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COURSE NOTES

LAW 106

Customary Law

The Nature, Sources and Operation of Customary Law in Botswana

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NOTE TO STUDENTS

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Section A. The Legal Nature of Customary Law

Historical Background, Political Organisation, Nature, Content and Sources

1. Historical Background

The history of customary law in Botswana cannot be understood in isolation from the broader history of the Tswana people and the political and social changes that have shaped their legal order. Before the establishment of the Bechuanaland Protectorate in 1885, the Tswana peoples of the territory now known as Botswana were organised into chiefdoms, each governed by its own customary law and traditional institutions. These chiefdoms, including the Ngwato, Kgatla, Kwena, Ngwaketse, Tawana and others, had developed sophisticated legal and political orders over centuries, resting on the authority of the kgosi, the deliberative forum of the kgotla and the oral transmission of communal norms.

The historical background of customary law in Botswana encompasses three broad phases:

- **The Pre-Colonial Period.** Indigenous Tswana law and governance, characterised by the authority of the kgosi (chief), the centrality of the kgotla as a forum of public deliberation and adjudication, and the oral transmission of customary norms from one generation to the next.
- **The Colonial Period (1885 to 1966).** The establishment of the Bechuanaland Protectorate and the introduction of a dual legal system, in which received colonial law and indigenous customary law coexisted in an unequal relationship, with customary law subordinated to colonial authority and confined largely to personal and family matters.
- **The Post-Independence Period (1966 to the present).** The entrenchment of legal pluralism under the Constitution of Botswana 1966, the ongoing tension between customary law and constitutional human-rights guarantees, and the open question of the future of customary law in a modern democratic state.

2. Political Organisation of the Tswana

Schapera, Handbook of Tswana Law and Custom, Chapter III: Schapera provides a detailed account of the political organisation of the Tswana chiefdoms. The key features of Tswana political organisation are set out below.

- **The Kgosi (Chief).** The kgosi was the central figure in the Tswana political and legal order, exercising combined legislative, executive and judicial authority. The chief's authority was both political and ceremonial: the chief was the representative of the tribe before the ancestors and the guardian of tribal customs and traditions.

- **Central Government.** The chief governed through a system of councils and advisers, including the chief's council (lekgotla) of senior relatives and headmen. Major decisions affecting the tribe required consultation with the community through the kgotla.
- **Local Administration.** The chieftdom was divided into wards (dikgotla), each headed by a headman (motlhankedi) who exercised delegated authority from the chief and was responsible for administering the ward and resolving minor disputes.
- **Regimental Organisation.** Young men were organised into regiments (mephato) that performed communal labour, military service and other collective tasks. The regimental organisation reinforced communal solidarity and was an important mechanism of social control.
- **Citizenship.** Membership in the tribe was determined by descent and by acceptance into the tribal community. Strangers could be incorporated into the tribe through a process of adoption or assimilation.

ACADEMIC COMMENTARY

Gillet, "The Survival of Chieftaincy in Botswana" (1975) and Grant, "Reduced to nothing? Chieftaincy and a Traditional Town" (1980) both examine the challenges facing the institution of chieftaincy in the context of post-colonial modernisation, urbanisation and the development of democratic governance. They should be read alongside Schapera's Handbook for a full picture of the evolution of Tswana political organisation.

3. The Nature and Content of Customary Law

3.1 What is Customary Law?

DEFINITION

Customary Law

The body of rules, norms and principles that have been developed and maintained by a particular community through long-standing practice and general acceptance, and that are regarded by members of that community as legally binding. Customary law is the living law of the community: it reflects and regulates the actual social practices and values of the people it governs.

The definition of customary law is contested and has significant practical implications for its application in court. Different meanings have been attached to the concept:

- **People's customary law or living law.** The actual norms and practices observed by members of a community in their daily lives, whether or not these have been formally recognised by any court or legislature. This is what the community actually does, as distinguished from what courts or legislators say it does.

- **Official customary law.** The version of customary law that has been recognised, applied and in some cases modified by courts and legislators. Official customary law may diverge significantly from the living law of the community, particularly where courts have applied customary law through the lens of Western legal concepts or relied on outdated sources.
- **Frozen customary law.** Customary law as recorded in the works of scholars such as Schapera at a particular point in time. The danger of relying on such sources is that customary law is dynamic and changes over time, so that a record made in 1938 may not accurately represent the customary law of 2025.

Woodman, "Some Realism About Customary Law: The West African Experience" (1969): Woodman argues that the distinction between the living law of the community and the official customary law applied by courts is of fundamental importance. He contends that courts and scholars have often distorted customary law by forcing it into Western legal categories and by treating it as static when it is in fact dynamic and evolving.

De Jong, "Customary Law: A Confusing Fiction" (1994): De Jong argues that what is commonly called customary law is in many respects a legal fiction: a simplified, standardised version of diverse local practices created by colonial courts and scholars for administrative convenience, which does not accurately reflect the actual normative practices of the communities it purports to represent.

3.2 Characteristics of Customary Law

AJGM Sanders, "The Characteristic Features of Southern African Law" (1981): Sanders identifies the following as characteristic features of Southern African customary legal systems:

- **Orality.** Customary law is primarily transmitted and maintained through oral tradition, memory and practice rather than through formal written instruments. This gives customary law its dynamic and adaptive character but also makes it difficult to ascertain with precision in formal legal proceedings.
- **Communalism.** The community and the extended family are the primary units of social and legal organisation. The individual is embedded in a network of communal relationships and obligations rather than conceived as an autonomous rights-bearing subject.
- **Consensus-orientation.** Customary dispute resolution aims primarily at reconciliation and the restoration of social harmony rather than at the adversarial determination of winners and losers.
- **Functional overlap.** In traditional Tswana society the chief or headman may exercise legislative, executive and judicial functions simultaneously. The separation of powers characteristic of Western constitutional systems is not a feature of traditional customary governance.
- **Flexibility and adaptability.** Customary law is inherently dynamic and adaptable to changing social circumstances. Unlike formal statute law, it can evolve organically in response to social change without the need for formal legislative action.
- **Collective responsibility.** Customary law often recognises collective or family responsibility for wrongs committed by individual members, reflecting the communal character of the societies it governs.

3.3 Customary Law in Botswana as "Tswana Law"

The identification of customary law in Botswana with "Tswana law" raises important questions of inclusivity and legitimacy. Botswana is not a homogeneous society: it comprises numerous ethnic communities, including the Tswana (Ngwato, Kgatla, Kwena, Ngwaketse, Tawana and others), the Kalanga, the Basarwa (San), the Babirwa and others. Each of these communities has its own customary law. The identification of "Botswana customary law" with "Tswana law" may therefore marginalise the customary laws of non-Tswana communities.

Magang, "Customary Law as Administered in Botswana" (1981): Magang notes that the customary law administered by the courts of Botswana is largely based on Tswana customary law as recorded by Schapera and others, which may not accurately represent the customary practices of all communities in Botswana.

Molokomme, "Customary Law in Botswana: Past, Present and Future" (1994): Molokomme provides a comprehensive overview of the development of customary law in Botswana and identifies the key challenges facing it in the contemporary period, including its relationship with human-rights norms, its patriarchal character and the need for reform.

3.4 Authenticity and Legitimation of Customary Law

A fundamental challenge in the application of customary law is the question of its authenticity: how can a court determine what the customary law is, particularly when customary law is largely unwritten and subject to dispute? This problem is compounded by the fact that customary law was subjected to significant distortion and transformation during the colonial period. The principal sources through which courts ascertain customary law include:

- **Expert witnesses.** Persons with knowledge of the customary law of the relevant community may be called to testify about the applicable customary rules.
- **Academic works.** The writings of scholars such as Schapera are frequently cited as sources of customary law, though their authority is limited by the date of composition and the static nature of written records.
- **Previous court decisions.** Decisions of customary courts and the higher courts on customary-law questions may provide guidance, though the common-law doctrine of stare decisis does not strictly apply in the customary court system.
- **The living law.** Courts may, in appropriate cases, take judicial notice of or investigate the actual practices of the community.

3.5 Sources of Customary Law

- **Custom and tradition.** The accumulated practices and usages of the community over time, recognised as legally binding by community members.
- **Decisions of customary courts.** The decisions of the kgosi and other customary authorities in resolving disputes contribute to the development of customary law.

- **Academic works.** Schapera's Handbook of Tswana Law and Custom (1938) is the foundational academic source for Tswana customary law; Comaroff and Roberts' Rules and Processes (1981) provides an important analysis of how customary law operates in practice.
- **Statute.** Legislation may codify, modify or abolish customary law rules. The Marriage Act 2000, the Customary Courts Act, the Customary Law Act and the Tribal Land Act all regulate aspects of customary law in Botswana.

Section A. Cases

Petrus and Another v The State

1984 BLR 14 (Court of Appeal)

FACTS

The appellants were convicted in the subordinate court system of offences for which the sentence imposed included corporal punishment to be administered by instalments, that is, repeated strokes inflicted on separate occasions over a period of time, under the corporal-punishment regime then in force in the administration of justice. The mode and manner in which the punishment was to be inflicted was challenged as offending the Constitution. The matter reached the Court of Appeal as the apex constitutional tribunal of Botswana, squarely raising the validity of the punishment against the Bill of Rights.

