and Article 15 of the Constitution.
- In *Moatswi and Another v Fencing Centre (Pty) Ltd* (2002),<sup>34</sup> two women had been dismissed on the basis that the work was too heavy and not suited to women as they could not load or work the late night shift. The court concluded that “depriving an employee of a source of livelihood on the ground that one is being helpful to the employee can hardly be a welcome gesture”.<sup>35</sup> It found the dismissal to be discriminatory and substantively unfair.<sup>36</sup>

But the courts also began to limit the scope of Article 3 as an overarching principle. *Kamanakao v AG* (2002)<sup>37</sup> dealt with the unusual case of a challenge to the Constitution itself, on the basis that it discriminated on the basis of tribe by affording preferential treatment to members of the House of Chiefs to the exclusion of other tribes. These constitutional provisions were argued to violate Article 3’s guarantee of fundamental rights and freedoms of all citizens. The court rejected the argument that Article 3 was an overarching or higher ranking constitutional provision. In the court’s view, this would amount to the court rewriting the Constitution. The court concluded that the exercise of ranking rights and values is one reserved for the legislature.

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<sup>32</sup> 1995 BLR 178 (CA)

<sup>33</sup> The regulation provides that 22 (1) If at any time the Principal of any College has reason to believe that any student may be pregnant, the Principal may demand that the student should produce a medical certificate from a medical practitioner to the effect that she is not pregnant, or failing such production the Principal shall remove the student from the College and her return to the College shall be subject to the approval of the Permanent Secretary." 22 (1) If any student becomes pregnant the Principal shall be required to withdraw her from the College at which she is enrolled and her return to the College shall be subject to the approval of the Permanent Secretary."

<sup>34</sup> (2004) AHRLR 131 (BwIC 2002)

<sup>35</sup> Id para 37

<sup>36</sup> Id para 37

<sup>37</sup> (2002) AHRLR 34 (BwHC 2001)

### *The Interplay between Customary and Civil Law Institutions*

The Botswana Centre for Human Rights estimates that 80 percent of cases are handled in over 500 customary courts countrywide.<sup>38</sup> Other studies have also consistently showed that in civil matters, customary courts handle more disputes than magistrates' courts, and in criminal matters they play a substantial role.<sup>39</sup> The customary court system operates and is regulated separately from the statutory court system. A case can be transferred from a customary court to a statutory court if requested. Customary courts have jurisdiction over both civil and minor criminal law matters. Criminal jurisdiction is limited by the penalties capable of being imposed, as well as by the particular type of offences committed. Customary courts have no jurisdiction to hear offences such as treason, bribery, counterfeit currency, robbery, rape, issues related to statutory marriages and notably, cases related to witchcraft. A customary court has the power to sentence a convicted person to a fine, imprisonment, corporal punishment, but is limited in terms of the sentence it can impose by the terms of its founding warrant.<sup>40</sup> In the situation where a customary court is exercising a criminal jurisdiction, it is obliged to follow the Customary Court (Procedure) rules governing a criminal trial.

Customary courts are free of charge, and lawyers are barred from proceedings under Article 10(12)(b) of the Constitution. These courts operate with few standardized rules of evidence, preferring negotiation to adjudication, and are staffed by persons without significant legal training.<sup>41</sup> These courts enjoy a great deal of cultural legitimacy, are preferred by both the local and national police service and dispense swift and accessible justice.<sup>42</sup> However, they are also viewed as problematic from a gender perspective, since their informal procedures and lack of female participation can increase the risk of incorporating discriminatory stereotypes of women into court procedures and findings.<sup>43</sup> These reasons and concerns, such as corruption, resulted in the creation of the Customary Court of Appeal in 1986, which was designed to provide a "more credible, faster and cheaper method of dealing with appeals and limit the appeals that go before the non-customary courts".<sup>44</sup> This impetus to limit the appeals from customary courts to statutory courts can also be seen in jurisprudence of both the Customary Appeal Court and the High Court.<sup>45</sup>

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<sup>38</sup> Kumar 2010

<sup>39</sup> Fombad 2004 at 181.

<sup>40</sup> In terms of Section 8 of the Customary Courts Act, the minister may constitute a customary court by "warrant" prescribing the constitution of the court, as well as the powers and duties of assessors.

<sup>41</sup> Kumar (2101) at 294. See also Botswana Country Report on Human Rights and Practices for 2011, United States Department of State, Bureau of Democracy, Human Rights and Labour at 6.

<sup>42</sup> Human Rights Council 2008

<sup>43</sup> Id 289 See also Dishwanelo, The Botswana Center for Human Rights, "human rights, not human wrongs".

