IN THE HIGH COURT OF BOTSWANA HELD AT GABORONE

MAHGB-000291-14

In the matter of:

[G……] [K…….] **Applicant**

And

[B……..] [O…….] [K……..] **1st Respondent**
[C……..] [G……..] [L…..] [K…] **2nd Respondent**
[M……..] [T……..] **3rd Respondent**
The Attorney General **4th Respondent**

Mr. U. Ndadi (with Mr. P. Molebatsi and Mr. T. Bobodhla) for the Applicant
Mr. D. Moloise for the 4th Respondent

J U D G M E N T

DINGAKE J:

Introduction

1. This is an application in which the applicant, Mr. K……., is challenging the constitutionality of Section 4 (2) (d) (i) of the Adoption of Children Act Cap 28:01, in so far as it does not require his consent for the adoption of his child, just because such child was not born in wedlock.

2. The applicant's case is that he is being discriminated against on the basis of sex or marital status.

3. The 1st Respondent, although having been served with the application, did not file any opposing papers within the time allowed by the rules, nor within the extended period. Her last minute attempt to postpone this matter was rejected by this court because she simply told the court that she has been too busy to attend court papers timeously. The casual manner in which she treated this matter and her open contempt of the processes of this court were intolerable.

4. Fortunately, for the 1st, 2nd, 3rd Respondents and the court, the Attorney General, who opposes this matter has filed comprehensive heads to assist the court.

5. The 1st Respondent, is the 2nd Respondent's mother. The 2nd respondent, C……. is the child at the centre of the contemplated adoption proceedings, the subject matter of this litigation.

6. The 3rd Respondent is the boyfriend to the 1st Respondent, who seeks to adopt the 2nd Respondent.

Factual background

7. The facts underpinning this litigation are largely common cause. The applicant's averments which have not been contradicted by any opposing papers stand as the truth.

8. The applicant, Mr. G…….. K…… is the biological father of a female minor, called C……. G……. L……. K…… (Hereinafter referred to as

C……) who was a product of a brief romantic relationship. She came into this world in 2000.

9. C……'s parents were not married at the time of her conception, nor at the time of her birth. Their romantic relationship ended before she was born.

10. The applicant has played an active role in his daughter's life, including providing care and support during the 1st Respondent's pregnancy and following the child' birth.

11. Once the child was born, the applicant sought to support the child through providing finances and supplies. The applicant continued to follow up on the child's wellbeing, meeting the child when the 1st Respondent permitted him to do so.

12. It is not in dispute that between 2004 and 2006, the applicant went to Norway to further his studies. His wife agreed to be available to attend to

the child's needs while he was away. The 1st Respondent, the child's mother, was informed and understood the arrangement. It is also not in dispute that the applicant's wife contacted the 1st Respondent regularly during this time to check on the child's wellbeing on his behalf.

13. Upon his return to Botswana in 2006, the applicant reconnected with the child and continued to support her. The child spent at least one weekend every month with him and his wife.

14. It would appear that in due course of time, the 1st Respondent's relationship with the 3rd Respondent entered a rough patch. In consequence of this, the 1st Respondent asked if the child could live with the applicant. They agreed that from 2007, the child would stay with the applicant and that he would put the child through school. The applicant was happy with this arrangement as he desired to raise the child with her half-siblings in his home.

15. In 2007, the child moved in with his family and was enrolled in an English Medium School. They moved to M…… with the 1st Respondent's

consent. During school holidays, the applicant arranged that the child visit her mother at his expense.

16. Within a few months, ominous signs of trouble started to show. The 1st Respondent contacted the applicant indicating that the 3rd Respondent had threatened to find and kill the child. Concerned about his child's safety, the applicant and his wife reported the threat to the police who questioned the boyfriend. The boyfriend admitted to having threatened to kill the child. The police released the 3rd Respondent with a warning that he should stay away from the child.

17. During the Christmas holidays in 2007-2008, the applicant arranged for the child to be with her mother. After the child returned to the applicant, the 1st Respondent contacted him and demanded that the child be returned to her to live together with the boyfriend. The applicant, concerned for his child's welfare, tried to reason with the 1st Respondent and sought the assistance of social workers.

18. In due course of time, the social workers undertook to conduct an assessment and advised that the child should be returned to her mother in the meanwhile.

19. Shortly thereafter, the applicant was contacted by the 1st Respondent's sister who indicated that the 1st Respondent had abandoned the child after arguing with the boyfriend. The child eventually went to stay with her maternal grandmother.

20. As months ticked by, the applicant appeared to have been struck by doubt as to whether he is the father to the minor child and arranged for a paternity test to be conducted. His paternity was confirmed and he continued to support the child. On the papers, it is not apparent what could have triggered the doubt.

21. In no time the applicant launched an application for shared custody of the child in the Magistrate Court. The court considered two social worker's reports. One report recommended that the applicant be granted custody over the child and the 1st Respondent be given visitation and

access rights. The other report recommended that the child stay with the 1st Respondent and the applicant be given access and visitation rights.

22. It is instructive that the court found that the applicant loves his daughter so much but so does the mother. The court considered that there were no compelling reasons to remove the child from her mother because she was at no threat of harm where she was then staying with her aunt and that the child had expressed a preference to stay with her mother.

23. The court ordered that the child should stay with the 1st Respondent and granted visitation rights to the applicant, who was to provide further support as necessary and in agreement with the 1st Respondent.

24. The applicant avers in his papers that thereafter he was denied access to the child and has not been permitted to see her despite the court order. He nevertheless continued to support her by providing finances to get her to school and providing school uniforms and attending to her medical needs through his medical aid.

25. The applicant fears that the 2nd Respondent is in the process of being adopted by the 3rd Respondent without his consent. He avers that he has no way to ascertain whether or not the child has been adopted as he is irrelevant in the whole process.

26. The above constitutes the undisputed facts that underpin this litigation.

The case of the Applicant

27. The applicant's case is that Section 4 (2) (d) (i) of the Adoption of Children Act Cap 28:01, in so far as it does not require his consent for the adoption of the child, just because the said child was born out of wedlock, violates his constitutional rights, being freedom from discrimination, freedom from inhuman and degrading treatment and the right to fair hearing.

28. The applicant, relying on a number of well-known cases in this jurisdiction, such as **Attorney General v Dow (1992) BLR 119 (CA) and**

Diau v Botswana Building Society 2003 (2) BLR 409 (IC) urges the court to interpret the Constitution purposively and generously.

29. It is the applicant's case that precluding the requirement of a biological father's consent, in all circumstances, for the adoption of his child, discriminates unjustifiably against him, on basis of his sex and marital status, in violation of Section 15 of the Constitution.

30. The applicant points out that discrimination based on sex is prohibited by Section 15 of the Constitution and further that although marital status as a ground is not listed in Section 15, it is similarly impermissible to discriminate on that basis.

31. Mr. Ndadi, learned counsel for the applicant, relying on the authority of the Court of Appeal decision in **Dow**, cited, supra, argued that the grounds listed in Section 15 of the Constitution, upon which it is not competent to discriminate, are not exhaustive.

32. Mr. Ndadi argued that in determining whether a particular class of people are protected under Section 15 (3), the courts have looked to whether there is an identifiable group or class of persons who suffer discrimination as such a group or class for no other reason than the fact of their membership of the group or class.

33. According to Mr. Ndadi, learned counsel for the applicant, Mr. K..... is subjected to differential treatment solely because he was not married to the 1st Respondent.

34. According to Mr. Ndadi, the differential treatment afforded to unmarried fathers under Section 4 (2) (d) (i) is irrational and unfair in that it, *inter alia*, allows, in effect, for the unilateral termination of the rights and duties of biological fathers, and entrench the view which is contrary to the best interest of the child, that fathers do not have or should have less attachment towards their children, particularly when not married.

35. Mr. Ndadi contended that the effect of denying unmarried fathers a legally protected relationship with their children was to discriminate

unfairly and irrationally against them on the basis of sex or marital status.

36. Mr. Ndadi, placing heavy reliance on the South African case of **Fraser v Children's Court Pretoria North and Others (1997) ACC 1**, submitted that a father who has shown interest in the child and actively participated in her upbringing such as the applicant, should be allowed to withhold consent to the adoption of his child.

37. Mr. Ndadi also relied on the Canadian case of **In Re MacVicar and Superintendent of Family and Child Services, et al, 34 DLR (4th) 488 (B.C.SC. 1986) (Canada, British Columbia, Supreme Court),** which, consistent with the **Fraser** decision, found no justification for discriminating against unwed fathers.

38. The applicant also argues that to deny him the right to withhold consent to his child's adoption is treatment that dehumanizes him and is undignified in that it terminates his manifested connection with his child. The applicant says that to deny him parental relationship with his child is to deny him an intimate aspect of his humanity.

