

The Impact of Customary Law on Children's Rights in Botswana

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OIDA International Journal of Sustainable Development, Ontario International Development Agency, Canada

ISSN 1923-6654 (print) ISSN 1923-6662 (online) www.oidaijsd.com

Also available at <http://www.ssrn.com/link/OIDA-Intl-Journal-Sustainable-Dev.html>

Abstract: Botswana has a dual legal system, one based on customary law and the other on the received law. This appears clearly from the Constitution that ring-fenced customary law from any constitutional scrutiny. A customary practice may continue even if it discriminates against women and children. As a result of this, numerous human rights of children are infringed. Firstly, if parents are married under customary law and separated, the custody is granted to the father and the mother merely having the right to visit. Secondly, female children are not entitled to inherit property. Thirdly, there is no age for marriage under customary law and even a child at the age of 10 years can get married. Lastly, marital power of a husband still continues under customary law and therefore females are still treated as perpetual minors. The latter infringement of rights is not in the best interests of children and conflicts with Botswana's international obligations. Botswana is a signatory of various international and regional human rights instruments and it is suggested that it has to accelerate the incorporation of human rights instruments into domestic law in order to safeguard the best interest of children.

Keywords: custody, marital power, best interests of a child

Introduction

This paper will begin by discussing custody of children born within customary marriage system and those that are born out of wedlock. It continues by arguing that allocation of custodial rights as it stands under customary law has a negative impact on the promotion of the principle of the best interests of children.

The second part of this paper is dedicated to the discussion of the selected aspects of customary law rules that have a negative impact on the equality rights of women and girls. In addition to that, the second part of the paper reveals that inheritance rights and marital power of a husband conflicts with the normative commitment to the protection gender equality as adopted under international law.

The following section will discuss custody of children under customary law and the principle of the best interests of the child.

Custody

Custody is defined by Bekker as 'the capacity of a person to have actual physical "possession" of the minor, to live with him or her, to take care of him or her and to assist him or her in his or her daily life.'¹ In customary law the custody of children born out of wedlock remains with the mother and her family group.² However, if parents were married in terms of customary law and then separated, the father is granted custody of children and the mother has

¹ Bekker and Van Zyl "Custody of Black Children on divorce" 2002 *Obiter* 128.

² Schapera I A Handbook of Tswana Law and Custom (1970) 2nd ed Frank Cass & CO. LTD at 126.

mere visitation rights.³ If the husband has complied with his obligation to pay *lobolo* (*bogadi* in *Sotho* & in *Tswana*), he and his family group has full custody over children. This is aptly summed up in *Madyibi v Nguva*⁴ as follows:

By nature the progeny of woman accrue to her father's group and are members of his group and tribe for religious and practical purposes...these rights and duties are transferred by Native law to another group only on contraction of a valid customary union whereby the woman's group receives lobolo from the other group and transfers the natural right to the woman's productive powers and her progeny to the group providing lobolo.

In line with the above, custody together with parental rights ends up being exercised by many people in woman's family group (if she is not married) and husband's family group (if she is married), 'each one of whom is entitled to make or contribute to decisions relating to the child's best interests.'⁵ However, it is noted that this type of decision making process does not always promotes the best interests of children, since a huge number of persons are entitled to make decisions. This may lead to conflicting solutions to particular problems and 'it is not always possible to get decisions made as quickly as possible due to the large number of opinions to be solicited even when the best interests of the child require a quick solution.'⁶

This principle of the best interests of the child has been evolving under in international law. The following section will discuss that the failure to consider child's opinion in custody decisions taken under customary law conflicts with the principle of the best interests of the child.

Best interests of the child

The principle of the best interests of the child can be traced back to 1924 when the League of Nations adopted the Declaration on the Rights of a child.⁷ This 1924 declaration does not create any binding legal obligation amongst states. However, it served as a foundation for the creation of a catalogue of children's rights in the world. It also emphasized that human kind is duty bound to give the best it got to give to children.⁸

The principle of the best interests of the child is further emphasized by the 1959 Declaration on the rights of the child.⁹ The preamble to the 1959 declaration reaffirmed the principle of the best interests of the child by providing that 'mankind owes to the child the best it has to give.'