<http://www.ditshwanelo.org/bw/botswana.html#acc;>

<sup>44</sup> Id 186

<sup>45</sup> Id 294-295

- In *Mofokate v Mofokate* (2000)<sup>46</sup>, the High Court found that traditional marriages are best dealt with by customary courts, since the Matrimonial Causes Act does not apply to such marriages.
- In *S v Ntwayame* (2008)<sup>47</sup> the appellants were charged in the customary court under the statutory offence of stock theft and attempted to get the proceedings moved to the magistrate's court, so they could have legal representation in the proceedings. Despite provisions permitting the transfer of a case before a customary court to another court if requested, the Customary Appeal Court directed that the trial proceed before the customary court.

Aside from these institutional difficulties experienced in customary courts, as customary law is unwritten, there are also significant challenges in proving its rules of law. Traditionally, this was not thought of as a problem, since “the rules of customary law are supposed to be in the breast...of the elders, chiefs and headmen who man these courts”, but increasingly this is not the case.<sup>48</sup> The case of *Kweneg Land Board v Mathlo* (1992)<sup>49</sup> illustrates the different understandings of customary law, and its development.<sup>50</sup> In this case the question faced by the Court of Appeal was whether a rule of customary law prohibiting the sale of traditional land by private individuals could have changed. The majority judgment viewed customary law as living, and adaptable to changing circumstances; while the dissenting judge found that there must be clear and satisfactory evidence of such a change.

While there has never been a codification or substantive legislative reform of customary law in Botswana, it has always developed in response to changing conditions. As early as the 1930s, chiefs began allocating land for housing and cultivation to unmarried women.<sup>51</sup> Another study describes customary court proceedings where an urban unmarried daughter, who had contributed “beyond ordinary female contribution”, was able to continue to remain in the ancestral house on the basis of her direct financial contribution.<sup>52</sup> A study in 2009 undertaken in *Tlokweng* peri-urban area on the fringes of Gaborone found that the old practice of the eldest male son inheriting all property has fallen into disfavor. Instead parents now divide property among all siblings by writing a will that is publicly distributed before death.<sup>53</sup>

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<sup>46</sup> 2000 (2) BLR 430 (High Court).

<sup>47</sup> CLCLB-066-07 (2008) BWCA 37 (1 January 2008)

<sup>48</sup> Id 182

<sup>49</sup> 1992 BLR

<sup>50</sup> Fombad 2010

<sup>51</sup> Schapera 1994

<sup>52</sup> Griffiths 1998

<sup>53</sup> Kalabamu 2009

### *The Mmusi Case: Challenging Discriminatory Customary Personal Law Using the Constitution*

The case of *Mmusi v Ramantele* was heard by the Botswana High Court in May 2012 and finally decided by the Court of Appeal in September 2013. The applicant, Edith Mmusi, an 80-year-old widow and her sisters, with the support of women's networks and legal associations, were challenging the *Ngwaketse* customary rule that only the youngest son can inherit the family home on the basis that they contributed to its upkeep and expansion, and that the rule violated their right to gender equality.<sup>54</sup> Her nephew (the son of her late brother) sought to assert his right to the family home even though he had never lived there.

The case was originally heard before the lower Customary Court in May 2007, which ordered the sisters to vacate the family home within 30 days of the order. Edith Mmusi appealed the decision, and in November 2008, the *Kgosi* (the customary court judge) ordered "the present elders to go and convene a meeting with all concerned parties and identify the one child who will take care of the home on behalf of the elders". The *Kgosi's* order was subsequently overturned by the Customary Court of Appeal, who observed that "it is really surprising to see married women fighting over a family home, a trend way out of *Sengwaketse* culture" and concluded that in "*Sengwaketse* culture and tradition, if the inheritance is distributed, the family home is given to the last born son".<sup>55</sup>

Edith Mmusi sought to overturn the decision in the High Court, on the basis that the customary law rule violated her right to equality under Article 3 of the Constitution. Her argument centered on the fact that she had made the ancestral home into her home and had deep ties to the property and the community. She relied on constitutional jurisprudence, particularly *AG v Dow's* dicta that "constitutional guarantees cannot be overridden by custom" and where there is a conflict between constitutional guarantees and custom, "it is the custom, not the Constitution that must go". She also relied on comparative jurisprudence, primarily in the form of the South African Constitutional Court judgment of *Bhe v Khayelitcha (2005)*, and Botswana's international obligations, to argue that the violation of her rights to equality were unjustifiable.