39. The applicant also complains that Section 4 (2) (d) (i) also violates his right to a fair hearing to the extent that it does not require his consent for the adoption of his child. He says that this denial violates Section 10 (9) of the Constitution.

The case of the Attorney General

40. The Attorney General opposes the application.

41. The position of the Attorney General is that Section 15(3) of the Constitution is not violated because the applicant is simply complaining that he is being discriminated against by virtue of being unmarried as opposed to a married man. Consequently, it is argued that he cannot complain that he is being discriminated on the basis of sex.

42. Mr. Moloise, learned counsel for the 4th Respondent, argued that the description of the applicant as an unmarried man relates to social standing and not to any of those grounds mentioned in Section 15(3) and certainly cannot be squeezed in to the sex category.

43. According to Mr. Moloise, learned counsel for the Attorney General, the social standing of being an unmarried father is not one of the listed grounds in Section 15, upon which it would not be permissible to discriminate.

44. Mr. Moloise submitted further that Section 15 (3) does not prohibit discrimination on grounds of social standing or status and certainly not marital status, and therefore this prayer should be dismissed.

45. Mr. Moloise, learned counsel for the Attorney General, pointed out that the matter before the court concerns adoption, one of those instances specifically prohibited by Section 15 (4) (c).

46. According to Mr. Moloise, Section 4(2) (d) (i) of the Adoption Act is an attempt at the codification of both the common law as well as the customary laws of Botswana. Mr. Moloise submitted that in order to understand the rational and justification behind Section 4(2)(d)(i) one must look at it from its origin and the purpose it served.

47. The Attorney General argued that in terms of our customary law, a child born out of wedlock belongs to the mother's family.

48. According to Mr. Moloise, in terms of customary law, the father of a child born out of wedlock has no legal rights over the said child due to the surreptitious nature of conception. Such child, the court was told, is or was normally referred to as "ngwana wa dikgora" to denote his illegitimate status. The inspiration for this line of reasoning was derived from Schapera, who wrote on Botswana Customary Law many, many decades ago.

49. The Attorney General is not wholly wedded to Schapera, lock, stock and barrel, because Mr. Moloise concedes that the above position has changed through various legislative instruments which now see the biological father being recognized as the father of the child, although his rights are only limited to the best interests of the child in so far as upbringing is concerned.

50. According to Mr. Moloise, learned counsel for the Attorney General, the biological father acquires a limited right to be consulted only where the biological father has been actively involved in the child's life from the beginning.

51. The Attorney General argued that in terms of customary law, the infringing father was and is still charged a number of beasts as a sanction for having violated, not only the lady in question, but for also disrespecting the mother's family and bringing shame upon them.

52. The Attorney General submits that the above, is the rationale and justification behind Section 4(2)(d)(i) of the Adoption of Children Act.

53. The 4th Respondent also denies that Section 7 of the Constitution is implicated and applicable in this matter.

54. With respect to the applicant's argument that Section 10 (9) of the Constitution has been violated by permitting the adoption to proceed, while the applicant has a court order permitting him visitation and other

privileges and that this would be tantamount to taking away those rights without giving him a fair hearing, the Attorney General argues that if the applicant feels that any adoption will take away his rights, he is permitted and should correctly approach the court for an appropriate order wherein Section 10 (9) shall apply.

55. The Attorney General also argued that there is no conflict between the Adoption Act and the Children's Act. Mr. Moloise argued that if the child is adopted, the consequences thereof would be to terminate the rights of the biological father as are granted or contained in the Children Act.

56. It is plain that the applicant approached this court to assert his right to equality and not to be discriminated against. In the result, it is imperative to consider the concept of equality, broadly defined.

Conceptual framework

57. Equality is one of the philosophical foundations of human rights and it is intimately connected to the concept of justice. The concept at its core,

speaks the language of the Universal Declaration of Human Rights (UDHR) of 1948, which stipulates that:

> "*All are equal before the law and are entitled without any discrimination to equal protection of the law*" (See **J Cooper "Applying equality and non-discrimination rights through the Human Rights Act, in G Moon (ed) Race discrimination: Development and using a new legal framework (2000) 39**); (See also, **Southern African Litigation Centre**, et al: **Using the Courts to Protect Vulnerable People: Perspective from the Judiciary and Legal Profession in Botswana, Malawi, and Zambia Southern Africa."** (**2015**)

58. The history of humanity would bear testimony to the assertion that human beings have, overtime, suffered discrimination on irrational grounds whose net effect was to rob some members of the human race of dignity.

59. The injunction "all are equal before the law and are entitled without any discrimination to equal protection of the law" is not a rhetorical statement. It is a substantive statement founded on the sad lessons of

history. The above phrase has stirred hearts around the world and courts across the globe have a sacred duty to give effect to it in practice.

60. The idea that all are equal before the law was considered radical prior to 1948, even though today we consider such phrase as expressing the norm. The idea that all are equal before the law inspired many subsequent international legal instruments such as the European Convention of Human Rights of 1953, that inspired the Botswana Constitution.

61. The European Convention of Human rights was opened for signature on the 4th of November, 1950, in Rome. It was ratified and entered into force on the 3rd of September, 1953. It is overseen and enforced by the European Court of Human Rights.

62. As history teaches, our Constitution pledged more than what we, as a people, were willing to grant in fact, as exemplified by the opposing arguments of the Attorney General advanced in the **Attorney General v Dow1992 BLR 119 (CA)**case. In the aforesaid case, some of the

arguments advanced by the Attorney General demonstrated a continuing reluctance to extend equal protection to women, on the ground that the framers of the Constitution deliberately intended to discriminate on the basis of sex because Botswana is a patriarchal society. However, the court in rejecting the above argument made all Batswana heirs to the promise of the equal protection clause in Section 3 of the Constitution. This court shall determine, in due course, whether the applicant was one such heir.

63. The Concept of equality and that of non-discrimination are considered to be the positive and negative statements of the same principle.

64. Benson has pointed out that:

> "*Generally speaking, equality and non-discrimination are positive and negative statements of the same principle. One is treated equally when one is not discriminated and one is discriminated against when one is not treated equally*" (see **S Benson "Gender Discrimination under EU and EUCHR Law: Never should the Train meet? 8:4 Human Review (2008) 647-982 p652**)

65. Equality is a problematic concept ridden with controversy. At its core, it communicates the idea that people who are similarly situated in relevant ways should be treated similarly.

66. A distinction must be drawn between formal and substantive equality. Formal equality simply means sameness of treatment. It asserts that the law must treat individuals in like circumstances alike. Substantive equality on the other hand requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal.

67. Simply put, formal equality requires that all persons are equal bearers of rights. Formal equality does not take actual social and economic disparities between groups and individuals into account. Substantive equality requires an examination of the actual social and economic conditions of individuals in order to determine whether the right to equality has been violated.

68. The above distinction, especially the emphasis on substantive equality, requires a thorough understanding of the impact of the discriminatory action upon a particular category of people concerned, in order to determine whether its overall impact is one which furthers the constitutional goal of equality or not. It follows, therefore, that a classification which is unfair in one context may not necessarily be unfair in a different context.

69. It is not every differentiation that amounts to discrimination. Consequently, it is always necessary to identify the criteria that separate legitimate differentiation from constitutionally impermissible differentiation. Put differently, differentiation is permissible if it does not constitute unfair discrimination.

70. The jurisprudence on discrimination suggests that law or conduct which promotes differentiation must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose.

71. The rationality requirement is intended to prevent arbitrary differentiation. The authorities on equality suggest that the right to equality does not prohibit discrimination but unfair discrimination. The question that often arises is what makes the discrimination unfair.

72. The determining factor is the impact of the discrimination on its victims. Unfair discrimination principally means treating people differently in a way which impairs their fundamental dignity as human beings. The value of dignity is thus of critical importance to understanding unfair discrimination. Unfair discrimination is differential treatment that is demeaning. This happens when law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when law or conduct perpetuates or does nothing to remedy historical prejudices and stereotypes.

73. The principle of equality attempts to make sure that no member of society should be made to feel that they are not deserving of equal concern, respect and consideration and that the law is likely to be used against them more harshly than others who belong to other groups.

Challenges, tensions and contradictions in interpreting equality clauses

74. Difficulties of interpreting equality clauses remain. These problems all derive from a fundamental problem: it remains unclear as to what 'treating persons equally' actually involves. Certain types of discrimination may be necessary and appropriate: other types may be suspect or offensive. Distinguishing between 'acceptable' and 'unacceptable' forms of discrimination may thus be complex and controversial.

75. It may also be unclear when it might be justified to give special advantages to some groups to compensate for past disadvantage, or when exceptions to a standard prohibition on a particular type of discrimination should be permitted.

