Extra-Marital Children and Their Right to Inherit from Their Fathers in Botswana

A Critical Appraisal

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Abstract

Despite the fact that in recent years a number of states have extended to non-marital children many of the legal rights previously exclusively granted to legitimate children, Botswana still denies non-marital children a wide constellation of their basic rights. One such area where the rights of non-marital children are violated in Botswana is inheritance. In terms of the law of succession of Botswana, extra-marital children have no real legal rights to inherit from and through their father, both at customary law and Common Law. This article discusses and analyses the rule that excludes non-marital children from inheriting from and through their fathers under the two systems of laws. Its central claim is that this rule is antithetical to extra-marital children's rights to equality, non-discrimination, and dignity. The article argues that the rule is devoid of social currency, has no place in a democratic society, and must be abolished.

Keywords: extra-marital children, inheritance, fathers, Botswana, human rights.

A Introduction

In Botswana, children born out of wedlock have been suffering serious legal and societal discrimination from time immemorial. Although the discrimination on ground of illegitimacy is abating somewhat, non-marital children are still placed in an inferior position relative to those born within wedlock. Society justifies this treatment on the basis that it discourages men and women from having children out of wedlock and protects traditional family life. Non-marital children continue to be discriminated in matters of inheritance. This article discusses and assesses the rule that non-marital children have no legal right to inherit from and through their fathers in intestate succession. The article gives a truncated historical account of the rule, both under customary law and Common Law of Botswana and its application within Botswana's legal order against the backdrop of norms of international law and decisions of select international and municipal jurisdic-

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tions. It argues that the rule is outmoded, discriminatory, and impairs the dignity of children born out of wedlock and recommends that it be abolished. By way of contextualising the discussion, it is important to note that Botswana operates under a hybrid legal system comprising customary law on one hand and Common Law on the other.[1] Both of these systems of law exclude non-marital children from intestate succession in relation to their father's property. We turn to consider the form, nature, and content of the rule under each system of the law, namely customary law and Common Law.

B Truncated Discussion of the Rule under the Customary Law

Under Tswana customary law,[2] non-marital children cannot inherit from their father or their father's relatives. The only exception is where there is a subsequent marriage to legitimise them or where they are adopted.[3] The rule in customary law context was illustrated in the case of *Hendrick v. Tsawe*,[4] a decision of the High Court confirming an appeal from the Customary Court of Appeal in which the applicant, an 'illegitimate' son, had been ordered to return the cattle he had taken from his father's estate.The High Court endorsed the reasoning of the Customary Court of Appeal that under customary law an 'illegitimate' child could not inherit from his father. In this regard, the court stated that "[o]nly the children born in marriage, legitimised by subsequent marriage or by adoption can inherit the property of their father".[5] Explaining the differential treatment between marital and non-marital children, Nganunu CJ stated that:

> Despite certain modern developments in some countries in the world, I think it is still correct that marriage is the critical legal step that ought to take place in order to bind a man and a woman together and make them husband and wife; thus forming a legally recognised unit known as a family. By and large the children born out of that union are regarded as entitled to the protection and support of their parents until they can fend for themselves. And on the death of one of their parents, those children are entitled to a share of the estate of the couple; or such part of it as is then distributable as an inheritance. Children born outside the marriage are not treated like and do not

1 The customary law rules of inheritance are applicable to tribesmen who die intestate and the common law rules to tribesmen who die leaving behind a valid will and to non-tribesmen. There is a raging jurisprudential debate in the country relating to the question as to who is a tribesman and who is not. This debate is however beyond the remit of this paper and therefore shall not be addressed herein.

2 By Tswana customary law, we refer to the customary law of Tswana-speaking groups of Botswana. It is important to note that the customary laws of various tribes of the Tswana are not heterogeneous or uniform. However, the difference in these laws cannot be over-emphasised as they are not major.

3 <www.freiheit.org/Aktuelle-Berichte/1804c25227i3p/index.html> (accessed 31 May 2014).

4 [2008] 3 BLR 447 (HC).

5 *Ibid*., p. 450.

European Journal of Law Reform 2015 (17) 1
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> have the same rights in inheritance as children born within the marriage, save for a few exceptions.[6]

Under classical customary law in Tswana societies, an unmarried girl who fell pregnant became the object of trenchant scorn and suffered public humiliation.[7] Her child was often killed at birth and if allowed to live always survived under damaging stigma, rejection, and ostracism from society. Although the girl no longer suffers intense stigma and ill-treatment for bearing a child outside wedlock, she is still being considered to be spoilt (*o senyegile*) and she is seldom regarded with approval as a candidate for marriage.[8] Further, a child born outside wedlock is no longer being killed and is allowed to take part in the normal tribal life. These attitudinal changes can be attributed in part to rights movements both at the local and international scenes and contact with the media. Despite the abating resentment towards extra-marital birth, the extra-marital child is regarded with disapproval and described in insulting and taunting terms. He or she is universally labelled *ngwana wa dikgora* (a child whose father surreptitiously crept into the girl's compound through the fence, without a legal right to do so).[9] An extra-marital child belongs to the family of his or her mother. In the local national language, Setswana,[10]*ngwana wa dikgora ke wa ga mmaagwe*, meaning that an extra-marital child belongs to the mother's family. More relevant to the present discussion, the child cannot inherit his father's property *ab intestato* nor from his father's relatives. In this regard, Professor Schapera writes:

> A man may be the natural father of a child, but he cannot claim that child nor has it any claims upon him, unless certain legal conditions have been fulfilled. Of these the most essential is marriage, and, above all, the payment of bogadi (lobola). It is only if he has given bogadi for its mother that a man is fully entitled to any child he begets with her.[11]

Schapera continues:

> Normally the children a man begets by his wife are regarded as his. He deserves every benefit from them and they in turn have the right to be maintained by him, to inherit his property, succeed to his social position and all other benefits and privileges accorded by society … owing to the rights established by the payment of bogadi; it further follows that where a child is born of adulterous intercourse, it does not belong to its natural father.[12]

6 *Ibid.*
7 I. Schapera, *A Handbook of Tswana Law and Custom*, Oxford University Press, London 1938, p. 171.
8 *Ibid.*
9 *Ibid.*
10 The national local language of Botswana is Setswana. English is the official language.
11 Schapera 1938, p. 169.
12 *Ibid.*