The principle of the best interests of the child continued to evolve and in 1989 the General Assembly of the United Nations adopted the Convention on the Rights of the Child.¹⁰ This 1989 Convention is a comprehensive instrument that protected almost all aspects of children's rights. It was warmly received by many countries of the world and entered into force in a period of less than a year.¹¹ The Convention on the Rights of the Child¹² provides that the best interests of the child shall be a primary consideration in all actions concerning the child. Botswana is compelled to implement the principle of safeguarding best interests of the child because it is a signatory to the convention. This principle is not constitutionally enshrined and its application under customary law of Botswana is negligible because customary law does not treat the rights of a child separately from that of the family group. This is reflected where the family head determines what is in the best interest of a child according to the family values and their cultural and religious background.

³ Roberts S "Botswana: Tswana Family Law", Restatement of African Family Law (1972) 5 London: Sweet & Maxwell 34.

⁴ *Madyibi v Nguva* 4 NAC 40; see also Bennett TW Customary Law in South Africa (Juta Cape Town 2004) 285 when he argued that this is so because in customary law, the parental rights are determined by the payment of lobolo.

⁵ Kaime T The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective (2009) PULP at 116.

⁶ Kaime T (supra) at 117.

⁷ Hodgson D "The Historical Development and "Internationalization" of the Childrens Rights Movement" (1992) Australian Journal of Family Law 25.

⁸ Kaime (supra) at 11-12.

⁹ Declaration on the Rights of the Child, GA Res. 1386 (xiv), 14 UN GAOR Supp (No16) 19, UN Doc A/4354 (1959).

¹⁰ (1990) 29 International Legal Materials 1340.

¹¹ KaimeT (supra) at 1.

¹² Article 3 (1) United Nations Convention on the Rights of the Child (1989).

It has been noted that it is not an easy exercise to determine what is in the best interest of the child. Further, the question is exacerbated by the fact that the issue has not been given an exhaustive treatment in foreign or international jurisprudence.¹³ The imprecision that surrounds the principle has led one of the commentators to declare that it is indeterminate and working with it is similar to exercising “Solomonic judgment.”¹⁴ The other problem surrounding the principle is that ‘what is best for a specific child or children cannot be determined with absolute certainty.’¹⁵

It is a serious shortcoming that the principle of the best interests of the child is not taken into consideration on custody disputes under customary law and the voice of a child is not considered. This failure to consider the best interests of the child and the wishes of the child violates the provisions of the Convention on the Rights of the Child, which emphasizes the consideration of child’s opinion when determining his or her best interests. The Convention provides that:

1. States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.¹⁶

In a similar vein, the African Charter on the Rights and Welfare of the Child provides that the views of the child have to be taken into consideration in all matters affecting the child as follows:

In all judicial or administrative proceedings affecting a child who is capable of communicating his or her own views, [an] opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.¹⁷

In view of the above international and regional instruments, it is argued that the failure to hear child’s opinion in custody decisions under customary law of Botswana undermine these instruments. The consideration of child’s opinion in all matters affecting him or her is significant because it enables the court to be familiar with the child’s needs, problems and aspirations, the kind of a relationship he has with each parent, and the child’s personality.¹⁸ Moreover, certain aspects of customary law rules regulating inheritance rights and marital power have a negative impact on the equality rights of women and girls.

Rules of Customary law affecting equality rights

Inheritance Rights

Female children are not entitled to inherit property from their deceased fathers. They cannot rely on common law of inheritance because Africans married in terms of customary law are expected to apply customary law rules of inheritance to the devolution and administration of their estates.¹⁹ This means that if the parents were married in

¹³ Minister of Welfare and Population Development v Fitzpatrick 2000 (3) SA 422 (CC).

¹⁴ Mnookin RH “Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy” 1975 LCP 226.