ISSUE

Whether corporal punishment as authorised and administered under the relevant statutory regime, and in particular punishment inflicted repeatedly and by instalments, was consistent with the constitutional prohibition against torture and against inhuman or degrading punishment or other treatment guaranteed in the Bill of Rights of the Constitution of Botswana.

RULE

The Constitution of Botswana is the supreme law and its guarantees of fundamental rights must be interpreted broadly, generously and purposively so as to give full effect to the rights protected. A person is protected from torture and from inhuman or degrading punishment or other treatment. Neither the customary origin of a practice nor its authorisation by statute immunises it from constitutional scrutiny: any law or practice authorising punishment that crosses the threshold of inhuman or degrading treatment is unconstitutional and invalid to the extent of the inconsistency.

APPLICATION	The Court of Appeal mapped the constitutional prohibition onto the specific punishment under review. It examined how the corporal punishment was in fact to be administered, namely the repetition of strokes by instalments over a period of time, and measured that concrete mode of infliction against the standard of what amounts to inhuman or degrading punishment. The Court treated the manner of infliction, not merely the abstract category of the sentence, as the decisive factual matter to be assessed against the constitutional text.
ANALYSIS	The reasoning proceeds from the premise that a Bill of Rights is not a static catalogue but a living instrument whose content is fixed by contemporary standards of decency rather than by the penal practices inherited from an earlier age. On that footing the Court rejected three lines of argument that, if accepted, would have placed the punishment beyond review: that long usage legitimises a practice, that statutory authorisation conclusively settles its lawfulness, and that the abstract permissibility of corporal punishment answers the distinct question of whether a particular mode of inflicting it is degrading. By insisting that the court look at the actual manner of infliction, the repetition of strokes spread across separate occasions so that the condemned person relives the dread of the punishment each time, the Court located the constitutional vice in the cumulative impact on human dignity rather than in the label attached to the sentence. This substance-over-form method has two important consequences. First, it makes effect, not pedigree, the touchstone: a practice is tested by what it does to the person, so that neither tradition nor the imprimatur of the legislature can rescue a punishment that is in fact inhuman or degrading. Second, it establishes a general technique of constitutional adjudication, the generous and purposive construction of the rights guarantees, that is transferable from the penal context to the very different context of discriminatory custom. It is precisely this technique that later courts deploy when they subject customary rules to the equality guarantee in <i>Dow and Ramantele</i> and the practice of chiefly corporal punishment to constitutional limits in <i>Kgafela</i>. Petrus therefore functions as the methodological root of the whole body of Botswana jurisprudence subordinating both statute and custom to the Constitution, and its analysis repays close study not for the narrow point about strokes but for the interpretive posture it models.
HELD	The Court of Appeal upheld the supremacy of the constitutional guarantee and subjected the impugned mode of corporal punishment to constitutional scrutiny, holding that punishment infringing the protection against inhuman or degrading treatment could not stand to the extent of its inconsistency with the Constitution.

RATIO DECIDENDI	The ratio decidendi is that the Constitution of Botswana is the supreme law and must be interpreted broadly and purposively to give full effect to the fundamental rights it guarantees. A customary-law practice or a statutory provision authorising corporal punishment that constitutes torture or inhuman or degrading punishment is inconsistent with the constitutional guarantee of protection from such treatment and is void to the extent of the inconsistency. The customary or statutory character of a practice does not immunise it from constitutional scrutiny.
SIGNIFICANCE	This case is foundational for the entire subject of customary law in Botswana. It establishes the principle of constitutional supremacy over customary law and the requirement that customary practices conform to the constitutional guarantee of fundamental rights. It is the starting point for any discussion of the relationship between customary law and constitutional rights, and it anticipates the analytical approach later applied in <i>Kgafela Kgafela v The State</i> and in the equality jurisprudence of <i>Dow and Ramantele</i> .
Tshekedi Khama and Another v The High Commissioner <i>1926 to 1953 HCTLR 9</i>	
FACTS	The dispute arose within the colonial administration of the Bechuanaland Protectorate and concerned the position and authority of a chief (kgosi) of the Ngwato in relation to the supervisory powers asserted by the High Commissioner. The litigation tested the legal basis on which colonial authority could interfere with, suspend, depose or banish a recognised traditional ruler, and the extent to which the chief's indigenous authority survived as an independent source of power once the Protectorate was established. The decision is principally significant for its statement of the legal relationship between colonial and chiefly authority; the narrow procedural facts should be confirmed from the report and are treated as secondary to that holding here.
ISSUE	Whether the High Commissioner had lawful power to depose, banish or otherwise control a chief of the Ngwato tribe, and what the legal basis and limits of chiefly authority were within the colonial legal framework of the Bechuanaland Protectorate.
RULE	Under the colonial legal framework of the Protectorate, established through the Foreign Jurisdiction Act and the relevant Orders in Council and Proclamations, the High Commissioner exercised broad powers of supervision and control over the chiefs of the Protectorate, including the power to suspend or remove a chief from office. Chiefly authority was recognised by the colonial administration but was exercised subject to, and ultimately subordinate to, that supervisory authority.

APPLICATION	The Court examined the respective powers of the High Commissioner and the chief within the constitutional and administrative instruments governing the Protectorate. It located the source of the High Commissioner's authority in the imperial legislative scheme and measured the chief's claimed autonomy against that scheme, identifying chiefly power as a recognised but supervised competence rather than an independent sovereignty.
ANALYSIS	The judgment is best understood as a legal expression of the policy of indirect rule, and its reasoning rewards attention for what it reveals about how colonial law absorbed, rather than abolished, indigenous authority. The Court did not deny that the kgosi held real power within the tribe or that this power had a pre-colonial pedigree rooted in descent, the kgotla and the consent of the community. What it denied was that this pedigree could survive as an independent legal source once the Crown had assumed jurisdiction: the chief's authority was re-characterised as a competence recognised and tolerated by the colonial order and therefore defeasible at its hands. Three features of the analysis deserve emphasis. First, it effects a transformation of legitimacy: authority that had flowed upward from the tribe is reconceived as flowing downward from the Crown, so that the kgosi becomes in law an official within an administrative hierarchy rather than a ruler in his own right. Second, it exposes the structural inequality at the heart of the dual legal system, because the recognition extended to customary authority is conditional and revocable in a way that the authority of the colonial power is not. Third, it illustrates the durability of that subordination: the same logic by which the colonial executive supervised chiefs reappears, in constitutional dress, in the modern Ministerial power to suspend a chief considered in <i>Gaseitsiwe v Attorney General</i>, where executive supervision of traditional leaders survives but is now disciplined by natural justice and judicial review. Read together with the scholarship of Otlhogile on the making of the colonial courts, the case is a window onto the moment at which Tswana political authority was folded into a wider legal order whose terms it did not set, and it frames every later question about the place of chieftaincy in an independent Botswana.
HELD	The Court acknowledged the superior authority of the High Commissioner under the colonial legal framework, recognising the existence of supervisory and removal powers over the chief while affirming that chiefly authority itself was recognised within, and subordinate to, that framework.

RATIO DECIDENDI	The ratio decidendi is that under the colonial legal framework of the Bechuanaland Protectorate the High Commissioner had broad powers of supervision and control over the chiefs, including the power to suspend or remove a chief from office; chiefly authority was recognised by the colonial administration but exercised subject to its supervision. The case fixes the legal subordination of indigenous political authority to colonial power.
SIGNIFICANCE	This is a landmark case in the history of Botswana customary law. It illustrates the subordination of indigenous political authority to colonial power and the transformation of the kgosi's authority from an independent sovereign to a recognised official within the colonial administrative system. It should be read alongside the academic commentary of Sanders, Otlhogile and Wylie, and Otlhogile's study "Tshekedi Khama v The High Commissioner: The Making of a Court" (1993), for a full understanding of how colonial litigation shaped both chieftaincy and the court structure of the territory.

KEY POINTS: SECTION A

Customary law is the living law of a community, accepted as binding, but it exists in living, official and frozen forms that may diverge. Its characteristic features (orality, communalism, consensus-orientation, functional overlap, flexibility and collective responsibility) shape both its content and the difficulty of proving it in court. In Botswana the equation of customary law with Tswana law raises questions of inclusivity for non-Tswana communities. **Petrus v The State** establishes constitutional supremacy over both statute and custom; **Tshekedi Khama v The High Commissioner** shows the colonial subordination of chiefly authority that frames the modern law.

Section B. The Dual Legal System

Origins, Nature, Structure and Consequences of Legal Dualism

B1. The Dual Legal System

1. Definition

DEFINITION

Dual Legal System

A legal system characterised by the coexistence of two distinct legal orders, a received (formal) legal system imported through colonial processes and an indigenous customary legal system, which operate in parallel and often in tension with each other within the same state.