76. The South African Supreme Court has in the main, adopted an 'anti-classification' approach, whereby the use of 'suspect' distinctions such as colour or ethnic origin is treated as inherently unconstitutional, even where such distinctions are being used to identify groups in need of

special assistance. At times, however, the Court has also veered towards an 'anti-subordination' approach, to issues of equality, whereby the emphasis is placed on eliminating group disadvantage rather than on prohibiting the use of suspect characteristics. (See **Prinsloo v Van der Linde 1997 (3) SA 1012; Harsken v Lane No 1998 (1) SA 300; President of the Republic of South Africa v Hugo 1997 (4) SA 1; National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC)**).

77. At the heart of this dispute is the question whether the Adoption of Children Act, Section 4 (2) (d) (i) thereof, constitutes constitutionally impermissible discrimination on the basis of sex or marital status, having regard to both Sections 3 and 15 of the Constitution of Botswana.

78. Before analyzing Sections 3 and 15 of the Constitution, and applying it to the facts of this case, it makes sense to remind ourselves of the guiding principles to constitutional interpretation.

The Approach of the Courts to Constitutional Interpretation

79. In this section, I refrain from reproducing the guiding principles that are now trite and I will deliberately attempt to focus on those that are more in tune with the present matter; those that relate to interpreting the Constitution as a living document.

80. In interpreting the Constitution, the courts must reflect the nation's best understanding of its fundamental values. The power of constitutional decisions rest upon the accuracy of the courts' deep appreciation of the values of the societies, of which it is the guardian of the rights granted to everyone. For as Alexandra Hamilton said; independent courts serve as a barrier to the encroachment and oppressions of those bestowed with public and private power and plays important role in safe guarding individual rights and liberties.

81. A Constitution must be interpreted in its contemporary social context, not according to a situation that prevailed when it was adopted, otherwise, as Friedman J observed "it will cease to take into account the growth of the society which it seeks to regulate" **Nyamakati v President of Bophuthatswana 1992 (4) SA 540 at 567)**.

82. A Constitution must be interpreted as a living document. On this view, the Constitution is understood to grow and evolve over time as the conditions, needs, and values of our society change. On this approach, constitutional interpretation must be informed by contemporary norms and circumstances, not what the original framers had in mind.

83. It is generally agreed that to be faithful to the Constitution is to interpret its words and to apply its principles in ways that sustain their vitality over time. Fidelity to the Constitution requires judges to ask not how its general principles would have been applied when the Constitution was crafted, but rather how those principles should be applied today, in accordance with the values and dynamics that inform the contemporary era.

84. The men, (yes–men) who gathered in Lobatse and other venues to craft our Constitution, prior to our independence in 1966, could not have imagined that one day the court would outlaw discrimination based on sex, given the deep seated nature of patriarchy at that time. But our contemporary society frowns upon discrimination based on sex and this court has to reflect the contemporary norms of society. The credit for

keeping the Constitution up to date does not belong to the framers of the Constitution. It belongs to the judiciary that is enjoined to interpret the Constitution as a living document. It belongs, to the judiciary that refused to acquiesce or accept the argument that the framers intended to discriminate on the basis of sex, by omitting the word "sex" in the prohibited grounds stated in Section 15 (1).

85. The courts, in interpreting a Constitution as a living document, must be agents of change, and should not be stuck in the ideas and values of yesteryear – for, as it is has often been said, sometimes change is essential for fidelity, but refusing to change in the light of changed circumstances may amount to infidelity and working counter to the dictates of the Constitution.

86. Interpreting the Constitution as a living document requires that a text that falls for determination be construed to have the capacity to adapt to a changing world, otherwise, rights declared in words may be lost in reality.

87. Strict constructionists, who urge us to stick to the original meaning the framers intended and even urge us not to readily invoke the Constitution but rather to adopt the doctrine of avoidance, tend to simplify and underrate the value and great purpose of the Constitution, their reasoning is often appealing on the surface, but on close scrutiny, it is unduly restrictive and does grave injustice to the educational value of invoking the supreme law and the resulting public benefit. Constitutional phobia should not be one of the attributes of judges in a jurisdiction such as ours, where the Constitution is the mother of all laws.

88. Currie argues that the above approach, of avoiding the Constitution, translates into a preference for decisions in constitutional cases that are shallow and narrow, minimally reasoned and confined in their impact on subsequent cases as opposed to deep and broad (widely reasoned and with wide implications for subsequent cases (see **Currie, "Bill of Rights jurisprudence", Annual survey of South African Law 2001 at 45**)

89. It seems to me that reading the Constitution's text and principles in light of changing norms and societal consequences is not radical. What is radical is an insistence that the Constitution be given a mechanical and static meaning divorced from contemporary context.

90. Having regard to all the above, it makes sense to have regard to the relevant statutory framework: Adoption of Children Act sought to be impugned and the broad statutory framework governing the rights of children, being the Children's Act of 2009.

A synopsis of relevant statutory framework governing adoption and rights of children

91. Section 4 2 (d) (i) of the Adoption of Children Act provides as follows:

> *(1) The adoption of a child shall be effected by the order of the court of the district in which the adopted child resides, granted on the application of the adoptive parent or parents.*
>
> *(2) A court to which application for an order of adoption is made shall not grant the application unless it is satisfied-*
>
> *(a) that the applicant is or that both applicants are qualified to adopt the child;*
>
> *(b) that the applicant is or that both applicants are of good repute and a person or persons fit and proper to be entrusted with*

the custody of the child and possessed of adequate means to maintain and educate the child;

(c) that the proposed adoption will serve the interests and conduce to the welfare of the child;

(d) that consent to the adoption has been given –

(i) by both parents of the child or, if the child is illegitimate, by the mother of the child whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband, as the case maybe."

92. Section 4 (2) (d) (i) is quite clear. Essentially, it contemplates that consent for the adoption of a child born out of wedlock can only be granted by the mother of the child. The father is irrelevant and is of no consequence.

93. The question that arises is whether the unwed father's rights or interests in his child are entitled to protection?

The position of unwed fathers in the Children's Act of 2009

94. The Children Act of 2009 recognises the unmarried father as a parent and acknowledges that there is a relationship between him and his offspring - with the exception of those children sired through rape or incest.

95. The current Children Act, with its enhanced acknowledgment of the parental role of unmarried biological fathers, would seem to suggest that *some* biological fathers hold protected rights regarding the parent-child relationship, especially as seen from the perspective of the child and their best interests, which are to be considered paramount in all decisions concerning children.

96. The Children Act defines the parent to include biological parents (no distinction is made on the basis of marital status) with the exception of those biological fathers whose children were sired through an act of rape or incest with the biological mother.

97. The stated objectives of the Act include acknowledgement of the:

"*primary responsibility of parents … to care for and protect children, and to support and assist them in carrying out that responsibility*." (See **Section 4(d)**)

98. The Act contains a Bill of Children's Rights to supplement the rights set out in Chapter II of the Constitution. These rights include the right to a birth certificate indicating the name and particulars of the biological father "whether the child is born in or out of wedlock." (See **Section 12(4)**)

99. Section 13 of the Children Act provides that a child has a right to know and be cared for by both biological parents.

100. Section 28 goes further and outlines the rights of every parent, including those of the unmarried father. These rights (subject to the best interests of the child) include the right to: have the child live with them; be involved in the child's upbringing; and to participate in court and other proceedings relating to his child.

101. The Children Act has established that the unmarried father may no longer be categorically excluded from the legal definition of "parent" and thus must participate in legal proceedings concerning the future of his child.

Comparative Case Law on the position of the Unwed father with respect to adoption of his child

United Kingdom/Europe

102. Currently, unmarried fathers in England receive protection only when they embrace fatherhood or express commitment to their children's mothers. The general rule is that where a family tie exists between parent and child, then the State must act in a manner that allows that tie to be developed. Failure to do so will amount to a breach of Article 8 of the European Convention on Human Rights (the European Convention).

103. In **Keegan v Ireland [1994] 18 EHRR 342** an unmarried couple living together planned to have a child. Shortly after the child was conceived, the relationship broke down. The father saw his baby once. The child

was placed for adoption without his knowledge or consent. He applied to be appointed the child's guardian, but by the time his application came to be decided, the child had formed bonds with the prospective adopters and could not be moved without damage to her welfare.

104. In the case of **S. v The Adoption Board [2009] IEHC 429**, the court held that in establishing whether family life exists as between a natural father and his child, it is apparent that the court will adopt a pragmatic approach in identifying the necessary personal ties. If this relationship exists, a very high threshold must be reached to demonstrate that those ties have been extinguished by subsequent events. If a natural father who enjoys family life with his child is deprived of any participation in adoption proceedings, this may or may not result in a finding of a breach of Article 8. It will have to be established, in the context of the specific case, whether such a decision to exclude him was "*in accordance with the law*", pursued a "*legitimate aim*" and whether it was "*necessary in a democratic society*", in the sense of being a proportionate measure in the circumstances. It is clear that a child's interests may override that of a natural parent.