Though Professor Schapera's views were penned in the late 1930s, Nganunu CJ accepted in the *Tsawe* decision handed down in 2008 that the position as stated by Schapera represents the customary law of Botswana as it stands today in relation to inheritance by non-marital children.[13] In terms of Professor Schapera's exposition of the customary law, a man must marry the mother of the child and pay lobola to avoid the child being excluded from inheritance. This makes the rule rigid and subject to no exceptions. It is submitted that the position of the law as expressed by Professor Schapera is unmaintainable because even the institution of marriage to which the rule is etched is in constant evolution. As far back as 1938, Lord Russel observed that: "[t]he institution of marriage has long been on a slippery slope. What was once a holy estate enduring for the joint lives of the spouses, is steadily assuming the characteristics of a contract for a tenancy at will".[14] In *Mazurek v. France*,[15] the Court noted that the institution of the family was not rigidly codified, whether historically, sociologically, or legally.[16] Whereas the conception of marriage is evolutive, its incidentals such as inheritance for non-marital children have seemingly remained static as the associated discrimination for non-marital children persists unabated. What seems relevant for addressing this discrimination is a deconstructionist approach in terms of which the question of the status of a child for purposes of inheritance is de-linked from the marriage status of his or her parents. To be more specific, it is neither fair nor just to use a child as an object for the enforcement and protection of the values of traditional family. The rule that excludes children born out of wedlock to inherit from his or her father is also inconsistent with the provisions of section 2 of the Customary Courts Act,[17] which states that:

> [C]ustomary law means, in relation to any particular tribe or tribal community, the customary law of that tribe or tribal community so far as it is not incompatible with the provisions of any written law or contrary to morality, humanity or natural justice.

Thus, denying children born out of wedlock to inherit from their father is contrary to principles of 'morality, humanity or natural justice'. Customary law must be fairly and equitably applied. This means that where a rule of customary law is not in accordance with notions of justice, good sense, equity and human rights, it will not be applied at all.[18]

As indicated above, in terms of Tswana customary law, the girl's seducer has an option to marry her and consequently legitimatise the child. If he does so, the child will be regarded as legitimately his and belonging to his family. But if he elects not to marry her, he cannot as a rule take the child and place him or her

13 *Tsawe* case, p. 450.
14 *Lord Russel of Killowen in Fender v. John-Mildway* [1938] 1 AC 34-5.
15 Application no. 34406/97 of 1 February 2000.
16 *Ibid*., at para. 52.
17 Cap 04:05, Laws of Botswana.
18 *Molefi Silabo Ramantele v. Edith Mosadigape Mmusi & others* CACGB-104-12 (unreported), 2012, p. 18.

European Journal of Law Reform 2015 (17) 1
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under his own custody or guardianship. The child cannot bear his name. However, among some tribes, such as Bangwato and Bakalanga, the child takes the totem of his father as it is believed that the child will become stupid if he eats the totem of his or her father.[19] However, the child does not have a right to inherit from his or her father. In the past, the father may be liable for the maintenance of the child and pay one or more cattle as *kotlo* (maintenance fees).[20] The liability of the father to pay maintenance for his extra-marital child has now been provided for statutorily. In terms of section 3 read in association with section 8 of the Affiliation Proceedings Amendment Act,[21] a mother or a guardian of a child born out of wedlock is entitled to claim maintenance from the child's father until the child is 18 years of age or is self-supporting, whichever occurs earlier.

C Truncated Discussion of the Rule under the Common Law

At Common Law, a non-marital child was *filius nullius* (the child of no one).[22] A child born out of wedlock was considered as a non-person, with no rights to inherit from parents or any other relatives. Contrary to the position under customary Tswana law, under the Common Law, extra-marital children had no legal rights to parental support.[23] They were barred from holding "positions of social visibility and responsibility"[24] and could not claim wrongful death damages.[25] They were the objects of social scorn as demonstrated by the appellations used to describe them – 'bastard' or 'illegitimate'[26] – and were often denied participation in social, professional, and civic lives.[27] This Common Law rule that disinherits extra-marital children in relation to their fathers is hallowed by age. Emperor Justinian of the Roman Empire ordained as early as 500 BC that:

> ... those who are born of a union which is entirely odious to us, and therefore prohibited, shall not be called natural children and no indulgence whatever shall be extended to them. But this fact shall be punishment for the fathers that they know that children who are the issue of their sinful passion will inherit nothing.[28]

19 Under Tswana Custom, a person is prohibited from eating their totem because it is believed that they will be stupid.
20 Schapera 1938, p. 169.
21 Cap 28:02 as amended by Act 8 of 1999.
22 *See* J. Witte, Jr., *Ishmael's* 'Bane: The Sin and Crime of Illegitimacy Reconsidered', *Punishment & Society: The International*, Vol. 5, 2003, p. 335.
23 *See Trimble v. Gordon*, 430 U.S. 762 (1977), p. 768.
24 Witte 2003, p. 335 (pointing out that non-marital children could not ascend to high political, military, or judicial office, or serve as prison wardens or coroners).
25 *Ibid.*
26 Witte 2003, p. 335.
27 *Ibid.*
28 *See* J.A.C. Thomas, *Textbook of Roman Law*, North-Holland Publishing Company, New York 1976, p. 57.

In essence, no blood relationship for the purpose of succession is recognised between a man and his illegitimate children at Common Law. Therefore, his children cannot succeed him *ab intestato*.[29] Society justified discrimination against non-marital children on the basis that it will deter extra-marital childbearing and "preserve and strengthen traditional family life".[30] It has also been stated that this rule emanates from the recognition that "the preservation of chastity is the first duty of freedom of an illustrious woman" and that it would "be unjust, and very oppressive and unworthy of the spirit of our age, for bastards to be acknowledged".[31] The Romans regarded the concept of family as the central legal entity.[32] Family relations were considered extremely important in society, and the law emphasised the 'family unit' as opposed to the individual.[33] During the Roman times, the promotion and protection of the family was important for both moral and legal reasons. 'Illegitimacy' was important not only because it was considered to be an aberration from shared family-oriented values but also because it placed the individual outside the 'family unit for jurisdictional purposes under the Roman legal system'.[34] In this connection, the Roman Digest of 1808 expressed the view that distinctions such as those based on sex, legitimacy, and minority were 'natural distinctions' and were thus acceptable bases for discrimination under the law.[35] Therefore under the Roman Dutch Law, children born in wedlock were entitled to certain legal rights which were denied to those born in extra-marital sexual relations – such as to inherit from one's father and through him.

It has been argued above, at Common Law, the exclusion of children born out of wedlock from inheriting from their fathers was premised on the understanding that a child born out of wedlock has no legal relationship with his or her father. The position at Common Law is that an extra-marital child is in law related to its mother and her relations but not the father and his relations.[36] This Common Law position finds expression in the Dutch principle that 'een wijfmaaktgeen bastaard'.[37] The implications of this rule, therefore, is that an extra-marital child takes his or her mother's family name, inherits only from his or her mother, and the father cannot assume any parental obligations *vis-à-vis* the child (save for maintenance). Whether intended or not, this legal policy projects the extra-marital child as a target of social opprobrium.

In Botswana, the common rule was judicially considered and applied by the Court of Appeal in the case of *Tape v. Matoso* (*Matoso* case).[38] The facts of this

29 *Portgieter v. Bellingan* (1940) EDL 204.

30 S. Maldonado, 'Illegitimate Harm: Law, Stigma, and Discrimination against Non-Marital Children', *Florida Law Review*, Vol. 63, No. 3, 2011, p. 351.