¹⁵ Mohlobogwane FM “Determining the Best Interests of the Child in Custody Battles: Should a child’s Voice be Considered?” 2010 Obiter 233; see also S v M 2008 (1) SA 232 (CC) para 24 where Sachs J held that “...it is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child. Furthermore, the list of factors competing for the core of best interest is almost endless and will depend on a particular factual situation.”

¹⁶ Article 12 (1) & (2) of the United Nation Convention on the Rights of the Child (1989).

¹⁷ Article 4 (1) & (2) African Charter on the Rights and Welfare of the Child (1990).

¹⁸ Grossman CP and Scherman IA “Argentina: Criteria for Child Custody Decision-Making upon Separation and Divorce” 2005 Fam L Q 557.

¹⁹ Molokomme A “Disseminating family law reforms: Some lessons from Botswana” (1990-1991) Journal of Legal Pluralism 316.

terms of customary law and therefore their estates would devolve in terms of customary law. The estates of black people are generally intestate and therefore expected to devolve in terms of customary law.²⁰

Customary law of succession and inheritance promotes the principle of primogeniture. This principle prefers mere inheritance of an estate by an eldest son to the exclusion of daughters. Inheritance goes together with responsibilities. Therefore an heir is expected to maintain the wife of the deceased, brothers, sisters and other siblings.²¹

At the time and context when people were still living as extended families, it was relatively easy for an heir to fulfill his obligations:

The rules...were part of a system which fitted in with the community's way of life. The system had its own safeguards to ensure fairness in the context of entitlements, duties and responsibilities. It was designed to preserve the cohesion and stability of the extended family unit and ultimately the entire community...property was collectively owned and the family head, who was nominal owner of the property, administered it, for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. He acquired the duty to maintain and support all the members of the family who were assured of his protection and enjoyed the benefit of the heir's maintenance and support.²²

However, the influence of capitalism and urbanization brought about many changes. Kerr noted that most of the inheritance claims made by male family members especially when the deceased left no male descendent, are often selfish and deny women's inheritance rights under customary law,²³ in fact males inherit property from the deceased but fail to adhere to their obligations that goes with inheritance and therefore leaving other family inmates suffering. This has been reinforced by the Constitutional Court of South Africa in the case of *Bhe v Magistrate, Khayelitsha*²⁴ where the court held that:

Modern urban communities and families are structured and organized differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased's estate without the accompanying social implications which they traditionally had. Nuclear families have largely replaced traditional extended families. The heir does not necessarily live together with the whole extended family which would include the spouse of the deceased as well as other dependents and descendants. He often simply acquires the estate without assuming, or even being in a position to assume, any of the deceased responsibilities.²⁵

The latter paragraph shows that heirs are now generally refusing to take their responsibility of maintaining other family members. In a recent case of *Mmusi and another v Ramantele and another*,²⁶ the high court of Botswana decided to strike down the principle of male primogeniture. The case was brought by four daughters who alleged that the customary law rule that prefers only males to inherit violated their right to equality as entrenched in section 3 of the Constitution of Botswana. This case was initially heard by the customary court, whose judgment was appealed to the customary court of appeal. The customary court of appeal held that daughters had to vacate the family home because in terms of customary law had to be inherited by the nephew. Daughters were not happy about the latter judgment and lodged a further appeal to the high court.

The high court held that customary law applies only if it is not in conflict with the Constitution. In doing so the court relied on the definition of customary law that is defined as meaning 'in relation to any particular tribe or tribal community, the customary law of that tribe or community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice.'²⁷ The Constitution is the supreme written laws of Botswana and provides for the protection of fundamental rights and freedoms for every person without any

²⁰ S 7 of the Customary Law (Application and Ascertainment) Act, 1969 which stipulate that 'notwithstanding the provisions of section 4, customary law shall be applicable in determining the intestate heirs of tribesmen and nature and extent of their inheritance.'