105. In **Re H; Re G** (Adoption: Consultation of Unmarried Fathers), **[2001] 1 FLR 646** (first case), the parents had a relationship, including cohabitation, which had lasted for several years and the father had shown continuing commitment to the elder child. The father was therefore entitled to respect for a family life with the child under Art 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

106. The court held that to place the child for adoption without notice to the father would *prima facie* be in breach of this right, and in accordance with Art 6 (1) and under r 15(3) of the Adoption Rules 1984, the father should be given notice and made a respondent with the opportunity to be heard.

United States of America

107. The United States Supreme Court has protected fathers' legal rights mostly through the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Although the parent-child relationship is

therefore recognised to merit protection, this protection is conditioned on certain specific circumstances that trigger it.

108. The courts in the United States have grappled with the question of the rights of putative fathers. In the 1972 case of **Stanley v. Illinois**, **404 U.S. 645 (1972)** Joan Stanley lived with Peter Stanley intermittently for 18 years, during which time they had three children. When Joan Stanley died, Peter Stanley lost not only her but also his children.

109. Under Illinois law, the children of unwed fathers become responsibility of the State upon the death of the mother. Accordingly, upon Joan Stanley's death, in a dependency proceeding instituted by the State of Illinois, Stanley's children were declared the responsibility of the State and placed with court-appointed guardians. Stanley appealed, claiming that he had never been shown to be an unfit parent and that since married fathers and unwed mothers could not be deprived of their children without such a showing, he had been deprived of the equal protection of the laws guaranteed him by the Fourteenth Amendment.

110. The Supreme Court held that the State of Illinois was barred, as a matter of both due process and equal protection, from taking custody of the children of an unwed father, absent a hearing and a particularised finding that the father was an unfit parent. The court concluded, on the one hand, that a father's interest in the "companionship, care, custody, and management" of his children is "cognizable and substantial," [at 651-652] and, on the other hand, that the State's interest in caring for the children is "*de minimis*" if the father is in fact a fit parent, [at 657-658].

111. In another key US case on the matter, **Quilloin v. Walcott** (434 US 246 (1978)) the issue was the constitutionality of Georgia's adoption laws as applied to deny an unwed father authority to prevent adoption of his illegitimate child. The child was born in December 1964 and had been in the custody and control of his mother, appellee Ardell Williams Walcott, for his entire life. The mother and the child's natural father, appellant Leon Webster Quilloin, never married each other or established a home together, and in September 1967 the mother married appellee Randall Walcott.

112. In March 1976, she consented to adoption of the child by her husband, who immediately filed a petition for adoption. Appellant attempted to block the adoption and to secure visitation rights, but he did not seek custody or object to the child's continuing to live with appellees. Although appellant was not found to be an unfit parent, the adoption was granted over his objection.

113. The Appellant contended that even if he was not entitled to prevail as a matter of due process, principles of equal protection required that his authority to veto an adoption be measured by the same standard that would have been applied to a married father.

114. In particular, appellant asserted that his interests were indistinguishable from those of a married father who is separated or divorced from the mother and is no longer living with his child, and therefore the State acted impermissibly in treating his case differently.

115. The Supreme Court held that:

"... the appellant's interests are readily distinguishable from those of a separated or divorced father, and accordingly believe that the State could permissibly give appellant less veto authority than it provides to a married father.

Although appellant was subject, for the years prior to these proceedings, to essentially the same child-support obligation as a married father would have had, compare § 74-202 with § 74-105 and § 30-301, he has never exercised actual or legal custody over his child, and thus has never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child. Appellant does not complain of his exemption from these responsibilities and, indeed, he does not even now seek custody of his child. In contrast, legal custody of children is, of course, a central aspect of the marital relationship, and even a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of the marriage. Under any standard of review, the State was not

foreclosed from recognizing this difference in the extent of commitment to the welfare of the child."

116. The court, having found that the father has never shouldered any significant responsibility with respect to the child, concluded that the relevant laws, as applied in this case, did not deprive appellant of his asserted rights under the Due Process and Equal Protection Clauses.

117. In the case of **Caban v. Mohammed**, **441 US 380 – Supreme Court 1979,**the appellant, Abdiel Caban, challenged the constitutionality of s111 of the New York Domestic Relations Law (McKinney 1977), under which two of his natural children were adopted by their natural mother and stepfather without his consent. Section 111 of the New York Domestic Relations Law (McKinney 1977) provides in part that:

"consent to adoption shall be required as follows: . . . (b) Of the parents or surviving parent, whether adult or infant, of a child born in wedlock; [and] (c) Of the mother, whether adult or infant, of a child born out of wedlock. . . ."

118. The Supreme Court found the statute to be unconstitutional, as the distinction it invariably makes between the rights of unmarried mothers and the rights of unmarried fathers had not been shown to be substantially related to an important state interest. The court took the view that gender-based distinctions "must serve important governmental objectives and must be substantially related to achievement of those objectives" [at 388] in order to withstand judicial scrutiny under the Equal Protection Clause:

> *"Even if unwed mothers as a class were closer than unwed fathers to their newborn infants, this generalization concerning parent-child relations would become less acceptable as a basis for legislative distinctions as the age of the child increased. The present case demonstrates that an unwed father may have a relationship with his children fully comparable to that of the mother. Appellant Caban, appellee Maria Mohammed, and their two children lived together as a natural family for several years. As members of this family, both mother and father participated in the care and support of their children.[7] There is no reason to believe that the Caban children—aged 4 and 6 at the time of the adoption*

proceedings—had a relationship with their mother unrivaled by the affection and concern of their father. We reject, therefore, the claim that the broad, gender-based distinction of § 111 is required by any universal difference between maternal and paternal relations at every phase of a child's development." At 389.

119. The Supreme Court held that the effect of New York's classification was to discriminate against unwed fathers even when their identity was known and they had manifested a significant paternal interest in the child.

120. The court observed that:

"The facts of this case illustrate the harshness of classifying unwed fathers as being invariably less qualified and entitled than mothers to exercise a concerned judgment as to the fate of their children. Section 111 both excludes some loving fathers from full participation in the decision whether their children will be adopted and, at the same time, enables some alienated mothers arbitrarily to cut off the paternal rights of fathers. We conclude that this undifferentiated distinction between unwed mothers and unwed fathers, applicable

*in all circumstances where adoption of a child of theirs is at issue, does not bear a substantial relationship to the State's asserted interests." (*At 394).

121. In **Lehr v. Robertson**, **463 US 248 – Supreme Court 1983**, the question presented was whether New York has sufficiently protected an unmarried father's inchoate relationship with a child whom he has never supported and rarely seen in the two years since her birth. The appellant, Jonathan Lehr, claimed that the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as interpreted in **Stanley v. Illinois, and Caban v. Mohammed,** gave him an absolute right to notice and an opportunity to be heard before the child may be adopted. (See **Michael J Higdon (2014) "Marginalized fathers and demonized mothers: A feminist look at the reproductive freedom of unmarried men" Legal Studies Research Paper Series, Research Paper #234, 20).**

122. The court disagreed. The State of New York maintains a putative father registry. The court took the view that a man who files with that registry demonstrates his intent to claim paternity of a child born out of wedlock and is therefore entitled to receive notice of any proceeding to adopt that

child. Before entering Jessica's adoption order, the Ulster County Family Court had the putative father registry examined. Although appellant claimed to be Jessica's natural father, he had not entered his name in the registry.

> *In addition to the persons whose names are listed on the putative father registry, New York law requires that notice of an adoption proceeding be given to several other classes of possible fathers of children born out of wedlock — those who have been adjudicated to be the father, those who have been identified as the father on the child's birth certificate, those who live openly with the child and the child's mother and who hold themselves out to be the father, those who have been identified as the father by the mother in a sworn written statement, and those who were married to the child's mother before the child was six months old. Appellant admittedly was not a member of any of those classes. He had lived with appellee prior to Jessica's birth and visited her in the hospital when Jessica was born, but his name does not appear on Jessica's birth certificate. He did not live with appellee or Jessica after Jessica's birth, he has never provided them*

with any financial support, and he has never offered to marry appellee.

123. The court took a strong position upon this lack of parental interest:

The difference between the developed parent-child relationship that was implicated in Stanley and Caban, and the potential relationship involved in Quilloin and this case, is both clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," Caban, 441 U. S., at 392, his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." Id., at 389, n. 7. But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in

`promot[ing] a way of life' through the instruction of children . . . as well as from the fact of blood relationship." Smith v. Organization of Foster Families for Equality and Reform, 431 U. S. 816, 844 (1977) (quoting Wisconsin v. Yoder, 406 U. S. 205, 231-233 (1972)).

124. The above case underscored the significance of the biological connection, being that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he exploits that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. And no court ought to deny the development of that relationship where the unwed father has consistently shown that he cares for his child.

125. It seems plain from the above that in terms of the US jurisprudence, constitutional protection for a parent's right to maintain a relationship with his or her child does not derive from some kind of parental possessory right existing in a vacuum. Rather, the protection is inextricably intertwined with the parent's constant responsibility to care for the child.