Edith Mmusi's reliance on *Bhe* is particularly apt here. In the landmark case of *Bhe*, the South African Constitutional Court struck down the customary law norm of primogeniture (favoring male heirs), arguing that the customary norm had been distorted by apartheid legislation, but also by the realities of modernization and urbanization. They found that the obligations to protect inherent in customary norms of succession were no longer honored, with the result that widows were being thrown out of their homes upon the deaths of their husbands. The court was determined that this changed social reality had to be taken into account in determining whether the customary norms violated constitutional guarantees of equality. The changed reality

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<sup>54</sup> Full pleadings and Heads of Argument are available on the website of the Southern African Litigation Center. <http://www.southernafricalitigationcentre.org/>

<sup>55</sup> See *Ramantele v Mmusi*, judgment, Customary Court of Appeal, 22 November, 2011. Civil Appeal case No. 121/2007 (on file).

described in *Bhe* is not dissimilar to the situation in Botswana, where the government has itself observed that “upon the death of their parents unmarried women are likely to be evicted by the heir”.<sup>56</sup>

The nephew’s arguments were twofold: he argued that *Ngwaketse* customary law did not discriminate, but merely differentiated, since both men and women could inherit. The only difference is that men inherited cattle and fields, while women inherited household goods, such as pots, pans and utensils. Furthermore, although the home was inherited by the last born, he was obliged by custom to make it available to his siblings for certain functions such as weddings and funerals. At the level of constitutional doctrine, he argued that Article 15 explicitly exempted personal law from the ambit of the prohibition against non-discrimination.

The High Court held that the customary law was biased against women and as such unconstitutional. The Court also rejected the view that it had to take into account public opinion which was not in favor of equal rights for women. It also referred to Botswana’s international obligations and endorsed numerous cases from Ghana, Kenya, Tanzania, India, Nigeria and South Africa all of which had set aside discriminatory customary laws.

The Judge summed up by stating that “[a] large number of the people of this country may not be conscious of their rights. Those who are conscious may lack resources to litigate. If it so happens that they have the fortune to approach the court; and their complaint has merit, then it is the sacred duty of this court to protect their rights at all costs”.<sup>57</sup>

The Court of Appeal in September 2013 definitively ruled that discriminatory customary law favoring male heirs was unconstitutional and that in any event this was contrary to “morality, humanity or natural justice” according to the Customary Law Act and therefore unenforceable.<sup>58</sup>

### *Conclusion*

It is timely now to assess what has been gained, and what is left incomplete, in the twenty years following the *Dow* judgment. The applicant in *Mmusi* relied principally on the *Dow* judgment, which without doubt represents the high watermark of constitutional adjudication in Botswana, and created the jurisprudential architecture required to protect gender equality. Much is at stake in the aftermath of the *Mmusi* case. The question is whether *Mmusi* takes Botswana one step forward and begins a vitally important conversation that could trigger far-reaching legislative reform of other discriminatory laws and ultimately lead to the removal of the constitutional exemption for personal laws. The argument that the Botswana public is not yet ready for gender equality was rejected by the court and in doing so has affirmed the importance of the Constitution as the benchmark for all sources of law.

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<sup>56</sup> Government of Botswana, CEDAW Report

<sup>57</sup> Southern Africa Litigation Center 2012

<sup>58</sup> The Court of Appeal did not reject the role that customary systems still had to play as any disputes as to who should take care of the property on behalf of the others would be determined by the elders and uncles of the heirs and in the absence of agreement, by the tribal chief.

The *Dow* and *Mmusi* cases showcase the tangible impacts of strong women's movements. Women's groups all over the world are effectively leveraging state commitments to international treaties such as CEDAW, constitutional reform processes and national court systems to ensure that the principle of gender equality is implemented in practice. Regional and international coalitions between networks have resulted in resources and knowledge becoming building blocks towards the next step of the process. International institutions have a part to play in supporting the reform of discriminatory laws through the mapping and highlighting of bad laws and linking reform to positive economic outcomes, capacity building of women's lawyer's associations and other networks, and through facilitating the flow of knowledge. The role of the judiciary in responding to these cues for social change is heartening and such landmark cases could be included in gender sensitivity training for legal personnel more broadly. The government through embarking on constitutional and legislative reform can cement the endorsement of equality principles in the national framework for generations to come. The lessons drawn from Botswana's pathway to promoting legal equality contribute to a broader international dialogue on women's economic empowerment.

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### **Databases**

*Human Development Index 2012*, is a composite measure of health, education and income covering 187 countries which was developed as an alternative to purely economic assessments of national progress, such as GDP growth;

*World Economic Forum Global Gender Index 2012* benchmarks national gender gaps on economic, political, education and health criteria and provides country rankings that allow for effective comparisons across regions and income groups and over time.

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