The dual legal system in Botswana is the product of the colonial period. It was created by the deliberate decision of the colonial administration to maintain customary law as the governing legal order for the indigenous African population in personal and family matters, while applying the received law (Roman-Dutch and English common law) to the settler population and to matters of colonial governance.

2. Origins of the Dual Legal System

The dual legal system in Botswana originated in the following key legislative and administrative instruments of the colonial period:

- **The Foreign Jurisdiction Act 1890.** The Act of the British Parliament that provided the legal basis for Britain's assumption of jurisdiction over the Bechuanaland Protectorate and other territories. It authorised the Crown to exercise jurisdiction over British subjects in foreign territories through Orders in Council.
- **The 1891 Order in Council.** Formally established the legal framework for the administration of the Protectorate, applied the law of the Cape Colony (Roman-Dutch law) and established the initial court structure.
- **The General Administration Proclamation 1891.** Established the basic administrative framework of the Protectorate, including the powers of the Resident Commissioner and the structure of local administration.
- **Proclamation 36 of 1909.** A key instrument in the development of the dual legal system, establishing the framework for the application of customary law and the jurisdiction of customary courts.

- **Proclamation No 74 of 1934 (as amended 1943).** Regulated tribal government and the authority of traditional leaders within the colonial framework.
- **Proclamation No 1 of 1919 and No 75 of 1934 (as amended 1943 and 1961).** Regulated tribal courts and their jurisdiction.

Aguda, "Legal Development in Botswana 1885 to 1966" (1973): Aguda traces the development of the Botswana legal system from the establishment of the Protectorate to independence, documenting how the dual legal system was created and developed during the colonial period.

JH Pain, "The Reception of English and Roman-Dutch Law in Africa" (1978): Pain analyses the mechanisms by which English common law and Roman-Dutch law were received into Botswana and examines their relationship with the pre-existing indigenous legal order.

3. Nature and Structure of the Dual Legal System

- **Two parallel legal orders.** The formal law (Constitution, statute, Roman-Dutch common law, English common law) and the customary law of the various communities coexist within the same state.
- **Personal-law character of customary law.** Customary law applies primarily as a personal law, governing persons subject to customary law (members of Tswana tribal communities) in personal and family matters regardless of where they are; the formal law applies as a territorial law.
- **The repugnancy proviso.** Customary law is applicable only insofar as it is not incompatible with any written law or contrary to morality, humanity or natural justice (Customary Law Act, Cap 16:01, s 2).
- **Constitutional supremacy.** Since independence in 1966 both the formal law and customary law are subject to the supremacy of the Constitution of Botswana 1966.

4. Organisation of Courts in the Dual System

Court Level	Formal Court	Customary Court
Apex	Court of Appeal	Court of Appeal (on appeal from High Court)
Superior	High Court	High Court (supervisory jurisdiction)
Intermediate	Magistrates' Courts	Magistrate's Court (customary appeal)
First Instance	Magistrates' Courts	Customary Court of Appeal
Community	(not applicable)	Customary Court (kgosi / headman)

B2. The Consequences of Legal Dualism

1. Competing and Conflicting Jurisdictions

The coexistence of two legal systems within the same state inevitably creates situations of competing and conflicting jurisdictions, cases where it is unclear which legal system applies or where the two systems reach inconsistent results. The principal problems arising from legal dualism include:

- **Choice of law.** Which legal system governs a particular dispute? The Customary Law Act provides some guidance, but the rules are not always clear or consistent.
- **Choice of court.** Which court has jurisdiction to hear a particular dispute? The High Court has unlimited jurisdiction under section 95(1) of the Constitution, but customary courts also have jurisdiction in certain matters.
- **Conflict between customary and formal law.** Where the customary rule and the formal rule are inconsistent, which prevails? The answer depends on the nature of the inconsistency and the applicable constitutional and statutory provisions.

Kollewijn, "Conflicts of Western Law and Non-Western Law" (1951): Kollewijn examines the theoretical and practical problems created by the coexistence of Western and non-Western legal systems and analyses the choice-of-law rules developed to resolve conflicts between them.

Bennett, "Conflict of Law in South Africa: Cases involving Customary Law" (1980): Bennett analyses the rules governing the application of customary law in South African courts, with implications for the similar situation in Botswana.

Section B. Cases

Angu v Attah

1916 PC 74 (Privy Council)

FACTS

The dispute was between African parties and concerned rights to land held under indigenous tenure. The contest turned on whether the rights and obligations of the parties in respect of the land were to be determined according to the customary law of the relevant community or according to the received colonial law. The matter came before the Privy Council, the apex appellate tribunal for the colonial possessions, which was required to identify the governing law before the substantive land question could be resolved. The report is best known for its statement of choice-of-law and proof principles; the granular facts of the land transaction should be confirmed from the report and are subordinate to that holding here.

ISSUE

Whether a dispute between parties who are members of a customary-law community, concerning subject matter such as land tenure, was governed by customary law or by the received colonial law, and what choice-of-law principles determined the answer.

RULE	Where a dispute arises between parties who are members of a customary-law community, and the subject matter of the dispute (such as land tenure) is itself governed by customary law, the customary law of the relevant community applies, unless the parties have by agreement or by their conduct subjected themselves to the received law. The court must examine the nature of the transaction and the intentions of the parties to determine which legal system governs. The case is also a classic source for the proposition that the content of customary law is, in the colonial forum, a matter to be established by evidence rather than assumed.
APPLICATION	The Privy Council applied these principles to the facts before it: it identified the parties as members of a customary-law community and the subject matter as land held under customary tenure, and found no agreement or conduct displacing customary law in favour of the received law. It therefore held that the transaction fell to be governed by the indigenous customary law of the community concerned.
ANALYSIS	The decision performs two distinct pieces of work that are easily run together but are best kept apart, and the analysis is clearer for separating them. The first is a rule of attribution for a plural legal order. By making customary law the presumptive governing law for transactions between members of a customary community, displaced only where the parties have chosen the received law, the Privy Council protected indigenous tenure against silent absorption into common-law categories while preserving party autonomy to opt into the formal system. This is the doctrinal seed of the personal-law principle that organises the whole dual system: customary law follows the person and the character of the transaction rather than merely the territory. The second piece of work is evidential and, for Botswana, the more consequential. The court treated the content of customary law not as law of which judicial notice is automatically taken but as a matter to be proved, an approach that reflects the colonial forum's distance from the communities whose norms were in issue. That characterisation has a double edge. On one hand it respects the specificity and variability of customary law and refuses to flatten it into assumed rules; on the other it imposes an evidentiary burden that can disadvantage parties who cannot marshal expert proof, and it tends to freeze the law at whatever the witnesses or texts describe. The Botswana courts inherit precisely this tension and work it out in their ascertainment jurisprudence: the insistence in <i>Kweneng Land Board v Matlho</i> that a change in customary law must be established by positive evidence, and the living-law caution of <i>Molefe v Seketeme</i> and <i>Letsholo v Sete</i> that the proven rule must track current practice rather than dated record, are the direct descendants of the proof principle stated here. <i>Angu v Attah</i> is thus not merely a colonial curiosity but the origin point for both how Botswana decides which law governs and how it decides what that law actually is.

HELD	The Privy Council applied customary law to the dispute, holding that the parties were subject to customary law and that the subject matter was governed by customary law in the absence of any agreement or conduct submitting the matter to the received law.
RATIO DECIDENDI	The ratio decidendi is that where a dispute arises between parties who are members of a customary-law community and the subject matter is governed by customary law, the customary law of the relevant community applies unless the parties have by agreement or conduct subjected themselves to the received law; the court must examine the nature of the transaction and the intentions of the parties to determine the governing system.
SIGNIFICANCE	This is a leading authority on choice of law as between customary and received law in colonial Africa. The principle that customary law applies to transactions between parties subject to customary law is fundamental to the operation of the dual legal system and is directly applicable in Botswana. It underpins the personal-law character of customary law and connects to the proof-of-customary-law principle developed in the Botswana cases.

KEY POINTS: SECTION B

The dual legal system is a colonial inheritance: received law was applied territorially while customary law was preserved as a personal law for the indigenous population, subject to the repugnancy proviso (Customary Law Act, s 2) and now to constitutional supremacy. Dualism generates problems of choice of law and choice of court, and of conflict between the two systems. **Angu v Attah** supplies the foundational choice-of-law rule (customary law presumptively governs transactions between members of a customary community) and the principle that the content of customary law must be proved by evidence.

Section C. Customary Court Structure and Applicability

Statutory Definitions, Applicability, Jurisdiction and Judicial Ascertainment

1. Statutory Definitions and Framework

The legal framework governing customary courts and the application of customary law in Botswana is established by the following principal statutes:

- **The Customary Courts Act (Cap 04:05).** The principal Act governing the establishment, jurisdiction and procedure of customary courts in Botswana. It provides for the constitution of customary courts, their jurisdiction in civil and criminal matters, the right of appeal to higher courts and the procedure to be followed.
- **The Customary Law Act (Cap 16:01).** Provides the basic framework for the application of customary law. It defines customary law, identifies the persons subject to customary law and provides the repugnancy proviso. It was formerly called the Common Law and Customary Law Act before the 2000 revision of laws.
- **Native Courts Proclamation 1934 and African Courts Proclamation 1943.** The colonial predecessors to the Customary Courts Act, which established the original framework for customary courts in the Protectorate.