126. In each case it is important that the father must also have displayed, at the earliest possible moment, an interest in taking responsibility for his child, and he must have acted upon that interest in a timely manner. Essentially, he must establish a relationship with the child to the greatest extent possible under the circumstances. It is this parent-child bond and nothing less that, according to the court, that deserves constitutional protection. (See **Dwelle cited above at 215**)

127. The parent's constitutional right to be with, provide for, and control their child is closely linked to the parent's duty to provide for the child's physical and emotional needs. According to Buchanan, the term:

> *"custody" has been used to describe this intermingling of rights and duties. In her analysis, she concludes: "that the Constitution particularly protects the custodial rights of biological parents who perform custodial responsibilities has been stated as a fact and explained in terms of tradition and natural right. That the Constitution continues to protect parent-child relationships even when parents no longer perform custodial responsibilities also has been stated as a fact and has been explained as a recognition that the emotional attachments that arise during a custodial relationship*

are worthy of protection even when the custodial aspect of the relationship no longer exists. Thus, parents who live with, provide for, and form emotional attachments with their children perform the social function of caring for children, and their interests are worth protecting. Under this analysis, unwed fathers who have custodial relationships with their children are parents whose interests are worth protecting." (See **Buchanan above at 323.**)

128. According to Shanley, the Supreme Court was correct to ground parental rights in a combination of biology and nurture. In order to determine whether an unmarried biological father has the right to consent to the adoption of his offspring, the law should look at his actions with respect to both the potential child and the mother during her pregnancy as well as after the birth. Parental rights cannot be decided without considering the complex web of relationships involved in procreative activity. (See **Mary L Shanley (1995) "Unwed fathers' rights, adoption and sex equality: Gender-Neutrality and the Perpetuation of Patriarchy" 95(1) Columbia Law Review 60, 77.**)

129. It is only when the court considers the complex web of relationships involved and the level of the biological father's commitment that it can determine where the best interest of the child lies.

130. I turn to the relevant jurisprudence of our neighbour, South Africa – a country which, like Botswana, is a constitutional democracy.

South Africa

131. In the South African case of **Fraser v. Children's Court Pretoria North and Others [1997] ZACC 1**the question of the constitutionality of Section 18(4)(d) of the Child Care Act 74 of 1983 was referred for determination to the Constitutional Court in terms of Section 102(1) of the Constitution. Section 18(4)(d) of the Child Care Act 74 of 1983 provided that a children's court, to which application for an order of adoption is made, shall not grant the application unless it is satisfied that consent to the adoption has been given by both parents of the child, or, if the child is illegitimate, by the mother of the child only.

132. The court held that the discrimination entailed by the section could not be justified. It unfairly discriminated against the fathers of certain children on the basis of their gender or their marital status. Every mother was given an automatic right to withhold her consent to the adoption of the child while this right was denied to every unmarried father. An order declaring the section unconstitutional was made and an order was made to allow the section to survive pending correction by parliament.

133. Mahomed DP pointed out that:

> *"The effect of section 18(4)(d) of the Act is that the consent of the father would, subject to section 19, be necessary in every case where he is or has been married to the mother of the child and never necessary in the case of fathers who have not been so married. In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with. But in the context of an adoption statute where the real concern of the law is whether an order for the adoption of the child is justified, a right to veto the adoption based on the*

*marital status of the parent could lead to very unfair anomalies. The consent of a father, who after his formal marriage to the mother of the child concerned, has shown not the slightest interest in the development and support of the child would, subject to Section 19, always be necessary. Conversely a father who has not concluded a formal ceremony of marriage with the mother of the child but who has been involved in a stable relationship with the mother over a decade and has shown a real interest in the nurturing and development of the child, would not be entitled to insist that his consent to the adoption of the child is necessary. The consent of the mother only would, subject to Section 19, be necessary even if the only reason why the relationship between the couple has not been solemnised through a marriage is that the mother refuses to go through such a ceremony, either on the ground that she has some principled objection to formal marriages or on some other ground. [**Para 26**].*

… A child born out of a union which has never been formalised by marriage often falls into the broad area between the two extremes expressed by the case where he or she is so young as to make the interests of the mother and the child in the bonding

*relationship obvious and a child who is so old and mature and whose relationship with the father is so close and bonded as to make protection of the father-child relationship equally obvious. There is a vast area between such anomalies which needs to be addressed by a nuanced and balanced consideration of a society in which the factual demographic picture and parental relationships are often quite different from those upon which "first world" western societies are premised; by having regard to the fact that the interest of the child is not a separate interest which can realistically be separated from the parental right to develop and enjoy close relationships with a child and by the societal interest in recognising and seeking to accommodate both." [**Para 29**]*

A synopsis of relevant local jurisprudence

134. In the olden days when the law was retrogressive, it was the position of our common law that a father of a child born out of wedlock has no relationship to his/her father. The law has since developed and now frowns upon the notion that a child may not have a legally recognizable relationship with a biological father who is not married to the mother.

135. In the case of **Motlogelwa v Khan 2006 2 BLR 147, at page 149 F-G,** Molokomme J (as she then was) expressed the position of yesteryear as follows:

> *"…the Roman Dutch law position espoused in a number of South African decisions….is well known and in its crudest form, it is that as a general rule, Roman Dutch law does not recognize a relationship between a child born out of wedlock and its father, except in so far as his obligation to maintain the child."*

136. This court and indeed the highest court in the land, (Court of Appeal) has of recent (although the circumstances are not on all fours with the present) had occasion to deal with a case involving adoption (See **Mey v July (CACGB- 134-13, High Court Case No. UAHGB-000072-12**)

137. In the case of **Mey** the respondent Joshua July, the biological father of the little girl referred to as Angel, improperly obtained a High Court order declaring Angel to be a child in need of care when he discovered that her adoptive mother (a South African national) sought to leave the country with her.

138. The child was removed from her home and placed amongst strangers at Child Line Botswana. The respondent was then given supervised access to the child, privileges that he had not previously enjoyed since he had no ongoing interaction with the child prior to that time. As a result of his appeals to the court, the little girl known as Angel was removed from her parents and her brother. Yet, as Lesetedi JA rightly pointed out: "*it was never shown at any stage that these interim orders and the removal of the child from its legal parent or her guardian was in the best interest of the minor child." [***Para 47**].

139. It is noteworthy that Lesetedi JA mentions the lack of a bond or relationship between the respondent and his biological daughter.

> *"[I]t is evident from the respondent's affidavit … that he had no bond with Angel who was now four years old. He had only seen the child once or twice in its first year of life but had not seen the child at any stage thereafter. … He had at no time assisted the appellant in any way in upbringing the child… he never took any legal steps to assert a right of access to the child until the last moment*

*when he heard that the appellant was relocating from the jurisdiction." [**Para 13**].*

140. In terms of his application for the rescission of the adoption, the court correctly pointed out that Mr July would have had to show that he was a parent of the child as contemplated under Section 8(1)(a) of the [Adoption] Act and secondly, that the order of the adoption should not have been made without his consent.

141. It must be pointed out that, the Adoption Act did not require his consent, so that the second requirement could not be shown. Since he based his rights on the Children's Act No. 8 of 2009, he still had to show that he was a parent whose consent was required in terms of that Act.

142. The court pointed out that:

"Under section 121 of the current Children's Act, the repealed Act is deemed for those purposes to have been valid and to continue until the adoption was finalized. Under the repealed Act there is no definition of a parent and in terms of the common law the consent of the father of a child

born out of wedlock has no parental rights over that child. The new Children's Act No. 8 of 2009 does not in any of its provisions require the consent of the biological father of a child born out of wedlock to be a condition precedent to the adoption of the child. The Act gives such father greater rights of involvement in the child's upbringing and outlines in detail his duties. To that extent it does not conflict with or override the Adoption Act. What flows from the Children's Act of 2009 is that the father would now expect to be consulted ***if he had hitherto involved himself in the life of the child****. His views and the nature and extent of his involvement in the child's welfare and upbringing would then be factors to be taken into account in deciding the totality of every relevant consideration whether the adoption would be in the child's best interests." [****Para 61****, emphasis added].*

143. The court determined that the only recourse (aside from showing that he had *locus standi* in terms of law to bring the rescission of adoption application if his consent were necessary before the adoption order was made) would have been for the respondent to set out why the adoption was to the detriment of the child. None of these averments were made in the affidavits and for that reason alone he ought to have been non-suited to seek the reliefs he sought.

144. The court ruled that in all matters involving the welfare of minor children,

> "*the court should always be astute to ensure that there are always compelling reasons, not mere unsupported allegations by a party to the litigation who has not yet established a prima facie right to custody of the child, advanced to interrupt the child's present situation or circumstance. A matter such as the present requires to be approached with caution to avoid the abuse of the judicial process by a litigant to gain an unfair advantage over another party for reasons which have little to do with the best interests of the minor child.*" **[Para 77]**

145. It should be plain beyond doubt from reading the judgment of the Court of Appeal that the matter of parental interest or involvement looms large. This is also clear from the closing remarks of the court.