31 *See* A.P Scott translating the 'The Civil Law', 1976, pp. 86-87.

32 P.K. Daigle, 'All in the Family: Equal Protection and the Illegitimate Child in Louisiana Succession Law', *Louisiana Law Review*, Vol. 38, No. 1, 1977, p. 191.

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

36 *See* E. Spiro, *The Law of Parent and Child*, Juta & Co. Ltd., Cape Town 1985, p. 450.

37 *See* also B. Van Heerden *et al.* (Eds.), *Boberg's Law of Persons and the Family*, 2nd edn, Juta & Co. Ltd., Kenwyn 1999, p. 390.

38 2007 (1) BLR 512 (CA).

European Journal of Law Reform 2015 (17) 1
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case can be briefly recounted as follows. The Respondent was married to the deceased and together had four children. Following incessant misunderstandings, the fortunes of the marriage dipped and the respondent and the deceased got estranged. The deceased proceeded to establish an adulterous relationship with the Appellant with whom he had ten children. The deceased and the Appellant had stayed together for a period of 30 years before the former passed away. Upon the death of the deceased, a dispute over the distribution of his estate ensued. One of the questions that the court had to determine was whether or not the children of the subsequent union, that is, those born of the deceased and the Appellant in an adulterous union were entitled to inherit from the estate of the deceased. In a brief and unanalytical judgment, the court found that the latter or subsequent union was bigamous and thus void *ab initio* at law and that children born of this union were, therefore, 'illegitimate'. Relying on the South African case of *Green v. Fitzgerald* and Others (*Green* case)[39] decided by the Appellate Division as far back as 1914, the court held that children born between the deceased and the appellant were not entitled to inherit from the estate of the deceased. In another Botswana case of *Samsam v Seakarea*,[40] the court cast the rule thus:

> But can the children having been born out of wedlock, be entitled to reside in the Gaborone property belonging to the deceased by virtue of them being his children and she alongside as their guardian? It is common cause that the deceased died intestate. As a common law principle, children born out of wedlock do not succeed ab intestatio to their father and his relations but to their mother and her relations. See, *The Law of Succession in South Africa* by Corbett, Hahlo and Hofmeyr at p 586. On the other hand a child born out of wedlock is entitled to maintenance from both its parents according to their means. See, *Moremi and Others v Mesotlho* [1997] BLR 7, and on their father's death, from his estate. See, *Lamb v Sack* 1974 (2) SA 670 (T); *Spies' Executors v Beyers* 1908 TS 473. This is now a settled principle of our law. In the light of the above authorities therefore, although the two children are not entitled to inherit from their father, they are entitled to claim maintenance from his estate in so far as they may be dependants.[41]

However, in another local case of *Mosienyane v. Lesetedi and Others* (*Mosienyane* case),[42] Justice Masuku of the High Court expressed doubt, albeit *obiter*, over the validity of the rule in the following words:

> There is one issue that I must address as an *obiter dictum* which has caused me spasms of disquiet, [namely] that the applicant is not entitled to inherit from his father's estate because he was born out of wedlock. In some countries in the region, the distinction of children on the basis of whether or not

39 1914 AD 88.
40 2004 (1) BLR 378 (HC).
41 *Ibid.,* 378. *See* also Lesomo and Anor v Otukile and Another 2008(3) BLR 447.
42 Misca F257/2005, unreported.

> they were born out of wedlock has been removed in relation to their right to inherit from their fathers. This is an issue worth considering in this country…[43]

What the judge found obnoxious, inequitable, and repugnant to fairness and justice is that on evidence, it was established that the deceased did not have any other child apart from the applicant who was born by him out of wedlock. This meant that since the deceased did not have any child born in wedlock, his estate fell to be distributed to his nephews, nieces, cousins, and other relatives at the exclusion of 'his own flesh and blood' – his only surviving son.[44] The judge concluded by noting that the law must be inherently flexible to respond to the changing circumstances of society.

To conclude the discussion on the Common Law framework for inheritance rights of non-marital children in Botswana, reference must be made to Section 27(4)(g) of the Children's Act,[45] which provides that one of the duties of "every parent" is to "ensure that the child inherits adequately from his or her estate". Section 2 thereof, which is a definitional section, states that a parent in relation to a child means a biological parent, adoptive parent, foster parent, or step parent. It is important to note that the said Section 2 does require that the parents to a child need to be married before they are considered to be his or her parents under the law. In other words, marriage is not a factor for determining filial relations between a child and his or her mother or father. Thus, a cursory reading of the aforesaid 27(4)(g) may seem to suggest that the Common Law rule that excludes non-marital children from inheriting from or through their fathers has been statutorily abolished. However, a closer examination of the provision indicates that it merely creates a duty on the part of a parent to ensure that a child inherits and does not create a corresponding right on the part of a child to inherit. This means that all that the provision requires is that a parent must take affirmative steps such as through the making of a will to ensure that the child inherits from his or her estate and this contemplated action must necessarily occur during the lifetime of a parent. On the other hand, if a child inherits as of right, he or she inherits upon the death of the parent and the right to inherit accrues to the child upon the death of their parent. As is the case with marital children, before a parent dies, a child only has *spes successionis* (hope of succeeding).

For these reasons, section 27(4)(g) cannot be interpreted as conferring a right on non-marital children to inherit from and through their fathers. It is also important to note that the legislature was aware, or at least it is presumed to be aware, of the Common Law position in this regard. Thus, if it intended to statutorily modify the Common Law position, it would have done so expressly. In this regard, the position of the law is that the Common Law remains unchanged unless expressly stated by an Act of Parliament.[46]

43 *Ibid.*, para. 74.
44 *Ibid.*
45 Act no. 8 of 2009.
46 *See Fisher v. Bell* [1961] 1 QB 394.

European Journal of Law Reform 2015 (17) 1
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The failure or omission to expressly modify the Common Law position in this regard means that the Common Law position still applies. To date, section 27(4(g) has not been judicially considered. It is hoped that when the provision finally reaches the courts, they will construe it dynamically and creatively with a view to improve the inheritance situation of non-marital children in the country one way or the other. We now turn to consider the trends and norms that have emerged on the international sphere in response to the question at issue.

D Is the Exclusion of Extra-Marital Children from Inheritance in Tune with Human Rights Notions?