2. Applicability of Customary Law

Section 2 of the Customary Law Act provides that a person is subject to customary law if they are a member of a tribe or tribal community of Botswana, or a member of a tribe or similar group of any other African country prescribed by the Minister. Under section 5 of the Customary Law Act, customary law applies between tribesmen and non-tribesmen where it appears from express agreement or from all relevant circumstances that the parties intended, or may reasonably be deemed to have intended, the matter to be regulated by customary law, or where the parties expressly consent to its application.

Fombad, "Customary Courts and Traditional Justice in Botswana" (2004): Fombad provides a comprehensive analysis of the Botswana customary court system, examining its structure, jurisdiction and the challenges it faces in the contemporary legal environment. He argues that customary courts continue to play a vital role in providing accessible justice to the majority of Botswana's population.

3. Jurisdiction of Customary Courts

The Customary Courts Act establishes a hierarchy of customary courts with varying jurisdictional limits:

- **Chief's Court (Kgosi's Court).** Exercises first-instance jurisdiction in civil and minor criminal matters involving persons subject to customary law, presided over by the chief or an authorised deputy.
- **Subordinate Chief's Court.** Exercises jurisdiction delegated by the chief.
- **Customary Court of Appeal.** Hears appeals from the lower customary courts, presided over by a senior traditional leader.
- **Appeals to the Magistrates' Court and High Court.** Decisions of customary courts may be appealed to the magistrates' courts and ultimately to the High Court; the full hierarchy of customary courts must be exhausted before an appeal lies to the High Court.

Section C. Cases

Mpopi Maoto (nee Motsumi) v Fernando Matsela Maoto

High Court Criminal Appeal No 10/2001 (delivered 7 May 2004, Chatikobo J)

FACTS

A party to proceedings that had been determined within the customary court system sought to bring the matter before the High Court by way of appeal. Rather than carrying the matter through each successive tier of the customary court hierarchy, the appellant sought to invoke the High Court's jurisdiction at a stage before the intermediate customary appellate levels had been exhausted. As an unreported High Court appeal the law report does not set out the underlying merits in detail; the precise facts should be confirmed from the judgment, and the decisive matter is procedural, namely the route by which the appeal reached the High Court.

ISSUE

Whether an appeal from a customary court could be properly brought before the High Court without first exhausting the full hierarchy of customary courts.

RULE

An appeal from a customary court decision must exhaust the full hierarchy of customary courts before it can be brought to the High Court. A party who bypasses the intermediate levels of the customary court hierarchy and seeks to appeal directly to the High Court has not properly exhausted the available remedies, and the High Court does not have jurisdiction to entertain the appeal at that premature stage.

APPLICATION

The High Court measured the route taken by the appellant against the statutory appellate structure of the customary court system. Finding that the intermediate tiers had not been exhausted, the Court concluded that the precondition for the exercise of its appellate jurisdiction had not been satisfied on the facts of the appeal before it.

ANALYSIS	The exhaustion requirement looks at first sight like a dry point of appellate procedure, but the reasoning carries a substantive vision of how the two arms of the dual system are meant to relate, and that is where its interest lies. Three rationales support the rule and reward separate statement. First, institutional competence: the intermediate customary tribunals are the bodies most familiar with the applicable customary law, and requiring resort to them ensures that the High Court, when it does intervene, does so on the footing of a considered customary appellate record rather than at large. Second, institutional integrity and dignity: to permit litigants to leapfrog the customary hierarchy would hollow out the very structure the legislature created and signal that the customary courts are an optional preliminary rather than a genuine system of adjudication. Third, comity and economy between the systems: exhaustion prevents premature and duplicative litigation and keeps the High Court's supervisory role as a reviewing rather than an originating jurisdiction. The decision is the procedural counterpart of the substantive deference shown in <i>Mafokate v Mafokate</i>, where the High Court recognised its unlimited civil jurisdiction yet directed customary divorces to the customary courts as the appropriate forum. Read together, the two cases describe a coherent architecture: customary disputes begin in the customary courts (<i>Mafokate</i>) and ascend through the full customary hierarchy before the superior courts are engaged (<i>Mpopi Maoto</i>), with the High Court's constitutional supremacy preserved but exercised with restraint. The case is therefore a useful corrective to any assumption that the High Court's wide jurisdiction may be invoked at will in customary matters.
HELD	The Court held that the full hierarchy of customary courts must be exhausted before an appeal lies to the High Court, and that an appeal brought without such exhaustion was not properly before it.
RATIO DECIDENDI	The ratio decidendi is that an appeal from a customary court decision must exhaust the full hierarchy of customary courts before it can be brought to the High Court; bypassing the intermediate levels means the available remedies have not been exhausted and the High Court lacks jurisdiction at that stage.
SIGNIFICANCE	This case establishes the important procedural principle that parties must exhaust the customary court hierarchy before seeking review by the High Court. It reinforces the institutional integrity of the customary court system and ensures that customary-law disputes are resolved through the appropriate channels before the superior courts are engaged.
Mafokate v Mafokate <i>[2000] 2 BLR 430 (High Court)</i>	

FACTS	The parties were spouses to a marriage contracted under customary law. One party sought the dissolution of that customary marriage and approached the High Court directly for a decree of divorce rather than instituting proceedings in the customary court. The High Court was thereby required to decide whether it should exercise its undoubted general jurisdiction to dissolve the marriage at first instance, or whether the customary court was the appropriate forum for such a dispute.
ISSUE	Whether the High Court has jurisdiction at first instance to hear an action for the divorce of a customary-law marriage, and whether it should exercise that jurisdiction or defer to the customary court.
RULE	While the High Court has unlimited jurisdiction under section 95(1) of the Constitution to hear and determine any civil matter, the dissolution of customary marriages is best suited to the customary courts, which are generally faster, less expensive and more familiar with the applicable customary law. The appropriate first-instance forum for the divorce of a customary marriage is therefore the customary court, subject to the right of appeal to the High Court by any party dissatisfied with the decision.
APPLICATION	The Court distinguished between the existence of jurisdiction and the propriety of its exercise. It accepted that constitutionally it possessed unlimited civil jurisdiction, but applied the principle that a court endowed with such jurisdiction may nonetheless decline to exercise it at first instance where a specialised and more suitable forum exists. On the facts, the dissolution of a customary marriage, it identified the customary court as that more suitable forum.

ANALYSIS	The pivotal move in the reasoning is the separation of two questions that litigants frequently conflate: whether a court has jurisdiction and whether it ought to exercise it. The Constitution answers the first in the High Court's favour by conferring unlimited civil jurisdiction, but it does not compel the High Court to act as a forum of first instance for every matter it is competent to hear. The Court fills that gap with a forum-suitability principle grounded in three practical considerations: cost, since customary courts are cheaper and more accessible to the majority of litigants; speed, since they are less encumbered by formal procedure; and expertise, since they are the repositories of the very customary law that governs the marriage and its dissolution. Crucially, this deference is not a derogation from constitutional supremacy but an exercise of it: the High Court retains its supervisory and appellate role, so that any customary determination remains answerable to constitutional standards on appeal, as the equality cases later confirm. The decision should be read alongside <i>Mpopi Maoto</i>, its procedural twin, which requires exhaustion of the customary hierarchy before the High Court is engaged; and against the equality jurisprudence of <i>Dow</i>, <i>Ramantele</i> and <i>Mabuane</i>, which makes clear that channelling a dispute to the customary court does not licence the application of discriminatory customary rules. The balance the Court strikes, respect for the customary system coupled with retained constitutional oversight, is the characteristic posture of Botswana law toward the customary courts.
HELD	The Court identified the customary court as the appropriate first-instance forum for the dissolution of customary marriages and declined to assume that role itself, subject to the parties' right of appeal.
RATIO DECIDENDI	The ratio decidendi is that although the High Court has unlimited civil jurisdiction under section 95(1) of the Constitution, the appropriate court to hear the divorce of a customary marriage is the customary court, being faster, cheaper and more familiar with the applicable customary law, subject to the right of appeal to the High Court.
SIGNIFICANCE	This case is a leading authority on the jurisdiction of customary courts in divorce matters. It affirms the central role of customary courts in resolving disputes governed by customary law and establishes that the High Court, despite its unlimited jurisdiction, will ordinarily defer to the customary court system in customary-law matters.
Bogatsu v Bogatsu and Another <i>[1987] BLR 496 (High Court)</i>	

FACTS	Following a death, competing claims arose over the right to bury the deceased and to control the burial arrangements. The dispute engaged the wishes of the deceased, the claims of family members and the customary practices of the relevant community concerning who is entitled to bury the dead. The matter was brought to the High Court, which had to decide both whether it could hear such a dispute and what legal principles governed its resolution where customary practice was in play.
ISSUE	Whether the High Court has jurisdiction to determine a burial-rights dispute, and what principles apply to such disputes where they are governed in part by customary law.
RULE	The High Court has jurisdiction to hear burial-rights disputes, including those governed by customary law. In resolving such disputes the court must apply both common-law and customary-law principles, balancing the competing interests of the parties and having regard to the deceased's expressed wishes and the customary practices of the relevant community.
APPLICATION	The Court assumed jurisdiction over the dispute and then applied the composite test to the facts: it weighed the competing claims of the parties, considered any expressed wishes of the deceased and took account of the applicable customary practices concerning burial. It thereby mapped the dual common-law and customary-law standard onto the specific contest over the right to bury.