²¹ Roberts S 'Kgatla law and social change' 1971 Botswana Notes and Records 2: 56.

²² *Bhe v Magistrate, Khayelitsha, and others* 2005 (1) SA 580 (CC) para 75 was quoted with approval by the High Court of Botswana in the case of *Mmusi v Ramantele*. .

²³ Kerr AJ Customary Law of Immovable Property and of Succession 3rd ed (1990).

²⁴ Para 80.

²⁵ Para 80.

²⁶ *Mmusi and another v Ramantele* 2012 MAHLB-000836-10 available at www.saflii.org.za

²⁷ Para 86.

discrimination based on, inter alia, sex and place of origin.²⁸ In an attempt to promote and protect equal rights under customary law of inheritance, the court relied on domestic law, foreign precedents and international law. Domestic law of Botswana provided some complications because discrimination is permissible under customary law. This is so because the provision²⁹ that prohibits discrimination does not apply 'with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law.'³⁰ This shows beyond any doubt that customary law is ring-fenced and therefore can continue to apply even if discriminates unfairly against women and girls.

The court also resorted to foreign precedents in order to adopt a generous approach to the interpretation of the Constitution that will promote the values of the Constitution. Equality and dignity are some of those values. *Dingake J* held 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 envisaged by the framers of the Constitution.'³¹

The court followed the equality test as formulated in the South African case of *Harksen v Lane NO*³² and held that the principle of primogeniture that prefers inheritance of males to the detriment of women and girls discriminated on the basis of sex. This discrimination on the basis of sex is unfair and therefore not acceptable.³³

The latter decision of the Botswana high court is commendable. However, the exception that protects customary law even if discriminating against women and girls continues to apply and is not yet abolished. Therefore children's rights, more especially the rights of women and girls to equal inheritance and dignity are still widely violated.

In addition to that, marital power continues under customary law and the husband is regarded as the head of the family, while women and girls continue to be subjected to perpetual tutelage for the rest of their lives.

Marital Power of a Husband

Botswana has no single age of majority because there are various legislative provisions regulating the age where a person is treated as a fully grown person with full contractual capacity and *locus standi* (i.e. the right to sue or be sued before a court of law):

Firstly, the interpretation Act³⁴ provides that the age of majority is 21 years and a child below this age has no contractual capacity, no *locus standi* and therefore has no right to sue or be sued without the assistance of a parent.

Secondly, Deserted Wives and Children protection Act³⁵ deals with the regulation of maintenance orders made by wives and children who have been deserted and without adequate means to support themselves. According to this Act a child is a person that is between 21 years and 16 years provided that he or she does not earn a living. However, a person that is between 21 years and 16 years is not regarded as a child if he or she earns a living.

Thirdly, the Marriage Act³⁶ regulates civil marriages and provides that no male below the age of 16 years or female below 14 years may marry.

Fourthly, the affiliation Procedures Act³⁷ provides that a child is a person below the age of 18 years, and lastly, it has been noted that Botswana adopted the Abolition of Marital Power Act.³⁸ This Act led to the abolition of the common law principle of the marital power of a husband. According to this principle, the husband was the sole administrator of the family estate and a wife was treated as a perpetual minor and therefore had no *locus standi* or capacity to sue or be sued without any assistance from a guardian or husband. An unmarried woman has to be assisted by her parent or guardian, while a married wife has to be assisted by a husband or a guardian³⁹.

²⁸ S 3 (a) of the Constitution.

²⁹ S 15 (1) of the Constitution prohibits discrimination.

³⁰ S 15 (4) (c).

³¹ Para 217.

³² 1998 (1) SA 300 (CC).

³³ *Harksen v Lane* (supra) Para 203.

³⁴ Section 49 of the Interpretation Act 20 of 1984.

³⁵ Section 1 of the Deserted Wives and Children Protection Act 5 of 1951.

³⁶ Section 17 of the Marriage Act 18 of 2001..

³⁷ The Affiliation of Procedures Amendment Act of 1999.

³⁸ Abolition of Marital Power Act of 2004.