In discussing the relevance of treaty norms to Botswana's legal system, it is important to note that Botswana is a dualist state. Thus, provisions of treaties that Botswana has not incorporated into its domestic law are non-justiciable before its courts.[47] However, this does not mean that pertinent international instruments are irrelevant to the adjudication of human rights claims in the country. Even if un-incorporated, relevant international human rights instruments have high persuasive value on decisions of the courts. In this connection, Dingake J held in *Ndlovu v. Macheme*[48] that:

> It is indisputable that the provisions of an international treaty ... which Botswana is a party do not form part of Botswana law, unless parliament elects to incorporate its provisions into our domestic law by legislation. But the fact that the [treaty] has not been incorporated into national law... does not mean that its ratification holds no significance for Botswana law, for its provisions have strong persuasive value on the decisions of this court.[49]

The court further relevantly reasoned that:

> ... the courts have a duty to develop the common law [and customary law], especially where it seems inconsistent with constitutional precepts, by using, where appropriate, unincorporated international conventions to develop the law – especially where the law conflicts with the right to equality – which is not only part of the core values of the constitution but is also part of customary international law, which qualifies it as *ius cogens*.[50]

In addition, Section 24(1) of the Interpretation Act[51] is instructive in this regard. It provides that:

47 *See* the case of *Kenneth Good v. Attorney General* [2005] 2 BLR (CA), pp. 345-346.
48 2008 (3) BLR (HC) 230.
49 *Ibid.*
50 *Ibid.*
51 Cap 01:01, Laws of Botswana.

> For the purposes of ascertaining that which an enactment was made to correct and as an aid to the construction of an 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.

To this end, in Botswana the importance of international treaties in the public law adjudicatory process cannot be over-emphasised. It may also be indicated that norms contained in international instruments serve as a beacon towards which a state must gravitate in an endeavour to comply with international best standards and practice. In this regard, Viljoen has observed that international human rights law instruments provide a "normative beacon of commonly agreed standards of humanity and dignity that all states should respect".[52] Botswana is a party to many international instruments that seek to protect the rights of children in their capacity as such or as individuals in society. Article 2 of the Universal Declaration of Human Rights outlaws discrimination on the following nine grounds: race, colour, sex, language, religion, political or other opinion, national or social origin, property, and *birth or other status*. The same prohibited grounds are included in Article 2 International Covenant on Economic Social and Cultural Rights[53] and Article 2 International Covenant on Civil and Political Rights.[54] The Convention on the Rights of the Child is also pertinent in this analysis. It asserts that by reason of their 'physical and mental immaturity', children need 'special safeguards and care'.[55] In terms of Article 2 thereof, States parties to the Convention must ensure that the rights set forth therein are enjoyed with no distinction on the basis of 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, *birth or other status*'. By its Article 2, the African Charter on Human and Peoples Rights[56] also prohibits discrimination on grounds of '*birth* or *other status*'.

Similarly, Article 3 of the African Charter on the Rights and Welfare of the Child (ACRWC)[57] proclaims that children are entitled to enjoy the rights and freedoms recognised and guaranteed under the Charter 'irrespective of the child's or his/her parents' or legal guardians' race, ethnic group, colour, sex, … *birth* or *other status*'. This provision is double-pronged. In the first place, it prohibits discrimination against a child on the basis of the listed grounds. In the second place, and more critically for my argument, it prohibits discrimination which the child may

52 F. Viljoen, 'Contemporary Challenges to International Human Rights Law and the Role of Human Rights Education', *De Jure*, Vol. 44, 2011, p. 209.

53 General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force on 3 January 1976.

54 Article 24(1) of the same instrument relevantly states that: "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."

55 *See* Preamble to the Convention which cites the Declaration of the Rights of the Child which was adopted by the General Assembly in 1959.

56 Adopted in Nairobi, Kenya on 27 June 1981 and entered into force in October 1986.

57 Adopted Addis Ababa on 11 July 1990 and entered into force on 29 November 1999.

European Journal of Law Reform 2015 (17) 1
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suffer as a result of the status of its parent or guardian. Bearing in mind that illegitimacy arises by reason that the parents of the child never married, this provision makes it illegal to discriminate a child on the basis that his or her parents never married. It is trite law that the listed prohibited grounds for discrimination are not exhaustive but merely illustrative. Thus, the phrase 'other status' is open-ended and allows the courts to include other grounds not specifically referenced by the drafters of the treaty, where justice dictates that this be done. To this end, it is submitted that a parent's marital status is a prohibited ground for discrimination under Article 3 of the ACRWC.

E Analysing the Rule through Case Law: National and International Cases

In *Marckx v. Belgium*,[58] the European Court of Human Rights held that differential treatment between marital and non-marital children for purposes of inheritance constituted unfair discrimination on the basis of birth or descent contrary to Articles 8 [guaranteeing 'everyone' the right to respect for private and family life without discrimination] and 14 [guaranteeing 'everyone' the right to non-discrimination] of the European Convention on Human Rights. The Court correctly reasoned that Article 8 makes no distinction between the 'legitimate' and the 'illegitimate' children, and further that any discrimination on the basis of illegitimacy would be discordant with the word 'everyone' contained in the wording of these provisions. The court took the view that the difference of treatment depending on whether affiliation is established in or out of wedlock amounts to a 'flagrant exception' to the fundamental principle of the equality before the law. It added that "lawyers and public opinion are becoming increasingly convinced that the discrimination against 'illegitimate' children should be ended".[59] In delineating the content of the right to family, the court stated that 'family life', within the meaning of Article 8, includes at least the ties between near relatives since such relatives play a considerable part in family life. It further stated that 'respect' for family life denotes an obligation on the part of the State not to act in a manner that is calculated to undermine these ties. To that end, the development of the family life of non-marital child and his or her father may be compromised if the child is denied the right to inherit from his or her father.

The case of *Marckx v. Belgium* was endorsed by the same court in *Mazurek v. France*[60] where it was held that discriminating an illegitimate child based on birth out of wedlock was irrational and unjustifiable. In this case, the court found a violation of Articles 8 and 14 of the European Convention as read with Article 2 of the UNCRC which also prohibits discrimination on the basis of birth or descent. The European Court also denounced the rule that illegitimate children cannot inherit from their fathers in *Inze v. Austria*,[61] where the Court noted that the rule was antiquated, discriminatory, and undermines the dignity of children born out-

58 Application No. 6833/74. 13 June 1979.
59 *Ibid*., para. 67.
60 Application No. 34406/97, Judgment of 1 February 2000.
61 [1987] ECHR 28 at para. 41.

side wedlock. It is a truism to state that the principle of equality and non-discrimination postulates that people who are similarly circumstanced in relevant ways should be treated in a similar manner.[62] However, it is important to indicate that not every distinction or difference in treatment amounts to unlawful discrimination at law.

At a general level, under international law, unlawful discrimination arises where (1) like or analogous cases are dealt with in a different manner; (2) a difference in treatment lacks objective and reasonable justification or basis; or (3) if there is no proportionality between the objective pursued and the means deployed. These requirements have been repeatedly spelt out by international judicial and quasi-judicial institutions such as the European Court of Human Rights,[63] the Inter-American Court,[64] and the Human Rights Committee.[65] What is clear though is that the rule in question is discriminatory. Can this discrimination be justified? In this article, in argue that there is no valid justification why children born out of wedlock must be denied the right to inherit from their father when those born in wedlock are entitled to inherit. This is a clear case of dealing with equal cases in a different manner. There is no objective and reasonable justification for this differentiation.[66] It has been pointed out above that excluding children born outside wedlock from inheriting their father's estate is intended to discourage individuals from having children outside wedlock and, by extension, underline the sanctity of the institution of marriage. Clearly the questions of the desirability of having children in wedlock and the importance of a marital union relate to individual moral choices and preference. In other words, while some people cherish and value marital unions and prefer to bear children in marriage, others do not. It may be that the predominant moral orientation of society favours that children be born in marriage and never outside it. However, given the pluralistic nature of societies, moral values alone can never justify discriminatory practices between children solely on the basis of labels: legitimate and illegitimate.