ANALYSIS	Burial-rights disputes sit at a sensitive intersection of personal autonomy, family authority and cultural obligation, and the reasoning is notable for refusing to resolve that intersection by the exclusive application of a single body of rules. Instead the Court adopts an integrative method, drawing on common law and customary law together, that reflects the reality of life in a plural legal order where the same event, a death and the disposal of the body, is simultaneously a private matter, a family matter and a matter of communal custom. Two aspects of the analysis are worth drawing out. First, the assumption of jurisdiction is itself significant: by entertaining an intensely customary question the High Court confirmed that its supervisory reach extends to customary-law disputes that touch fundamental personal interests, foreshadowing the burial and dignity dimensions that recur in later family litigation. Second, the balancing exercise is structured rather than ad hoc: the deceased's expressed wishes, the competing claims of relatives and the relevant customary practice are each given weight, so that no single factor automatically prevails and the outcome turns on the configuration of all three. This is a model of how courts should handle the soft conflicts that pervade customary practice, conflicts not of stark rule against rule but of overlapping and sometimes competing normative claims, and it stands in instructive contrast to the hard constitutional conflicts of <i>Dow</i>, <i>Ramantele</i> and <i>Kgafela</i>, where a customary rule must simply yield to a superior constitutional norm. <i>Bogatsu</i> shows the more common, quieter judicial task of accommodation within the plural system.
HELD	The Court confirmed its jurisdiction over the burial-rights dispute and determined the question by reference to the applicable common-law and customary-law principles, balancing the interests engaged.
RATIO DECIDENDI	The ratio decidendi is that the High Court has jurisdiction to hear burial-rights disputes, including those governed by customary law, and must resolve them by applying both common-law and customary-law principles, balancing the competing interests and having regard to the deceased's wishes and the customary practices of the community.
SIGNIFICANCE	This case confirms the High Court's jurisdiction over customary-law disputes involving fundamental personal rights such as burial rights, and establishes that such disputes must be resolved by reference to both common-law and customary-law principles rather than either system alone.

Kweneng Land Board v Kabelo Lister Matlho

[1992] BLR 292 (Court of Appeal)

FACTS	A Land Board, exercising the statutory powers conferred on it by the Tribal Land Act over the allocation and administration of tribal land, purported to revoke a customary land grant held by the respondent. The validity of that revocation was challenged, raising the questions of whether the Land Board possessed the power to revoke at all and, if so, what procedural conditions attached to its exercise. The matter reached the Court of Appeal as the leading examination of Land Board revocation powers.
ISSUE	Whether a Land Board has the power under the Tribal Land Act to revoke a land grant, and what principles, in particular what procedural requirements, govern the exercise of that power.
RULE	The Tribal Land Act vests broad powers in Land Boards to allocate, administer and revoke tribal land grants. The exercise of these powers must comply with the procedural requirements of the Act and with the principles of natural justice. A revocation of a land grant carried out without affording the holder an opportunity to be heard violates the requirements of natural justice and is invalid.
APPLICATION	The Court of Appeal examined the statutory source of the Land Board's revocation power and then tested the manner of its exercise against the requirements of natural justice. It asked, on the facts, whether the grant-holder had been afforded a proper opportunity to be heard before the revocation, treating the presence or absence of that procedural protection as decisive of validity.

ANALYSIS	The significance of the reasoning lies in its insistence that the modernisation of customary land tenure does not place the administering body above the ordinary law of fair procedure, and the analysis is best appreciated against the institutional shift the Tribal Land Act effected. Historically the kgosi allocated and reallocated tribal land as trustee for the community; the Act transferred that allocative function to statutory Land Boards in pursuit of orderly, district-wide administration. A predictable risk of that transfer is that the affected landholder, formerly able to appeal to communal and customary checks, becomes vulnerable to bureaucratic decision without a hearing. The Court forecloses that risk by importing the audi alteram partem rule into the operation of the Act: broad statutory power to revoke is confirmed, but its lawful exercise is conditioned on giving the holder an opportunity to be heard. Three points deserve emphasis. First, the decision treats Land Board action as administrative action subject to administrative-law discipline, notwithstanding its customary subject matter, thereby integrating customary land administration into the general rule of law. Second, it supplies a procedural floor that protects the security of customary tenure, complementing the formal recognition that certificates of customary land grant provide. Third, it establishes the analytical template later applied to Land Board conduct in <i>Kweneng Land Board v Selaki and Sekgome and Gaoetswe v Tebele</i>, and it harmonises with <i>Gaseitsiwe v Attorney General</i>, where the same natural-justice discipline is applied to executive supervision of chiefs. <i>Matlho</i> is thus the anchor of the proposition that customary land power, however broad and however modern its institutional form, is law-bound and procedurally constrained.
HELD	The Court held that the procedural requirements of natural justice, in particular the right of the grant-holder to be heard, must be observed in the exercise of the Land Board's revocation powers, and that a revocation failing to observe them is invalid.
RATIO DECIDENDI	The ratio decidendi is that the Tribal Land Act confers broad powers on Land Boards to allocate, administer and revoke tribal land grants, but those powers must be exercised in compliance with the Act and with natural justice; a revocation made without affording the holder an opportunity to be heard is invalid.
SIGNIFICANCE	This case is the foundational authority on the powers of Land Boards under the Tribal Land Act and the procedural requirements for their exercise. It confirms that administrative action under customary land law must comply with the principles of natural justice, anchoring the later land-administration jurisprudence.

Molefe v Seketeme*[1992] BLR 226 (High Court)*

FACTS	A dispute over rights to land held under customary tenure arose between persons subject to customary law and came before a customary court. Questions were raised about whether the customary court was competent to entertain the dispute and about the content of the customary land law that governed the parties' respective rights. The reported decision focuses on the jurisdictional and ascertainment questions; the granular facts of the land contest should be confirmed from the report and are not reconstructed beyond what the holding supports.
ISSUE	Whether a customary court has jurisdiction to hear a dispute involving customary land rights, and how the applicable customary law of land tenure is to be ascertained.
RULE	Customary courts have jurisdiction to hear disputes involving customary land rights between persons subject to customary law. In determining the applicable customary law the court must have regard to the actual practices of the community and to the evidence of customary law presented by the parties. The court cannot simply apply the rules as stated in academic works without considering whether those rules accurately reflect the current practice of the community.
APPLICATION	The Court confirmed the competence of the customary court over the land dispute and then turned to ascertainment, directing attention to the actual practices of the community and the evidence led rather than relying uncritically on textbook statements of the rule. It thereby applied the living-law standard to the concrete question of what customary land-tenure rule governed the parties.

ANALYSIS	The reasoning advances two connected propositions, one jurisdictional and one epistemic, and the second is the more important. The jurisdictional point affirms the customary courts as the proper fora for customary land disputes, consistent with the personal-law and forum principles that run through Mafokate and the exhaustion rule in Mpopi Maoto. The epistemic point goes to the nature of customary law itself. The Court embraces a dynamic, living conception under which the law to be applied is the law the community actually observes, not a fixed text frozen at the moment a scholar recorded it. That stance carries a methodological warning that is the heart of the case: written authorities such as Schapera's Handbook, however valuable, capture customary law at a historical instant and may have been overtaken by social change, so a court that mechanically applies the textbook risk enforcing official or frozen customary law in place of the living law. The corrective is evidence: the content of the rule must be established by reference to current community practice. This judicial scepticism toward static record is the doctrinal sibling of the proof principle in Angu v Attah and the direct forerunner of the ascertainment holdings in Letsholo v Sete and Kweneng Land Board v Matlho, the latter adding that a party asserting a change in customary law must prove the change by positive evidence. Molefe v Seketeme thus occupies an important place in the chain of authority that tells Botswana courts not only which law governs but how to discover what that law currently is, and it cautions against the twin errors of fabricating change and of ossifying the past.
HELD	The Court confirmed customary court jurisdiction over the land dispute and applied the relevant customary land-law principles as established on the evidence of community practice.
RATIO DECIDENDI	The ratio decidendi is that customary courts have jurisdiction over disputes involving customary land rights between persons subject to customary law, and that in ascertaining the applicable customary law the court must have regard to the actual practices of the community and the evidence led, rather than applying academic statements of the rule uncritically.
SIGNIFICANCE	This case illustrates the interaction between customary court jurisdiction and customary land law, and the importance of evidence in establishing the content of customary law. It is an early statement of the evidence-based, living-law approach to ascertainment later developed in the Botswana courts.
Letsholo v Sete <i>[1998] BLR 676 (High Court)</i>	

FACTS	A dispute concerning family relations governed by customary law came before the customary court and ultimately required the higher court to consider whether the matter was properly before the customary court and how the governing customary law was to be ascertained. As reported, the decision is concerned principally with the methodology of ascertaining customary law; the detailed facts of the family dispute should be confirmed from the report and are not reconstructed here.
ISSUE	Whether a customary-law dispute involving family relations was properly before the customary court, and what principles govern the judicial ascertainment of the content of customary law.
RULE	In ascertaining the content of customary law the court must consider all available evidence, including expert testimony, academic sources and the actual practices of the community, and must not assume that customary law is static or identical to what is recorded in academic works. Customary law evolves over time and the court must be sensitive to that evolution.
APPLICATION	The Court applied this methodology by surveying the available evidence of customary practice rather than treating any single source as conclusive. It assessed expert and documentary material in the light of the actual, current practice of the relevant community, applying the principle that the inquiry is into living law and not merely recorded law.