146. In closing the ruling, the court referred once again to the lack of parental interest that the respondent had shown prior to launching the "purported appeal":

*"for three years the respondent remained supine and made no attempt to assert his legal rights to have access to and bond with the minor child. This was the time at which the child was opening its eyes to the world, and for the respondent to later after the passage of several years seek to assert his rights on urgency, thereby disrupting the child's ordered life for his own convenience without demonstrating that the child's then situation was anything but well ordered and stable, was opportunistic and an abuse of judicial process."[**Para 78**]*

147. In this way, the Court of Appeal once more underscored the primacy of the best interests of the child. However, the court also introduced the possibility for an unmarried father to assert and obtain recognition of his legal rights as a parent. In essence, the court relies upon the enhanced role awarded to fathers under the Children Act of 2009, which would not have been applicable to the respondent whose matter commenced prior to the Act.

The best interests of the child

148. The supremacy of this standard has been clearly established in the legislation and in judicial decisions concerning children, including those born out of wedlock.

149. In **Macheme v Ndlovu** (**CACLB-035/08) [2009] BWCA 49**, the Court of Appeal upheld the judgment of this court in **Dumisani Ndlovu v Letsile Macheme [2008] 3 BLR 230 HC**, finding the respondent entitled to certain periods of access to Lorako Macheme, a male child born on 10 April 2003, of whom the appellant was the mother and the respondent, the father. Lord Coulsfield JA (with Tebbutt JP and Foxcroft JA concurring) held that

> *"the primary standard to be applied in all questions of guardianship of or access to children, whether their parents are married or unmarried, is that of the best interests of the child."*

150. In **Mfundisi v. Kabelo**, **2003 (2) BLR 129 (HC)** Chatikobo J held:

> *"The predominant approach, shared by all the cases, seems to be that the illegitimacy of the child is not the compelling reason for*

denying access by its father. Rather it is the interest of the child which must predominate".

151. The Children Act stipulates guiding principles to be used in determining the best interests of the child. These principles include taking into account the capacity of the child's parents to care for and protect the child; and, the importance of stability and the likely effect on the child of any change or disruption in the child's circumstances. (see **Section 6**)

152. Furthermore, no decision or action shall be taken that would result in the discrimination against any child on any status, including family; and, the parents of a child have the primary responsibility of safeguarding and promoting the child's well-being. (See **Section 7**)

153. Having regard to all the above, the stage has now arisen to consider whether the applicant's complaint that he is being discriminated on the basis of sex or his marital status has any merit.

154. On the undisputed facts of this matter, outlined earlier in some detail, it is plain that the applicant had cultivated a close relationship with his

child and contributed substantially to her education and general welfare. His interest in the welfare of his child was not sporadic, but consistent over time. He has in the past sought custody of the child. In a nutshell his interest and love for his child is not open to doubt.

155. On the evidence, the 3rd Respondent has in the past indicated a wish to end the life of the 2nd Respondent. Clearly, it is not in the best interest of the 2nd Respondent to be adopted by the 3rd Respondent.

156. To suggest that the applicant, as the father of the child, should have no say, when his child is about to be adopted by a man who threatened to kill her is the height of heartlessness and extremely demeaning to the human dignity of the applicant. It is so heart-wrenching that it cannot find support in the mind of any reasonable court, properly directing itself.

157. The position of the Attorney General is that Section 15(3) is not violated because the applicant is simply complaining that he is being discriminated by virtue of being unmarried, as opposed to a married

man. Consequently, it is argued that he cannot complain that he is being discriminated on the basis of sex or marital status.

158. Section 15(3) lists grounds upon which it is not permissible to discriminate. These grounds are race, tribe, place of origin, political opinions, colour or creed.

159. I pause here to ask, with reference to the listed grounds, upon which it is not permissible to discriminate, whether, the absence of such other grounds as are found in most recent Constitutions such as gender, health status and disability mean that it is permissible to discriminate on such grounds?

160. In the case of **Attorney-General v Dow Appeal Court 1994 (6) BCLR 1**) Amissah JP suggests general guidelines for expanding these categories:

> *"If the categories of groups or classes mentioned in section 15(3) are but examples, where does one draw the line as to the categories to be included? Of course, treatment to different sexes based on biological differences cannot be taken as discrimination in the sense that section 15(3)*

proscribes. With regard to the classes which are protected, it would be wrong to lay down any hard and fast rules. The vulnerable classes identified in sections 3 and 15 are well known. I would add that not only the classes mentioned in the definition in section 15(3), but, for example, the class also mentioned in subsection (4)(d), where it speaks of "community" in addition to "race" and "tribe" have to be taken as vulnerable. Civilised society requires that different treatment should not be given to people wholly or mainly on the ground of membership of the designated classes or groups.... The only general criterion which could be put forward to identify the classes or groups is what to the right thinking man is outrageous treatment only or mainly because of membership of that class or group and what the comity of nations has come to adopt as unacceptable behaviour."

161. Inspired and fortified by the above remarks, the Industrial Court in the case of **Diau**, cited supra, opined that:

"In my mind, the grounds listed in terms of section 15 (3) are not exhaustive. A closer interrogation of the said grounds show one

common feature – they outlaw discrimination on grounds that are offensive to human dignity and/or on grounds that are irrational..."

162. It is clear from the above, that Section 15(3) does not constitute a closed list, but an open one. The advantage with the open list system is that it allows the court to add on other grounds in accordance with the evolving norms of society and the values of international human rights regime.

163. Undertaking the analysis whether the adoption unduly discriminates against unwed fathers, the court would need to be cautious and cognitive of the very real differences that exist in the lived realities of women and men as parents. Granting formal equality to unmarried men that expands their role over the decision-making process, concerning their biological children, would have to be achieved in such a manner as to avoid further burdening women, who in practice, and according to research, bear the brunt of child-rearing duties.

164. An argument has been raised on the grounds of the differentiation between biological mothers and biological fathers in the relevant laws. The Attorney General sought to rely upon the terms of customary law, whereby a child born out of wedlock belongs to the mother's family and

argued that this is a position that was also applicable under common law, with parental rights and responsibilities over a child being acquired by birth in lawful wedlock.

165. The above position reflects the common law, whereby the father of an *illegitimate* child had no rights regarding his offspring, and the child lacked the rights normally bestowed upon a *legitimate* child, such as the right to inherit from his parents. This argument is answered eloquently in the **Dow** case, cited supra, per Amissah JP.

166. It is apposite to let Amissah JP speak for himself (even from the grave – may his soul rest in peace):

167. Amissah JP in the **Dow** case observed:

> *"Our attention has been drawn to the patrilineal customs and traditions of the Botswana people to show, I believe, that it was proper for Parliament to legislate to preserve or advance such customs and traditions. Custom and tradition have never been static. Even then, they have always yielded to express legislation.*

Custom and tradition must a fortiori, and from what I have already said about the pre-eminence of the Constitution, yield to the Constitution of Botswana. A constitutional guarantee cannot be overridden by custom. Of course, the custom will as far as possible be read so as to conform with the Constitution. But where this is impossible, it is custom not the Constitution which must go."

168. The above perspective was recently reinforced by the Court of Appeal in the case of **Ramantele**, cited supra, when the court stated that:

*"It is axiomatic to state that customary law is not static. It develops and modernizes with the times, harsh and inhumane aspects of custom being discarded as time goes on; more liberal and flexible aspects consistent with the society's changing ethos being retained and probably being continuously modified on a case by case basis or at the instance of the traditional leadership to keep pace with the times … For after all what is customary law but a set of rules developed by society to address issues around certain values which protect the community's social fabric and cohesion. (**Para 77**)*

169. It is clear from the above quotations that custom that is in conflict with the Constitution is invalid to the extent of its inconsistency. The same

position applies to legislation. Any legislation that is inconsistent with the Constitution is invalid to the extent of its inconsistency.

170. The court further held that – irrespective of the constitutional provisions- for a customary law to achieve the status of law, it must be compatible with morality, humanity, and natural justice, as set out in the Customary Law Act. The customary law must accordingly comply with any notion of fairness, equity and good conscience. (See **paras 49-50**)

171. The court concluded that there is no rational and justifiable basis for sticking to the narrow norms of days gone by when such norms go against current value systems. (**Para 80**)

172. The above statements apply with equal force to this matter. The customary rule relied upon by the Attorney General offends any notion of fairness, equality and good conscience when measured against the contemporary norms.

173. In determining whether the applicant has been discriminated against or not, this court must bear in mind that Section 15(4) contains a claw

back clause specifying that the protections of Section 15 do not extend to any law that makes provision with respect to adoption or other matters of personal law.