The question that readily springs to mind is: by whose moral standard is the state guided in this connection? It can never be correct that in a modern democracy such as Botswana, a discriminatory practice or principle can subsist solely on account that a segment, maybe a majority of the populace, consider it to be repugnant, reprehensible, or unacceptable. Discrimination based on illegitimacy is a relic of a bygone era of dispensation that is no longer justifiable in terms of modern social ethos. Indeed, "[t]he social judgment(s) of today on matter of 'immorality' are as different from those of the last century as is the bikini from a bustle".[67]

62 M. Llayayambwa, 'Homosexual Rights and the Law: A South African Constitutional Metamorphosis', *International Journal of Humanities and Social Science*, Vol. 2, No. 4, 2012, p. 5.

63 *See* for instance, *Hoffmann v. Austria* judgment of 23 June 1993, Series A, No. 255-C, p. 58; Karlheinz *Schmidt v. Germany* judgment of 18 July 1994, Series A, No. 291-B, pp. 32-33, among others.

64 *See, e.g., Advisory Opinion No. 4*, Set. A, OC-4/84 of 19 January 1984, para. 57.

65 *See, e.g.*, General Comment 18 U.N. Doc. HRI/GEN/1/Rev.1, 1994, at 26, para. 13 and *Jacobs v. Belgium*, Communication No. 943/2000, 7 July 2004.

66 *Marckx v. Belgium* 1979, para. 59.

67 Per Justice, Stable in *Andrews v. Parker*, Od R93 (1973), p. 104.

European Journal of Law Reform 2015 (17) 1
doi: 10.5553/EJLR/138723702015017001005

Modern public policy is "in favour of eliminating the stigma of illegitimacy".[68] To this end, it is submitted that it is irrational to despoil extra-marital children the right to inherit from their father's estate. Although it can be considered that the aim of protecting traditional family may be deemed legitimate, it is not logical to disinherit extra-marital children, as a mark of disapproval, on the ground that their parents elected not to marry. If it is a governmental interest that couples should only have children in marriage, the government can achieve this end by sensitising its people about the importance of having children in marriage, among other measures, and not by denying children born out of wedlock their father's inheritance. To stigmatise and discriminate children born from extra-marital relations as part of society's effort to underline the value of family life is to go overboard. The difference in treatment between non-marital children and marital children in relation to their father's estate appears disproportionate and inappropriate to the aim pursued. In this regard, the measures deployed to achieve the end are unfair, oppressive, and based on irrational considerations. In short, they are not rationally connected to the objective pursued and work to severely undermine the fundamental rights and freedoms of concerned children. In other words, there is no rational connection or reasonable relationship between the means employed and the aim pursued. The cases of *Marckx v. Belgium, Mazurek v. France, and Inze v. Austria* cited above support this reasoning.

Elsewhere municipal courts have also jettisoned the rule that non-marital children cannot inherit from or through their fathers. For its part, the Supreme Court of the United States has ruled that discriminating between children on the basis of 'illegitimacy' is irrational, unsupportable, and unjust.[69] Discrimination on grounds of illegitimacy was also criticised by the South African Constitutional Court [Per Langa DCJ] in *Bhe v. Magistrate, Khaliyelitsha & others*.[70] In this case, the court observed that the differential treatment between children born within wedlock and those born outside wedlock constitutes unfair discrimination on the ground of 'birth' – listed as a prohibited ground for discrimination under section 9(3) of the Constitution of South Africa. The court noted particularly that the prohibition of discrimination on the basis of 'birth' in terms of the aforesaid section 9(3) must be:

> interpreted to include a prohibition of differentiation between children on the grounds of whether the children's parents were married at the time of conception or birth. Where differentiation is made on such grounds, it will be assumed to be unfair unless it is established that it is not.[71]

68 *In re Estate of Greenwood*, 587 A.2d 749 (1991), p. 756.

69 *See Levy v. Louisiana* 391 US 68 (1968); *Weber v. Aetna Casualty and Surety Co* 406 US 164 (1972), p. 175; *Glona v. American Guarantee and Liability Insurance Co.* 391 US 73 (1968), p. 76 and *Trimble v. Gordon* 430 US 762 (1977), among others.

70 2005 1 SA 580 (CC).

71 *Ibid*., para. 59.

Adding credence to the above sentiments, the High Court of Namibia has also ruled in *Lotta Frans v. Inge Paschke* (*Lotta Frans* case)[72] that the Common Law rule under discussion is inconsistent with the general non-discrimination clause of the Namibian Constitution.[73] This clause provides that "[n]o persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or *social* or economic status".[74] Commenting on the negative social ramifications of the rule, the court stated that the rule "still crucifies illegitimate children for the sins of their *lustful parents*" and attracts harmful social stigma to them.[75] The court further pointed out that the rule is quintessentially punitive and serves no legitimate purpose in modern society. The court reasoned that in modern societies, parents may elect to live together as family and procreate without being married and that it is unconscionable for children born of such unions to be denied the right to inherit when their fathers die simply because their parents never desired to marry one another.[76] In this regard, the court stated that the rule in question is arbitrary and knows no boundaries in that it does not differentiate whether the child was born out of love or lust.[77]

More eminently, the court noted that the maxim '*een wyft maakt geen bastaard*' had been re-stated by the courts from generation to generation, without much legal philosophical analysis or problematising it to understand the deep-seated prejudice surrounding this doctrine.[78] In replying to the argument by counsel for the respondent that the abolition of the rule may lead to a floodgate of litigation, the judge stated that the '*floodgate-litigation-arguments*' cannot save an unconstitutional rule and that "sometimes, as in this case, it is indeed necessary to open the floodgates to give constitutional water to the arid land of prejudice upon which the ... rule has survived for so many years in practice".[79] The foregoing human rights-oriented authorities demonstrate in clear terms that the rule that excludes children born from extra-marital relations from inheriting from their fathers is discriminatory and undermines their dignity.

F Taking a Gaze at the Issue through a Constitutional Prism: The Constitutional Approach to the Impugned Rule

The right to equality and non-discrimination is central to the scheme of any constitutional dispensation. Commenting on the place and content of this right within the South African Legal Order, Mahomed DP (as he then was) stated in *Fraser v. Children's Court, Pretoria North, and Others*:[80] that "[t]here can be no doubt that the guarantee of equality [and non-discrimination] lies at the very

72 Unreported, Case no. P (I) 1548/2005.
73 Adopted in February 1990.
74 Section 10(2).
75 *Lotta Frans* case 2005, at para. 17(II).
76 *Ibid*.
77 *Ibid.*
78 *Ibid*., at para. 17(III).
79 *Ibid*., at para. 18.
80 [1997] 2 SA 261 (CC) or 1997 (2) BCLR 153 (CC).