ANALYSIS	The case consolidates the evidence-based, dynamic approach to customary law into a usable judicial method, and its value lies in the discipline it imposes on the sources. The Court treats the ascertainment of customary law as a composite evidentiary exercise in which expert testimony, academic writing and proof of actual community practice are weighed together, with none of them automatically decisive. The pivotal insight is temporal: academic works freeze the law at the date of writing, so a rule that Schapera accurately recorded in 1938 cannot be assumed to state the law of the present community without further inquiry, and the court must therefore remain alert to the possibility that practice has moved on. This guards against two distinct dangers that together define the central problem of customary-law adjudication. The first is ossification, the entrenchment of frozen or official customary law that no longer reflects how people actually live, which the living-law standard counters by privileging current practice. The second, addressed more directly in the Kweneng Land Board line, is unfounded assertion of change, which the requirement of positive evidence counters by placing the burden of proof on the party alleging that the rule has shifted. Letsholo v Sete is the natural companion to Molefe v Seketeme on the first danger and to Kweneng Land Board v Matlho on the second, and the three together furnish the Botswana law of judicial ascertainment: discover the living rule, prove it by evidence and neither freeze it nor invent its evolution. For the student the case is the clearest statement of how a court should go about the deceptively difficult task of finding out what unwritten law actually requires.
HELD	The Court applied the relevant principles of customary-law ascertainment to the facts, treating the content of customary law as a matter to be established on the whole of the available evidence with due regard to its evolving character.
RATIO DECIDENDI	The ratio decidendi is that in ascertaining customary law the court must consider all available evidence, namely expert testimony, academic sources and the actual practices of the community, and must not assume that customary law is static or identical to what is recorded in academic works, because customary law evolves over time.
SIGNIFICANCE	This case highlights the challenge of judicial ascertainment of customary law and confirms that courts must approach the question with sensitivity to the dynamic and evolving character of customary law. It is a key authority on ascertainment methodology in Botswana.
Molefi Silabo Ramantele v Edith Modipane Mmusi and Others CACGB-104-12 (Court of Appeal)	

FACTS	The respondents, elderly Ngwaketse women, had occupied and maintained the family home over many years. On the death of the family head a male relative (the appellant) claimed the family home on the strength of a customary rule said to confer inheritance of the family home on a male heir, to the exclusion of female relatives. The women resisted eviction. The customary entitlement to the home was litigated up to the Court of Appeal, which had to decide whether the asserted male-only inheritance rule could be enforced consistently with the Constitution.
ISSUE	Whether a customary-law rule of the Ngwaketse that only male relatives may inherit the family home was consistent with the constitutional guarantee of equality and freedom from discrimination on the grounds of sex.
RULE	Customary law is not immune from constitutional scrutiny. All customary-law rules must conform to the fundamental rights and freedoms guaranteed by the Constitution of Botswana 1966. Where a customary rule discriminates on the grounds of sex without constitutional justification it violates the constitutional guarantee of equality and is void to the extent of the inconsistency. The Constitution, as the supreme law, prevails over any inconsistent customary rule; traditional practices, however long-established, cannot override fundamental constitutional rights.
APPLICATION	The Court of Appeal applied a purposive and broad interpretation of the equality provisions of the Constitution to the asserted male-only inheritance rule. It rejected the argument that the customary-law exception in section 15(4) of the Constitution permitted sex discrimination in the devolution of property, and assessed the practical effect of the rule, the exclusion of the women from the home they had occupied and maintained, against the constitutional standard of equal treatment.

ANALYSIS	This is the high-water mark of the subordination of discriminatory custom to constitutional equality in Botswana, and the reasoning rewards careful study on several levels. The Court begins from the constitutional architecture: equality and freedom from sex discrimination are entrenched guarantees, and the Constitution is the supreme law, so any customary rule that offends those guarantees must yield. The crux is the treatment of the section 15(4) exception, which excludes certain matters, including some questions of personal and customary law, from aspects of the non-discrimination guarantee. A broad reading of that exception would have immunised customary inheritance from equality review and decided the case for the male claimant. The Court instead construes the exception narrowly and purposively, holding that it cannot be read so expansively as to authorise the very sex discrimination the Constitution condemns elsewhere; the exception is not a licence for discrimination but a limited carve-out that must be reconciled with the document's overriding commitment to equality. Two further features deserve emphasis. First, the Court adopts a dynamic conception of customary law: it declines to treat the asserted rule as a fixed and immutable command, recognising that customary law evolves and may be developed in conformity with constitutional values rather than ossified in a discriminatory form. Second, the analysis is resolutely substantive, focusing on the lived effect of the rule on women who had occupied and maintained the home, so that the discriminatory impact, not the formal pedigree of the custom, is decisive. In method this is the direct descendant of <i>Petrus</i>, which made effect rather than tradition the constitutional touchstone, and of <i>Dow</i>, which applied generous purposive construction to strike down sex-discriminatory law; in subject matter it completes the inheritance line running through <i>Tape v Matoso</i> and the High Court decision in <i>Mmusi v Ramantele</i>. <i>Ramantele</i> is therefore both the doctrinal culmination of that line and the leading modern statement that custom, however venerable, operates within and beneath the Constitution.
HELD	The customary rule of male-only inheritance of the family home was declared unconstitutional and void; the women were entitled to remain, and the appeal asserting the discriminatory rule was dismissed.
RATIO DECIDENDI	The ratio decidendi is that customary law is subject to the Constitution: a customary rule that discriminates on the grounds of sex without constitutional justification violates the equality guarantee and is void to the extent of the inconsistency, and the section 15(4) exception does not permit sex discrimination in the devolution of property.

SIGNIFICANCE	This is the landmark case on the relationship between customary law and constitutional rights in Botswana. The ratio is of the highest importance: customary law must conform to the Constitution. It must be read alongside AG v Dow [1992] BLR 119 as the two pillars of Botswana constitutional jurisprudence on equality and customary law, and it is the appellate affirmation of the High Court decision in Mmusi v Ramantele.
Tokoyame v Bok <i>2008 (1) BLR 384 (Court of Appeal)</i>	
FACTS	The dispute concerned a customary-law practice whose compatibility with the constitutional rights of the parties was put in question. The matter reached the Court of Appeal, which used the occasion to articulate the proper judicial approach to customary law in the constitutional era. The detailed facts of the underlying practice should be confirmed from the report and are secondary to that statement of approach here.
ISSUE	Whether a customary-law practice was consistent with the constitutional rights of the parties, and what is the proper approach of the courts to customary law in the constitutional era.
RULE	The courts of Botswana must approach customary law in the constitutional era with an awareness of the overriding requirements of the Constitution. Customary law is a legitimate and important source of law in Botswana, but it must be applied and developed in a manner consistent with constitutional values, including equality, dignity and the protection of fundamental rights.
APPLICATION	The Court of Appeal examined the customary practice at issue through the lens of the constitutional framework, asking whether the practice could be reconciled with constitutional values or whether it offended them. It applied the principle that customary law, while legitimate, operates within and subject to the constitutional order.

ANALYSIS	The contribution of the case is its constructive framing of the relationship between customary law and the Constitution, and the analysis is best understood as supplying the interpretive posture that the more dramatic invalidation cases presuppose. Where Petrus, Dow, Ramantele and Kgafela are remembered for striking down a rule or practice, Tokoyame articulates the underlying attitude: customary law is neither to be abolished wholesale nor distrusted as inherently suspect, but to be recognised as a legitimate and important source of law that must nonetheless be developed in harmony with constitutional values such as equality and dignity. This is the judicial expression of the adaptation thesis associated with Van Niekerk, that the post-colonial task is the principled adaptation of customary law to a constitutional democracy rather than its substitution by received law. Three implications follow. First, the posture is developmental: courts are stewards of the evolution of customary law, with a responsibility to shape it in conformity with the Constitution rather than merely to police it. Second, it is value-sensitive: the constitutional touchstones are not only rules but values, equality, dignity and the protection of fundamental rights, which inform how customary rules are read and applied. Third, it is reconciliatory: the aim is to harmonise custom and Constitution where possible, resorting to invalidation only where reconciliation fails. Tokoyame thus complements the invalidation jurisprudence by supplying its constructive counterpart, and it signals that the long-run trajectory of Botswana customary law is development within the constitutional order rather than displacement from it.
HELD	The Court applied the constitutional framework in assessing the customary-law practice, affirming that customary law must be developed and applied consistently with constitutional values.
RATIO DECIDENDI	The ratio decidendi is that the courts must approach customary law in the constitutional era with awareness of the overriding requirements of the Constitution; customary law remains a legitimate source of law but must be applied and developed consistently with constitutional values of equality, dignity and fundamental rights.
SIGNIFICANCE	This case contributes to the growing body of Botswana jurisprudence on the relationship between customary law and constitutional rights, confirming the need to develop customary law in a manner consistent with constitutional values rather than to apply it in isolation from them.