174. The Attorney General has placed reliance on the above clause as it has done in many other similar cases that have come before this court, arguing that in this instance, we are dealing with adoption, one of those instances specifically prohibited by Section 15 (4) (c).

175. Fortunately, the Court of Appeal has indicated, in clear terms, that the derogations listed in Section 15 are not beyond reproach and have to be tested against the parameters set out in the umbrella provision of Section 3. Lesetedi JA reiterated the holding in **Dow** that a derogation as contained in Section 15(4) does not permit unchecked discrimination which is not consistent with the core values of the constitution, stating:

> *"Where there is a derogation the court must closely scrutinize it, give it a strict and narrow interpretation and test whether such discrimination is justifiable having regard to the exceptions contained in Section 3 of the Constitution. It is only when the court is satisfied that a*

discrimination passes that test that the court can find that the derogation is constitutionally permissible.

... the derogations contained in Section 15(4) of the Constitution are not unchecked. They must be rational and justifiable either as being intended to ensure that the rights and freedoms of any individual do not prejudice the rights and freedoms of others or as being in the public interest." (See **Ramantele case, paras 71-72**)

176. I agree entirely with the above remarks, which constitute the law in Botswana. In addition, I am of the considered view that a contextual or purposive reading of Section 15 (4) is capable of two interpretations and both interpretations are consistent with the actual grammar used in the construction of Section 15 (4). The first and literal interpretation is that Section 15 (4) is a blanket licence for laws to discriminate on matters to do with adoption, marriage and other matters of personal law. The second interpretation is that if a litigant can show that the discrimination he/she complains of is not in the public interest and that not being discriminated against would not harm the interest of other persons, the court will construe Section 15(4) strictly or restrictively in a

manner that gives effect to the underlying values and purpose of the Constitution.

177. This court notes in passing that the attitude or standpoint of the Attorney General towards Section 15 (4) has not changed since **Dow** and even with the recent decision of the Court of Appeal in **Ramantele.** Their defence of Section 15 (4) appears not to be informed by the development in the case law. In this case, there was no attempt to persuade the court why the holding in the latest case of **Ramantele** should not apply. It seems to me that the Attorney General simply does not want to listen to what the courts are saying.

178. In my respectful view, the equal protection clause, as embodied in the United States Declaration of Independence, the United States Constitution and other international human rights instruments that influenced our Constitution, was designed to impose upon states positive duty to supply protection to all persons in their inalienable enjoyment of human rights.

179. Section 3 or the equal protection clause, to which Section 15(4) is subordinate to, is closely associated with the denial that differences in colour, creed, sex, marital status are relevant in the way in which humanity must be treated. These factors are irrelevant accidents in the face of our common humanity.

180. It is perhaps important to emphasise that Section 3, which Justice Lesetedi refers to as the umbrella provision, is first and foremost an equality provision. Its primary aim is the promotion of a society in which all are secure in the knowledge that they are recognised at law as human beings, equally deserving of concern, respect and consideration. A Section 3 and 15 analysis must focus on uncovering and understanding the negative impacts of legislative distinction or omission, whatever the case may be, on the affected individual or group. Critical in such an inquiry is the extent to which the less favourable treatment affects the human dignity and personhood of the aggrieved party.

181. The attempt to understand the relationship between Section 3 and 15 is complicated by the fact that many jurists and judges still refuse or are reluctant to accept that all rights are interdependent, indivisible and universal. Proceeding from this vintage point, it becomes easy to

understand why Section 15 (4), which is a derogation clause must be construed strictly. This is what the court in **Moses Magaya v Mary Magaya1999 (1) ZLR 100** could have done in order to protect rights that were at stake, when dealing with a provision similar to Section 15 (4) referred to above.

182. The facts in the case of **Magaya** may be stated briefly. When Shonhiwa Magaya died without a Will, a local court in Zimababwe designated his eldest child, Venia Magaya, heir to the estate. This aggrieved her younger half brother, who contended that in terms of African customary law, a woman cannot be appointed as heir to her father's estate when there is a man in the family who is entitled to be heir. The magistrate court, (sitting in an appellate capacity) agreed and Ms Magaya's heirship was reversed. The newly appointed heir took his position as head of the household and removed Ms Magaya from her family home. An appeal was lodged with the Supreme Court of Zimbabwe which upheld the derogation clause that saved discriminatory customary law in matters of personal law.

183. The case triggered widespread criticism in some legal circles on the basis that it violated Ms Magaya's right to equality, fundamental issues of fairness and international norms.

184. Speaking for myself, I do not agree that the decision the court took was the only outcome the court could have taken. Adjudication of equality cases requires a delicate balancing act. It must be approached from the perspective that human dignity is the core right that informs the bill of rights of any country, whether or not that Constitution expressly provides for the right to human dignity or not. This is so because any bill of rights implicitly flows from the right to human dignity. Secondly, the balancing act should take into account the truism that human rights are interdependent, indivisible and universal. No single provision should be interpreted in isolation from others. Had the Magaya court properly factored the above considerations it could not have come to a conclusion that in effect suggested that women are less human than men.

185. A recent decision by the Lesotho Court of Appeal in the case of **Masupha v The Senior Resident Magistrate for the Surbodinate Court of Berea and Others, Court of Appeal (CIV) 29/2013,** also adopted the Magaya logic when dealing with a derogatory clause similar to Section 15 (4) of

the Botswana Constitution and repudiated the reasoning of the Botswana judgments such as the **Dow** decision that interpreted the above section restrictively.

186. In that case, the Appellant, an unmarried woman, is the daughter of late Principal Chief of Ha "Mamathe, Thupa-Kubu and Jorotane." When her father died he was succeeded by her mother until her death in December 2008. In February 2009, the minor son and only issue of the subsequent marriage entered into by the appellant's late father, was named as successor to the chieftainship and a regent was appointed pending his majority. The appellant challenged her exclusion on the ground that it was based on Section 10 of the Chieftainship Act which was unconstitutional in that it disentitled her to succeed solely on the ground that she was a female. Although the Court held that Section 18 (4) c, which is more or less similar to the Botswana's Section 15 (4) above, had to be "strictly construed" because it was a limitation provision. It held that the limitations under Section 18 (including Section 18(4)c) are "***designed to ensure absence of prejudice to, inter alia, the public interest. Accordingly the Constitution itself affirmatively disposes the question whether s 18(4) c constitutes a permissible limitation on the s 18 right....In other words, the public interest issue is decided, in the instances where there are***

limitations, by the Constitution, not by construing subservient legislation. I would accordingly respectfully disagree with those judgments relied upon by counsel for the first amicus in which Botswana courts have appeared to construe provisions equivalent to the Lesotho sections 4 (1) and 18 (4) c as requiring that a limitation be measured against a proviso to assess whether it is in the public interest."

187. It appears to me, with the greatest of respect, that it was possible for the courts in **Magaya and Musupha** to have interpreted the derogatory clause restrictively and in the process affirm that discrimination on the basis of gender or sex is impermissible as it strikes at the heart of the right to human dignity - suggesting in effect that women are inferior to men. The right to dignity is the fundamental reason why there is a right to equality and/or freedom from discrimination. In my view, factoring human dignity in interpreting the derogatory clause is intellectually and jurisprudentially more satisfactory.

188. Section 3 of the Constitution, which embodies the equal protection clause, is a reminder to Parliament that as it enacts laws and makes classifications, or imposes burdens or disadvantages, such should be

justifiable and related to the purpose of law. It is a reminder to the legislature to guard against inequality of purpose.

Sex Discrimination

189. In simple terms, sex discrimination refers to less favourable treatment on the basis of sex. Sex is a biological term. It refers to biological and physical differences between men and women. (See **Iain Currie and Johan de Waal, The Bill of Rights Handbook, (2005) Juta, p 250**). Gender is a social term. It refers to ascribed social and cultural male and female roles. Although closely linked, the two terms do not mean the same thing.

190. In this case, it seems to me that the applicant is treated less favourably by the Adoption of Children Act Cap 28:01 than a woman, the 1st Respondent, because of prejudicial or stereotypical cultural views that a child born out of wedlock belongs to the mother and the father is effectively excluded from parenting responsibilities because he is considered less fit to exercise parental role simply because he is an unwed father.

191. The marital presumption that the husband of the child's mother is the child's legal father is a relic of the English Common Law. The less favourable treatment of the father is founded on prejudice, and not on any reason that can stand constitutional scrutiny in the contemporary society.

192. In my view, it is unfair gender discrimination to require consent of a mother, but not of a father to adoption of a child born out of wedlock. Although the ground of gender is not mentioned in Section 15, it is necessarily implied or analogous to the grounds listed. Less favourable treatment of the applicant on socially constructed roles has the potential to impair his fundamental dignity as a person and is therefore impermissible.