European Journal of Law Reform 2015 (17) 1
doi: 10.5553/EJLR/138723702015017001005

heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised".[81] These sentiments are applicable within the context of Botswana as in that of South Africa. Sections 3(1) and section 15 of the Constitution of Botswana associatively outlaw discrimination and promote and protect the right to equality before the law. Section 3(1) thereof guarantees the right to equal protection of the law, which is an aspect of judicial equality. Section 15(1) thereof states that "...no law shall make any provision that is discriminatory either of itself or in its effect". However, in terms of the constitutional scheme of Botswana, the debate cannot end here. In terms of section 15(4)(c) of the Constitution, discrimination is permissible "with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law". There is no doubt that the question of inheritance for non-marital children is covered by this provision as it is a question for the 'devolution of property upon death' and indeed a matter of 'personal law'.

To this end, it is clear that the constitutional provisions cited above are mutually discordant in that whereas section 3 guarantees the right to equality, section 15 permits discrimination, albeit under specified grounds. In resolving this conflict, the principle of harmonisation must be deployed or called to aid. This principle requires "... that the provisions of the Constitution must be interpreted in a manner that ensures their peaceful coexistence" and give effect to the constitution as a whole.[82] This position was endorsed in the case of *South Dakota v. North Carolina*,[83] where the learned judge said: "I take it to be an elementary rule of constitutional construction that no one provision of the Constitution is to be segregated from all the others, and to be considered alone but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purpose of the instrument".[84] This case was cited with approval by Amissah JP (as he then was) in the local case of *Attorney General v. Dow*[85] and by Kirby JP in another local case of *Ramantele v. Edith Modisagape Mmusi*.[86]

In *Kamanakao I v. Attorney-General*,[87] the High Court of Botswana ruled that the provisions of the Constitution of Botswana have no hierarchical ranking and that no provision should be interpreted to trump upon the other(s). The court reasoned that, in interpreting the Constitution, the court must adopt and apply an interpretation technique that harmonises all provisions of the constitution as opposed to the one that creates disharmony between them. In other words, conflicting constitutional provisions must be reconciled. More critically, the court observed that it was impermissible for the court to strike down a constitutional

81 *Ibid*., at para. 20.
82 O. Jonas, 'Gender Equality in Botswana: The Case of Mmusi and Others *v.* Ramantele and Others', *African Human Rights Law Journal*, Vol. 13, No. 2, 2013, p. 248.
83 [1940] 192 US 268; 48 ED 448.
84 *Ibid*., p. 465.
85 *Dow* case 1992, p. 165.
86 Civil Appeal no. CACGB-142-14 [unreported]. *See* also the case of *Ntesang v. the State* (1995) BLR 160.
87 [2001] (2) BLR 54.

provision on ground that it is inconsistent with another provision of the same constitution. The principle of harmonisation was ably articulated by Lugakingira J in the Tanzanian case of *Christopher Mtikila v. Attorney-General*.[88] In that case, the judge ruled that when a tension exists between two provisions that co-exist in the same constitution, the principle of harmonisation must be employed to resolve the conflict. In motivating his conclusion, the judge stated that in an interpretational exercise, the constitution must be read as a single, integrated compact, and its provisions must not be read in a mutually destructive manner but that one provision must sustain the other(s). The court stated further that if the harmonisation exercise is to succeed, the court must carefully balance all the contending provisions of the constitution and assign to them a meaning that sustains the democratic ideals of society. The court took the view that it is only in an extreme case where harmonisation proves impossible to achieve that the court must purposively interpret the right-guaranteeing provision and disregard the words of the countervailing provision, if its application would result in a failure of justice.

The authors, Chitaley and Rio, express the position thus:

> [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 harmonies (*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.[89]

The explanatory potency of the harmonisation technique arises from the realisation that, ultimately, the law "must safeguard rights and freedoms in their full breadth unless a restriction is justifiably necessary and this restriction is permissible in a democratic society".[90] In the famous case of *Sturgesd v. Crownshield*,[91] 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 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".[92] These sentiments were also adopted in the South African case of *Midi Television (Pty.) Ltd. v. Director of Public Prosecutions (Western Cape)*[93] where Nugent J held

88 Civil Case 5 of 1993 (High Court of Tanzania).
89 V.V. Chitaley & S. Rao, *The Constitution of India*, 2nd edn, The All India Reporter Ltd., Nagpur 1970, p. 716.
90 Jonas 2013, p. 250.
91 [1819] 17 US 4 Wheat 122.
92 *Ibid.*, p. 123.
93 [2007] SCA 56 (RSA).

European Journal of Law Reform 2015 (17) 1
doi: 10.5553/EJLR/138723702015017001005

that if two or more constitutional provisions are mutually discordant, the court must seek to harmonise them in line with the dictates of justice.

For harmonisation to be achieved, the court must interpret provisions of the constitution in a dynamic and creative manner, with its eyes constantly fixed on the achievement of justice. Given that constitutions are not amended regularly, it is upon the courts to interpret constitutional provisions in a manner that sustains their relevance and maintains their organic nature, taking into account the ever-changing circumstances of modern life and bearing in mind that the guiding imperative is the protection of human rights and not to whittle them down. Commenting on the interpretation of provisions of the Constitution of Botswana, Aguda JA opined in the *Dow* case that:

> 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.[94]

In *Smith v. Ushewokunze & Another*,[95] Gubbay CJ stated that courts of law must interpret rights-giving provisions of constitutions broadly so as to expand their reach rather than in a manner that diminishes their content and meaning. The learned judge observed that in an interpretational exercise involving human rights, the court 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".[96] In line with these sentiments, Lord Diplock stated in *Attorney-General, The Gambia v. Jobe*,[97] that: "[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".

In Swaziland, the Supreme Court of that country had occasion to discuss the harmonisation principle in the case of *Jan Sithole and Others v. Government of the Kingdom of Swaziland*.[98] This case deployed the harmonisation technique to recon-

94 These sentiments were also echoed by Gubbay CJ of the Supreme Court of Zimbabwe in the watershed case of *Zimnat Insurance Co. Ltd. v. Chawanda* (1991) 2 SA 825.

95 [1998] 2 BCLR 170 (SC).

96 *Ibid.*, 170.

97 [1985] LCR (Const) 556.