KEY POINTS: SECTION C

The Customary Courts Act (Cap 04:05) and the Customary Law Act (Cap 16:01) frame the customary court system and the persons subject to customary law. Jurisdictionally, customary disputes begin in the customary courts (**Mafokate**) and must ascend through the full customary hierarchy before the High Court is engaged (**Mpopi Maoto**); the High Court nonetheless has jurisdiction over personal-rights disputes such as burial (**Bogatsu**). On ascertainment, customary law is the living law of the community, established by evidence and not assumed from dated record (**Molefe v Seketeme**, **Letsholo v Sete**). Customary land power is procedurally constrained by natural justice (**Kweneng Land Board v Matlho**), and discriminatory custom yields to the Constitution (**Ramantele v Mmusi**; framing in **Tokoyame v Bok**).

Section D. Selected Contemporary Substantive Law

Tswana Land Law, Family Law and Inheritance

D1. Tswana Land Law

1. Historical Account of Tswana Land Tenure

Land tenure under Tswana customary law is characterised by a system of communal ownership in which land belongs to the tribe as a whole and is held in trust for the community by the chief. Individual members of the community have rights of use and occupation: they may be allocated land for residential, agricultural and grazing purposes, but these rights do not constitute ownership in the Western sense.

Key features of traditional Tswana land tenure:

- **Communal ownership.** Land belongs to the tribe collectively and is not individually owned.
- **The chief as trustee.** The chief holds land in trust for the community and has the power to allocate and reallocate land within the tribal territory.
- **Use rights.** Individuals have rights of use and occupation, allocated by the chief or headman; these rights are not transferable in the Western sense.
- **No alienation.** Tribal land cannot be sold or transferred outside the community without the consent of the chief and, after independence, the Land Board.
- **Reversion.** Land not being used reverts to the chief for reallocation.

Schapera, Handbook of Tswana Law, Chapter XI: Schapera provides a detailed account of the traditional rules governing Tswana land tenure, including the allocation of arable land, residential plots and grazing rights.

2. The Tribal Land Act (Cap 32:02)

The Tribal Land Act (Cap 32:02) is the principal statute governing tribal land in Botswana. It was enacted to provide a modern administrative framework for the management of tribal land, replacing the traditional system under which the chief allocated and administered land. Key provisions include:

- **Land Boards.** The Act established Land Boards as the bodies responsible for allocating, administering and managing tribal land in each district, transferring the traditional allocative function of the chief to an administrative body.
- **Certificate of Customary Land Grant.** The Act provides for the issue of certificates of customary land grant to persons allocated tribal land, giving a degree of formal recognition and security for customary land rights.

- **Common-law lease.** The Act allows for the conversion of a customary land grant into a common-law lease, enabling the holder to use the land for commercial purposes or as security for borrowing.
- **Land Board powers.** Land Boards have broad powers to allocate, administer and revoke land grants, subject to procedural requirements and the principles of natural justice.

Section D. Land Cases

Kweneng Land Board v Daniel Selaki and Paphani Sekgome

High Court Misca 590/2000 (delivered 17 August 2001, Collins P)

FACTS	The Kweneng Land Board purported to exercise its statutory power in respect of a customary land grant. In resisting or challenging the Board's position, reliance was placed on the proposition that customary land law had changed, that it had evolved to accommodate modern demands for more individualised or secure tenure. The matter turned on whether such an asserted change in customary law had been established. As an unreported High Court matter the report does not set out the underlying transactional history in detail; the precise facts should be confirmed from the judgment, and the decisive matter is the evidentiary question.
ISSUE	Whether the Kweneng Land Board had validly exercised its power in respect of the customary land grant, and what evidence was required to establish that customary land law had changed to accommodate modern demands.
RULE	Where a party relies on a change in customary law, for example to argue that customary land law has evolved to accommodate modern demands for individual tenure, they must adduce positive evidence establishing that such a change has in fact occurred in the practice of the relevant community. Courts cannot simply assume that customary law has changed without evidence. This case is to be distinguished from the Kabelo Matlho line on its particular facts.
APPLICATION	The Court tested the assertion of changed customary law against the evidence actually placed before it. It asked whether positive proof of a shift in community practice had been led and, finding the evidentiary foundation wanting, declined to accept that the customary land law had altered in the manner contended for.

ANALYSIS	The decision enforces an evidentiary discipline on claims that customary law has evolved, and the analysis is best read as the operational complement to the living-law principle rather than a retreat from it. The Botswana courts accept, in <i>Molefe v Seketeme</i> and <i>Letsholo v Sete</i>, that customary law is dynamic and must track current practice; the obvious risk of that acceptance is that a litigant will simply assert that the rule has modernised in whatever direction suits the case. This decision closes that gap by allocating a burden: the party who claims that customary law has changed must prove the change by positive evidence of actual community practice, and absent such proof the previously recognised rule is taken to continue. Three points merit emphasis. First, the rule produces a working presumption of continuity that lends stability and predictability to customary land tenure, so that rights are not defeated by unsubstantiated assertions of modernisation. Second, it is even-handed as between the parties: it neither freezes customary law against genuine evolution nor permits convenient invention, because change is recognised precisely when, and only when, it is demonstrated. Third, it situates the burden where the information lies, on the party asserting the new practice, who is best placed to lead evidence of it. The decision is the natural pair of <i>Kweneng Land Board v Matlho</i>, which states the same positive-evidence requirement at the level of principle, and of <i>Hendrick v Tsawe</i>, which applies the evidence-based method to conflicts between competing customary rules. For the student it is the clearest authority that, in Botswana, the evolution of customary law is a matter of proof and not of judicial or litigant assumption.
HELD	The Court held that the claimed change in customary law had not been established on the evidence, and the asserted evolution of customary land tenure was not accepted.
RATIO DECIDENDI	The ratio decidendi is that a party who relies on a change in customary law must adduce positive evidence that the change has actually occurred in the practice of the relevant community; courts will not assume a change in customary law without such evidence.
SIGNIFICANCE	This case is important for establishing the evidentiary requirements for proving a change in customary law. It confirms that customary law is presumed to remain as previously recognised unless positive evidence of change is adduced, and it sits at the heart of the Botswana judicial-ascertainment jurisprudence.

Ditira Gaoetswe v Keleomile Tebele and 23 Others

High Court Misc 590/2000 (17 August 2001, Collins P)

FACTS	The dispute arose in a communal or tribal land area and concerned the relationship between water rights, specifically borehole rights, and rights over the land surrounding the borehole. The holder of the water rights asserted, or was met with the assertion of, a claim that those rights carried with them an entitlement to the adjoining land. The Court had to delineate the scope of customary water rights and their relationship to land rights. The report concentrates on that question of scope rather than on extensive factual narrative.
ISSUE	Whether water rights (borehole rights) in a communal or tribal land area extend to ownership of the adjoining land.
RULE	Under Tswana customary land law the holder of water rights (borehole rights) in a communal or tribal land area does not thereby acquire rights over the surrounding land. Water rights and land rights are separate and distinct rights under customary land law, and the grant of one does not automatically extend to the other. The holder of water rights may use the borehole but has no automatic claim to the surrounding land.
APPLICATION	The Court applied the principle of separability to the facts by distinguishing the borehole right from any right in the land around it. It examined the nature of the water right granted and held that, on the customary law, that grant could not be parlayed into a proprietary claim over the adjoining communal land.

ANALYSIS	The reasoning protects the communal character of tribal land by keeping functionally distinct rights legally distinct, and its importance is best appreciated against the structure of Tswana land tenure described above. In that system land belongs to the tribe and is allocated by the chief, and now the Land Board, for particular uses; rights are use-specific rather than proprietary in the Western sense. To allow a borehole right, a permission to abstract and use water at a point, to expand silently into control of the surrounding land would subvert that structure in three ways the Court was evidently concerned to prevent. First, it would convert a limited use right into a de facto private holding, eroding the communal ownership that defines the tenure. Second, it would usurp the allocative authority of the chief and the Land Board, since the landholder would acquire by accretion what the system reserves to be granted deliberately. Third, it would prejudice other community members whose own use rights in the surrounding land, for grazing or cultivation, depend on the land remaining communal rather than being engrossed by the borehole holder. By insisting on the separability of water and land rights the Court preserves the integrity of the communal regime and prevents its incremental privatisation through the back door of resource rights. The decision also complements the natural-justice constraint of <i>Kweneng Land Board v Matlho</i>: where Matlho disciplines how customary land power is exercised, Gaoetswe delimits what a given customary right actually comprises, and both work to keep customary land law coherent and faithful to its communal foundations.
HELD	The Court held that water rights do not extend to ownership of the adjoining land, and the claim to the surrounding land based on the borehole right failed.
RATIO DECIDENDI	The ratio decidendi is that under Tswana customary land law water rights and land rights are separate and distinct, so that the holder of borehole rights in a communal or tribal land area does not thereby acquire rights over the surrounding land.
SIGNIFICANCE	This case clarifies the scope of customary water rights in Botswana and their relationship to land rights, confirming the separability of water and land rights under customary law and protecting the communal land regime from incremental individual engrossment.