³⁹ Schapera I A Handbook of Tswana Law and Custom (1970) 2nd ed Frank Cass & CO. LTD at 150-151.

Marital power of a husband was replaced by the equality of the spouses with respect to the joint matrimonial assets and a woman is no longer treated as a perpetual minor. This may look like the victory for the attainment of true equality of both females and males.

However, customary law and religious marriages are not affected by those reforms. This is a serious shortcoming because equality rights and dignity of women and girls continues to be violated under customary law. This is so because there is no minimum age for marriage under customary law and women and girls continue to be regarded perpetual minors for the rest of their lives. The position under customary law is that after puberty and initiation ceremonies, minors are deemed to be of marriageable age and regarded as adults afterwards.⁴⁰ Conversely, females continue to be subjected to perpetual tutelage of their fathers or guardians (in not yet married) and subjected to the tutelage of their husbands (if they are married).⁴¹

Marital power is in fact a blatant denial of equality rights to women and is not acceptable in an international community that subscribes to the strong normative commitment to the promotion of gender equality and human rights. This normative commitment is reflected in the numerous human rights instruments that prohibits discrimination. Equality is guaranteed in various formulations, in instruments such as the Convention on Elimination of all forms of Discrimination against Women (CEDAW),⁴² International Covenant on the Elimination of all forms of Racial Discrimination (CERD), African Charter on Human and Peoples Rights (ACHPR),⁴³ American Convention on Human Rights (ACHR),⁴⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),⁴⁵ The United Nations Charter,⁴⁶ Universal Declaration of Human Rights,⁴⁷ International Covenant on Economic, Social and Cultural Rights (ICESCR),⁴⁸ International Covenant on Civil and Political Rights (ICCPR),⁴⁹ Convention on the Rights of a Child (CRC),⁵⁰ and the International Convention on the Protection of the Rights of Migrant Workers.⁵¹ This shows beyond any doubt that marital power of a husband conflicts with the latter international and regional human rights instruments that protects the right to equality and it is suggested that Botswana ought to domesticate them in order to comply with its international human rights obligations.

Conclusion

This paper discussed the impact of customary law on the rights of children in the Republic of Botswana. It has drawn an inference that there are many rights of children that are violated under the name of culture:

Firstly, it has been argued that the manner in which custodial rights are awarded in terms of customary law conflicts with the principle of the best interests of children. Secondly, the paper further argued that the manner in which inheritance of the deceased estates are regulated in terms of customary law has a negative impact on children's rights and in fact conflicts with the normative commitment to gender equality. Lastly, it has also been argued that the marital power of a husband conflicts with the equality rights as protected under international and regional human rights instruments.

It is submitted that Botswana has to domesticate all the international and regional human rights instruments that were accepted by it. Moreover, Botswana has to amend the clause that ring-fenced customary law in its Constitution⁵². In doing so, it will be able to comply with its obligations under international law.

⁴⁰ United Nations Committee on the Elimination of Discrimination against Women (CEDAW) (2008) Consideration of Reports Submitted by State Parties under article 18 of CEDAW, Combined INp.114.

⁴¹ Schapera I (supra) at 150-151.

⁴² Art 16.

⁴³ Articles 2, 3, 18 & 28.

⁴⁴ Articles 1 (1) & 24.

⁴⁵ Article 14.

⁴⁶ Articles 1 (3), 13 (1) (b), 55 (c) & 76.

⁴⁷ Articles 2 & 7.

⁴⁸ Articles 2 (1), (2) & 3.

⁴⁹ Articles 2, 3 and 26.

⁵⁰ Article 2.

⁵¹ Article 7.

⁵² S 15 (4) (c).

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- [2] American Convention on Human Rights
- [3] Convention on Elimination of all forms of Discrimination against Women (CEDAW)
- [4] Convention on the Rights of a Child
- [5] European Convention for the Protection of Human Rights and Fundamental Freedoms
- [6] International Covenant on Civil and Political Rights
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