98 Appeal 59/08 (unreported), judgment delivered on 21 May 2009.

cile section 25 of the Constitution of Swaziland[99] that guarantees the right to freedom of association and section 79 thereof that prohibits individuals from using political parties to be elected to public office. It is therefore submitted that the harmonisation principle should be deployed to reconcile the tension between section 3 of the Constitution of Botswana which protects the right to equality and non-discrimination and section 15(4)(c) which entrenches discrimination on matters of inheritance and personal law. This is the principled way of settling the tensions within a constitutional scheme. To the extent that section 3 is a right-enacting provision and section 15(4) (c) a limiting one, the former must be interpreted broadly and be accorded greater efficacy than the latter in this regard. More importantly and for clarity reasons, it is contended that the legislature must amend the Constitution by expressly providing under section 15 thereof that no customary practice or custom that undermines individual rights shall be accepted as a valid ground for discrimination. In other words, only customary rules and practices that are congenial to notions of human rights shall be saved and those that are inimical to them discarded. In this way, the conflict between the aforesaid sections 3 and 15(4)(c) will have been addressed with relative ease.

G The Way Forward: Some Observations

The perpetuation of the rule that extra-marital children cannot inherit from or through their fathers is untenable, especially in a democratic setup like Botswana. Its utilitarian value is in grave doubt. As the court stated in the *Lotta Frans* case discussed above, in modern age the rule has been echoed by courts from one generation to the next without any serious interrogation of its present philosophical outlook. This is precisely what happened in the *Matoso* and *Tsawe* cases. In the *Matoso* case, Twum JA only stated in one line that since the children in question were born outside wedlock, they were not entitled to inherit from their father at Common Law. In support of this legal proposition, he cited the *Green* case referred to above, which was decided about a century ago, whose relevance in modern day is open to doubt. Similarly, Nganunu CJ affirmed the rule at customary law on the basis of the opinion of Schapera, also articulated almost a century ago. Both courts did not seek to interrogate this antiquated rule to establish if it was still relevant in society. Clearly, the circumstances, societal values, ethos, ideas, norms, and concepts have changed in line with societies' socio-economic and political vicissitudes that have occurred throughout history. Naturally, some legal constructs that are rigid, inorganic, and incapable of adapting to the ever-changing circumstances, such as the rule under consideration, inevitably render themselves obsolete in the process because they lose the capacity to solve complex legal problems of modern age. In this regard, in the context of customary law, Professor Bennett has remarked that:

99 Adopted in 2005.

European Journal of Law Reform 2015 (17) 1
doi: 10.5553/EJLR/138723702015017001005

> [a] critical issue in any constitutional litigation about ... law will therefore be the question whether a particular rule is a mythical stereotype, which has become ossified in the official code, or whether it continues to enjoy social currency.[100]

The above sentiments are equally valid and compelling for rules of the Common Law. A law that enjoys social currency is the one that is capable of serving justice by taking account, in its operation, the changing conditions, social norms, and values, so that it remains sufficiently flexible to keep pace with and meet the newly emerging problems and challenges.[101] It is the duty of the courts to ensure that outdated legal principles which undermine justice such as the one that deprives extra-marital children the right to inherit from their fathers are abrogated. In other words, the law cannot afford to remain static in an evolutive society. Although customary law is characteristically flexible, adaptable, and evolutionary, the Common Law is relatively inflexible and generally constrained from free evolution by operation of the doctrine of judicial precedent which declares that cases must be decided the same way when their material facts are the same. Although this doctrine must be accepted as a general rule, it must be ignored when the staleness of old law leads to unfairness and injustice. In this connection, Lord Denning had this to say:

> If lawyers hold to their precedents too closely, forgetful of the fundamental principles of truth and justice which they should serve, they may find the whole edifice comes tumbling down about them. Just as the scientist seeks for truth, so the lawyer should seek for justice. Just as the scientist takes his instances and from them builds up his general propositions, so the lawyer should take his precedents and from them build up his general principles. Just as the propositions of the scientist fail to be modified when shown not to fit all instances, or even discarded when shown in error, so the principles of the lawyer should be modified when found to be unsuited to the times or discarded when found to work injustice.[102]

Gubbay CJ echoed similar sentiments in *Zimnat Insurance Co. Ltd. v. Chawanda* when he stated that:

> The opportunity to play a meaningful and constructive role in developing and moulding the law to make it accord with the interests of the country may present itself where a Judge is concerned with the application of the common law, *even though there is a spate of judicial precedents which obstructs the taking of such course*. If Judges hold to their precedents too closely, they may well

100 T. Bennett, *Human Rights and African Customary Law under the South African Constitution*, Juta & Co. Ltd., Cape Town 1997, p. 64.

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

102 *See* The Rt. Hon. Lord Denning, *The Discipline of the Law*, Butterworths, London 1979, p. 292.

doi: 10.5553/EJLR/138723702015017001005

> sacrifice the fundamental principles of justice and fairness for which they stand.... (My emphasis)[103]

The crux of the above dicta is that the Common Law should remain consistently in motion and intimately connected to the peoples' lives and reflect their conceptions of justice and freedom and that constructionist techniques must not be used to obstruct it from this course. As Lord Atkin once remarked in relation to outdated concepts of the Common Law: "when the ghosts of the past [out-dated Common Law concepts] stand in the path of justice clanking their medieval chains, the proper course for the judge is to pass through them undeterred."[104] Aguda JA stated in *Attorney General v. Dow*[105] that the primary function of courts of law is to make the law 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.[106] Speaking of the need of the law to progressively develop in order to respond to the needs of society, Justice Gubbay had this to say:

> Law in a developing country cannot afford to remain static. It must undoubtedly be stable, for otherwise reliance upon it would be rendered impossible. But at the same time if the law is to be a living force it must be dynamic and accommodating to change. It must adapt itself to fluid economic and social norms and values and to altering views of justice. If it fails to respond to these needs and is not based on human necessities and experience of the actual affairs of men rather than on philosophical notions, it will one day be cast off by the people because it will cease to serve any useful purpose. Therefore the law must be constantly on the move, vigilant and flexible to current economic and social conditions....Today the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital role to play in moulding and developing the process of social change. The Judiciary can and must operate the law so as to fill the necessary role of effecting such development.... It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the Judiciary than by the Legislature. This is because Judges ... do not merely discover the law, but they also make law. They take part in the process of creation. Law making is an inherent and inevitable part of the judicial process.[107]

In essence, the law must be progressive and accommodative of altering views of justice to maintain relevance in society. In the recent age, the momentum of change in law has been coming from human rights principles that seek to engi-

103 *Ibid.*, p. 831.
104 *United Australia Ltd. v. Barclays Bank Ltd* [1941] AC 1, p. 29.
105 *Dow* case 1992, p. 133.
106 *Ibid.*, p. 166.
107 *Zimnat Insurance Co. Ltd. v. Chawanda* 1991, p. 831.