193. It seems to me that they may still be some people in the legal fraternity, and the broader public, that are reluctant to accept or internalise the full import of Section 3 of our Constitution, necessitating that our courts should be untiring in their fidelity to the Constitution. Culture is

important, to a people, but the one that is subversive to the constitutional values and ideals, we hold dear as a people, must be discarded without flinching.

194. To this extent, I am in total agreement with the words of Lord Atkin, writing in a different context, that:

> "*When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course for the Judge is to pass through them undeterred" (*Lord Atkin in ***United and Australia Ltd v Barclays Bank Ltd 1941 AC1, 29***)

Marital status

195. The prohibition to discriminate on the basis of marital status is aimed at removing the historical privilege of the position of a mother of a child born out of wedlock.

196. This court is persuaded that Section 4 (2) (d) (i) is unconstitutional, as the distinction it makes between unwed mothers and fathers has not

been shown to serve any legitimate purpose or interest. Differentials based on gender and/or marital status in order to withstand judicial scrutiny under Section 3, as read with Section 15 of our Constitution, must be shown, by those who support same, to serve important governmental purpose.

197. This court has considered the argument of the Attorney General that the denial of parental rights to the unwed father was some form of sanction for having violated, not only the lady in question, but for also disrespecting the mother's family. In this era, where what matters most is the best interests of the child, the reason advanced by the Attorney General can hardly be a valid governmental purpose.

198. I am satisfied that the effect of Section 4 (2) (d) (i) is to discriminate against unwed fathers even when their identity is known and have shown commitment to the welfare of the child. The message of the section sought to be impugned that unwed fathers are less qualified and entitled than mothers to exercise judgment, as to the fate of their children, cannot find support in a modern society, whose bill of rights is inspired by the right to human dignity and equality.

199. In my considered view, the father's interest in the companionship and generally to take care of his child is cognizable and substantial and it would not make sense for the law to regard such interest as inconsequential, when it has a direct bearing on the interest of a child.

200. The further effect of the section sought to be impugned is that the consent of the father is necessary where he is married and not necessary where he is not – and the underlying purpose, for such a stand point, that potentially has grave consequences for the best interest of the child, has not been shown to be necessary or reasonable.

201. In my mind, to exclude a father, such as the applicant, who has shown admirable commitment to the welfare of the child, is unreasonable. It completely undermines the significance of the biological connection, being that it offers the natural father an opportunity that no other male possesses to develop a relationship with his child.

202. In my mind, there appears to be no justification why the law (the Adoption Act) should give every mother an automatic right to withhold her consent to the adoption of the child while this right is denied to every unmarried father. In my judgment, this is absurd.

203. Having regard to all I have said, I have no hesitation whatsoever in holding that Section 4(2)(d)(i) discriminates against the applicant on the basis of gender and marital status and that such is constitutionally impermissible.

Inhuman and degrading treatment

204. The concept of inhuman and degrading treatment is generally used to capture levels of human suffering that do not amount to torture. Treatment or punishment amounts to cruel, inhuman and degrading treatment when it involves mental and physical ill-treatment that has been intentionally inflicted by, or with the consent or acquiescence of, the state authorities.Exposing a person to conditions reasonably believed to constitute ill-treatment will entail responsibility for its infliction. Degrading treatment may involve pain or suffering less severe than for torture or cruel or inhuman treatment and will usually involve humiliation and debasement of the victim. The essential elements which constitute *ill-treatment not amounting to torture* would therefore be reduced to:

- Intentional exposure to significant mental or physical pain or suffering;

- By or with the consent or acquiescence of the state authorities.

205. It is often difficult to identify the exact boundaries between the different forms of ill-treatment as this requires an assessment about degrees of suffering that may depend on the particular circumstances of the case and the characteristics of the particular victim.

206. In some cases, certain forms of ill-treatment or certain aspects of detention which would not constitute torture on their own may do so in combination with each other.

207. In international law, ill-treatment is prohibited even where the treatment does not have the purposive element or, as far as degrading treatment is concerned, is not considered severe enough (in legal terms) to amount to torture, it may still amount to prohibited ill-treatment." (See **Physicians for Human Rights (2010) "PHR Toolkits: Cruel Inhuman & Degrading Treatment & Punishment (CID)"**)

208. The courts in Botswana have dealt with cases on this ground, mainly within the context of imprisonment and the death penalty, and it has been established that: "what constitutes inhuman and degrading punishment has been defined as punishment which though not necessarily cruel, does not accord with human dignity." (Per Lesetedi AJA in **Motlhabane and Another v S (CLCLB-107-09) [2010] BWCA 27 (28 January 2010) Para 12.**

209. In order to show that he has been made to suffer "inhuman or degrading punishment or other such treatment," the applicant would have to show that he was *intentionally exposed* to mental or physical suffering and that this intentional exposure was *committed by or with the acquiescence of state authorities*.

210. Having regard to the view I hold that there is no concrete evidence that the applicant was intentionally exposed to any form of suffering with the acquiescence of state authorities, I must hold as I hereby do, that this ground has not been established and must fail.

Right to a fair hearing

211. The applicant further contends that Section 10 (9) of the Constitution has been violated by permitting the adoption to proceed, while he has a court order permitting him visitation and other privileges and that this would be tantamount to taking away those rights without giving him a fair hearing.

212. I entertain grave doubt whether Section 10 (9) of the Constitution is implicated. On the pleadings and the oral submissions made, I am not persuaded that a case with respect to the violation of Section 10 (9) of the Constitution has been made out and on the basis of the insufficiency of the pleadings and the evidence, I would dismiss this ground as without merit.

213. What is plain though is that in terms of the Children Act of 2009, the father would expect to be consulted, especially, where, as in this case he is committed to his child's welfare, and had been granted visitation rights.

214. In the result, I do not think it was wise for the applicant to frame his right of a fair hearing in terms of Section 10 (9) of the Constitution.

Conclusion

215. After conducting an exhaustive evaluation of comparative case law and a textual and value based analysis of the broad constitutional framework of the republic, in the context of the particular facts of this case, more particularly having regard to Section 3 and 15 of the Constitution, it seems clear to me, that in the view of the Constitution, in the eye of the law, irrational and unfair discrimination based on grounds unsupported by reason, such as gender and marital status is impermissible. The progressive realisation of the right to equality and the expansion of its boundaries, in this republic, has been forged in the crucible of unrelenting constitutional litigation. Examples that readily come to mind are the cases of **Dow, Ramantele, and Diau** referred to earlier. The main legacy of the above cases, routinely cited with approval across the globe, is their contribution to the uniquely Botswana culture of faith in litigation as a form of enforcing constitutional rights, and the concomitant willingness of the executive to comply with court decisions.

216. The above notwithstanding there is a limit to what the courts can do. The courts' interpretative power cannot be an effective substitute for legislation. To this extent, it would assist the courts greatly if the legislature were to amend Section 15 to list other grounds that are commonly referred to in international legal instruments such as gender, disability, etc. Fortunately, even without the required legislative intervention, in the manner I have suggested, the jurisprudence of our country is wedded to the idea that our Constitution would always have "to be adopted to the various crises of human affairs".

217. Of recent Parliament has made laudable efforts in the direction of discarding discrimination on the basis of irrational grounds. Examples include the Children Act of 2009 (which is the soul and mirror of the convention on the Rights of the Child), the Abolition of Marital Power Act (s18) and the Affiliation Proceedings Act.

218. The idea of equal protection of the laws is fundamental to the concept of democratic citizenship. With it, every person, to employ a term used by the Constitution, can participate in decisions that affect us and our society, and we can each bear responsibility for the choices we make – and to this extent, parents be allowed irrespective of irrelevant

distinctions, such as whether they are married or not, to carry out their parental responsibilities to their children. If our courts honour the provisions of Section 3 and construe Section 15 restrictively, they would redeem and/or effect the promise of the Universal Declaration of Human Rights and more importantly, of our Constitution, that all are equal in the eyes of the law.

219. Consequently, when a grave question, such as the present, confronts the courts, we cannot afford to blink or equivocate. We must declare what the law is. When it appears that an Act of Parliament conflicts with the Constitution, we must say so without flinching. It is our sacred duty to enforce the commands and values of the Constitution. We are sworn to do no less.

220. With respect to costs, I am not inclined to order costs because effectively there was no opposition to this application. The Attorney General only stepped in to assist the court.

221. In the result, it is ordered that:

1. Section 4 (2) (d) (i) of the Adoption of Children Act is unconstitutional to the extent that it does not require the consent of the father in the adoption of his illegitimate child in all cases;

2. Any adoption of second respondent can only be done with the consent of the applicant.

3. Any adoption of the second respondent without the applicant's consent is rescinded.

4. There is no order as to costs.

DELIVERED IN OPEN COURT AT GABORONE THIS DAY 2ND OF FEBRUARY 2015

OBK DINGAKE
JUDGE

NDADI LAW FIRM – APPLICANT'S ATTORNEYS
ATTORNEY GENERAL'S CHAMBERS – RESPONDENTS ATTORNEYS