European Journal of Law Reform 2015 (17) 1
doi: 10.5553/EJLR/138723702015017001005

neer a just and fair society for all who live in it. The relevance and significance of courts of law in this regard is to pick and choose progressive elements of foreign jurisprudence law and adapt them to their legal environments for the benefit of the people in their own country. In *Ahmed v. Attorney-General*,[108] Collins Ag J 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",[109] warning against the "dangers of any attempt to inculcate a culture of isolationism against the unstoppable juggernaut of globalisation".[110] In the process, the courts must modify or abolish ancient legal principles that are no longer capable of responding to aspirations of citizens in modern democracies. Courts of law are at large to adapt and modify both the Common Law and customary law rules to reflect society's changing circumstances. Speaking within the context of the Common Law, O'Regan has opined that judges are empowered to develop legal principles to the extent necessary to meet justice.[111] Propounding the judicial philosophy underlying the modification and development of Common Law rules by judges, Innes CJ stated in *Blower v. Van Norden* that:[112]

> There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions. And it is for the Courts to decide when the modifications, which time has proved to be desirable, are of a nature to be effected by judicial decision, and when they are so important or so radical that they should be left to the Legislature.

To this end, it is submitted that the Botswana high judicature missed golden opportunities in the *Matoso* and *Tsawe* cases to strike down the rule under discussion on account of its incompatibility with the values and conceptions of human dignity. It appears strange that in both cases courts elected to rely on precedents of another era while ignoring current decisions that abolish the rule such as the *Bhe* case by the South African Constitutional Court, the *Lotta Frans* case by the Namibian High Court, the cases of *Weber v. Aetna Casualty and Surety* and *Levy v. Louisiana* by the US Supreme Court and the cases of *Marckx v. Belgium*, *Mazurek v. France*, and *Inze v. Austria* by the European Court of Human Rights. All these cases are converging in their profound and symbolic message, namely that all children matter – whether born in or outside wedlock – and that they are entitled to equal rights as children. The sentiments expressed by Masuku J in the *Mosie-*

108 [2002] 2 BLR 431 (HC).
109 *Ibid.*, p. 440.
110 *Ibid.*
111 K. O'Regan, 'The Best of Both Worlds? Some Reflections on the Interaction between the Common Law and the Bill of Rights in Our New Constitution', *Potchefstroom Electronic Law Journal*, Vol. 2, No. 1, 1999, p. 4.
112 [1909] TS 890, p. 905.

nyane case denouncing the rule are also encouraging. It is hoped that they constitute flickers of the emergence of a new legal policy in Botswana that views all children as deserving of concern and self-concept, whether born in or outside a matrimonial setup. It must be noted that the final cause of law is the welfare of society – of which children form an integral part.

In ultimate analysis, it is important to recognise that what is actually in issue about the impugned rule is not only material equality between marital and extramarital children in inheritance but in both more abstract, symbolic and concrete terms, equality of the rights conferred by descent. For full equality to be achieved, the right to affiliation to one's father must be made equal for all children in every respect conceivable so that the possibility for establishing or contesting descent will no longer depend on the parents' legal status. Global trends indicate that the time to abolish this rule is now. There is ample evidence on the global scene that there is a sustained desire to put to an end all discrimination and abolish all inequalities based on birth or descent. On 15 October 1975, the European Convention on the Legal Status of Children Born out of Wedlock[113] was adopted in Strasbourg, France. In the spirit of this Convention, many Western European countries, such as the Federal Republic of Germany, Great Britain, the Netherlands, France, Italy, and Switzerland, have adopted new legislation radically altering the traditional structure of the law of affiliation and establishing almost complete equality between legitimate and illegitimate children.[114] It is suggested that African states should adopt a similar treaty. Although the implementation of this treaty will be hamstrung by the inertia on the part of African states in ratifying or domesticating it, as is usually the case, it will still remain important in creating a norm that strives for equality between children. Equally important, the African Commission must also pass a resolution condemning the perpetuation of this rule. This will make countries that still retain it, such as Botswana, to re-think its validity in the light of societal changing circumstances.

H Conclusion

This article has attempted to demonstrate that the rule that denies children born out of wedlock the right to inherit from their fathers is inimical to the children's constitutional rights to equality, non-discrimination, and dignity and needs to be abolished. Indeed, Aguda JA pointed out in the *Dow* case that constitutional rights should not be whittled down by principles derived from the Common Law.[115] The judge can also safely be understood to include customary law in this regard. The inegalitarian status of non-marital children is no longer supportable

113 Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/085.htm> (accessed 17 November 2014).

114 Icelandic Human Rights Centre Website, 'Concept and Importance of the Principle of Non-Discrimination', available at: <www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-equality-and-non-discrimination/concept-and-importance-of-the-principle-of-non-discrimination> (accessed 17 November 2014).

115 *Dow* case 1992, p. 170.

European Journal of Law Reform 2015 (17) 1
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since the factual and temporal circumstances have now changed to shun discrimination and embrace equality and non-discrimination. We must pause here and state that the final cause of law is the welfare of society. Thus, in interpreting and applying the law, the courts should endeavour to do justice to society by protecting the rights of all its members. In this connection, Justice Cardozo of the US Supreme Court remarked that:

> The final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. Ethical considerations can no more be excluded from the administration of justice which is the end and purpose of all civil laws than one can exclude the vital air from his room and live. Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all. There is an old legend that on one occasion God prayed, and his prayer was "Be it my will that my justice be ruled by my mercy." That is a prayer which we all need to utter at times when the demon of formalism tempts the intellect with the lure of scientific order. I do not mean, of course, that judges are commissioned to set aside existing rules at pleasure in favor of any other set of rules which they may hold to be expedient or wise. I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.[116]

With the above perspective in mind, it is clear that the rule under discussion is a relic of the past not befitting a democratic society founded on the sacred tenets of human dignity, non-discrimination, equality, and freedom such as Botswana and has lost all social currency. If the law is to be a living force, it must be dynamic and accommodative to change. The present rule is an ossified construct of law which is completely impervious to change and completely out of keep with modern conceptions of justice within the larger scheme of children's rights. As argued above, this rule must be expressly and statutorily abolished in order to establish equality or parity between marital and non-marital children. This equality must be structural and extend beyond inheritance and pervade all spheres of life in which extra-marital children still experience discrimination and prejudice. However, presently, there are no indications that parliament is intent on abolishing this rule. This leaves the job to the courts to strike it down. The position is now settled that courts have the latitude in appropriate cases, such as those involving the rule in question, to make law.[117] The last point to make in conclusion is that children cannot be blamed for conditions of their birth, for which conditions they bear no responsibility. It is hoped that this article will result in a long-awaited

116 B.N. Cardozo, 'Lecture II: The Methods of History, Tradition and Sociology', *The Nature of the Judicial Process*, 1921, quoted in O.B.K. Dingake 'The Role of the Judiciary and the Legal Profession in Protecting the Rights of Vulnerable Groups in Botswana: Using the Courts to Protect Vulnerable People: Perspectives from the Judiciary and Legal Profession in Botswana, Malawi and Zambia', 2015, 21.

117 *Joseph Svunurai Muringaniza v. Phillipa Munyikwa* [2003] ZWBHC 102 [per Ndou J].

abolition of inequalities associated with the law of descent, based on conditions of birth, and, thus, establish the principle that children should be treated equally regardless of descent.

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