D2. Family Law at Customary Law

1. Marriage at Customary Law

The essential elements of a valid customary-law marriage in Botswana have been examined in Section A and in the LAW 134 notes. For the purposes of LAW 106 the key issues are the recognition and registration of customary marriages, the consequences of customary marriage for women's

rights, and the interaction between customary marriage law and the formal legal system.

- **Marriage Act 2000 (Cap 29:01).** Introduced compulsory registration of customary marriages, with significant implications for the legal recognition and enforcement of customary marriage rights.
- **Dissolution of African Marriages (Disposal of Property) Act (Cap 29:06).** Governs the division of property on the dissolution of customary-law marriages.

Section D. Family Law Cases

The Attorney General v Unity Dow

[1992] BLR 119 (Court of Appeal)

FACTS	Unity Dow, a citizen of Botswana, was married to a foreign national. Under the Citizenship Act 1984 children born to a Botswana woman married to a foreigner were denied Botswana citizenship, whereas children of a Botswana man married to a foreign woman acquired citizenship by descent in the same circumstances. Dow challenged the Act as discriminating against her on the ground of sex and as infringing her fundamental rights. The matter reached the Court of Appeal as a direct test of the constitutional equality guarantee against a discriminatory statute.
ISSUE	Whether the Citizenship Act 1984, which denied citizenship to children of Botswana women married to foreign nationals while granting it to children of Botswana men in the same position, was inconsistent with the constitutional guarantee of equality and freedom from discrimination on the grounds of sex.
RULE	The Constitution of Botswana must be interpreted broadly and purposively to give full effect to the fundamental rights it guarantees, including the right to equality and freedom from discrimination on the grounds of sex. A statute that treats the children of women differently from the children of men in identical circumstances discriminates unconstitutionally on the ground of sex; the constitutional right to equality requires that women and men be treated equally, including in the transmission of citizenship to their children.
APPLICATION	The Court of Appeal applied purposive constitutional interpretation to the impugned provisions. It compared the treatment of the children of Botswana women with that of the children of Botswana men in materially identical circumstances, identified the differential treatment as turning solely on the sex of the parent and found no constitutional justification for the distinction. It thereby measured the statute directly against Chapter II of the Constitution.

ANALYSIS	Dow is the foundation of modern equality jurisprudence in Botswana, and the reasoning rewards study both for its method of constitutional interpretation and for the doctrinal bridge it builds to customary law. On method, the Court adopts a generous and purposive construction of the Bill of Rights, treating the fundamental-rights guarantees as living provisions to be read so as to advance, not defeat, their evident purpose, and declining the narrow or literal reading that would have salvaged the discriminatory statute. In support it drew on Botswana's commitment to equality and on the wider international human-rights context, signalling that domestic rights are to be interpreted in harmony with the values the country has embraced. The Court then confronted the argument that the constitutional scheme tolerated the distinction and rejected it: differential treatment that turns solely on the sex of the parent, with no justification, is exactly the discrimination the Constitution forbids. The decision matters for customary law for two connected reasons. First, the interpretive technique it establishes, purposive construction with effect rather than form as the touchstone, is the same technique later turned upon discriminatory custom in <i>Tape v Matoso</i> and <i>Ramantele v Mmusi</i>; the move from striking down a sex-discriminatory statute to striking down a sex-discriminatory customary rule is short and direct. Second, <i>Dow</i> establishes that the equality guarantee disciplines all law in Botswana, so that neither the statutory nor the customary label exempts a rule from scrutiny, a proposition that the customary-law exception in section 15(4) cannot defeat, as <i>Ramantele</i> later confirms by reading that exception narrowly. <i>Dow</i> is therefore not merely a citizenship case but the doctrinal headwater from which the constitutional control of discriminatory custom flows, and it is rightly paired with <i>Ramantele</i> as one of the two pillars of the subject.
HELD	The relevant provisions of the Citizenship Act 1984 were declared unconstitutional as unjustified sex discrimination violating Chapter II of the Constitution.
RATIO DECIDENDI	The ratio decidendi is that the Constitution must be interpreted broadly and purposively to give full effect to fundamental rights including equality and freedom from sex discrimination, and that legislation treating the children of women differently from the children of men in identical circumstances is unconstitutional sex discrimination.
SIGNIFICANCE	This is the landmark case in Botswana constitutional and customary law. It is directly relevant to LAW 106 because it established the principle that constitutional rights, including equality, override both statutory and customary rules that discriminate on the basis of sex. It fundamentally transformed the relationship between women's rights, customary law and the Constitution, and stands with <i>Ramantele v Mmusi</i> as a pillar of the equality jurisprudence.

Molefi Mphoyakgosi v Keitshekile Jakoba*[1997] BLR 604 (High Court)*

FACTS	The parties had performed certain customary formalities associated with the formation of a relationship, in particular the patlo (formal request and betrothal negotiations between the families) and steps connected with bogadi (bridewealth). A dispute arose as to whether these ceremonies had brought into being a completed customary-law marriage, with the legal rights and obligations that flow from marriage, or whether they amounted only to a customary engagement. The Court had to characterise the relationship by reference to the formalities performed and the parties' and families' intentions.
ISSUE	Whether the performance of patlo and bogadi ceremonies constituted a completed customary-law marriage or a mere engagement, and what legal consequences followed from the characterisation.
RULE	The performance of patlo and bogadi ceremonies does not automatically constitute a completed customary-law marriage. The court must examine all the circumstances, including the nature and extent of the formalities performed, the intentions of the parties and their families, and the surrounding evidence, to determine whether a completed marriage or merely an engagement was entered into. The distinction has significant consequences for the parties' legal rights and obligations.
APPLICATION	The Court applied this multi-factor test to the facts by scrutinising exactly which customary formalities had been completed and which had not, and by inquiring into the intentions manifested by the parties and their families. It weighed that evidence to decide whether the threshold of a completed marriage had been crossed or whether the relationship remained at the stage of engagement.

ANALYSIS	The reasoning rejects a mechanical, ceremony-counting approach to customary marriage in favour of a substantive inquiry into completion and intention, and the analysis is illuminating about the processual nature of customary marriage itself. Unlike a civil marriage solemnised in a single act, a Tswana customary marriage is built up through a sequence of stages: the patlo negotiations between the families, the agreement and transfer of bogadi, and the various acts of recognition that attend the union. Because the process is staged, the presence of some formalities is necessary but not sufficient to constitute a marriage; the court must determine whether the process has been carried through to completion. The Court therefore makes two related demands. First, it requires attention to the precise formalities performed and omitted, since the point reached in the sequence bears directly on whether the threshold of marriage has been crossed. Second, and more importantly, it requires inquiry into the intentions of the parties and, distinctively, their families, reflecting the communal character of customary marriage in which the families' shared understanding that a marriage has come into being is central. The stakes of the characterisation justify this care: the difference between marriage and engagement governs status, the devolution and division of property, the legitimacy and affiliation of children, and the claims available on dissolution or death. The case is thus a study in how courts identify the existence of a customary relationship on the evidence, and it connects to the broader theme, seen in <i>Molefe v Seketeme</i> and <i>Letsholo v Sete</i>, that customary law is established by careful attention to actual practice and understanding rather than by the application of abstract formulae.
HELD	The Court applied the applicable customary-law principles to the facts to determine the legal nature of the relationship, characterising it on the whole of the evidence concerning the formalities performed and the intentions of the parties and families.
RATIO DECIDENDI	The ratio decidendi is that the performance of patlo and bogadi does not automatically create a completed customary marriage; the court must examine all the circumstances, the formalities, the intentions of the parties and families, and the surrounding evidence, to decide whether a completed marriage or only an engagement was entered into.
SIGNIFICANCE	This case is important for understanding the requirements of a valid customary-law marriage and the distinction between a completed marriage and a customary engagement. It illustrates the complexity of customary marriage requirements and the role of the courts in determining their legal character on the evidence.

Moisakamo v Moisakamo (2)*1981 BLR 126 (Court of Appeal)*

FACTS	On the dissolution of a marriage contracted under customary law a dispute arose over the division of the matrimonial property. The question was which body of law governed the division, the customary law of the relevant community or the formal law, and on what principles the property should be apportioned between the parties. The matter reached the Court of Appeal, which addressed the governing framework for property division on customary divorce.
ISSUE	Whether the division of property on the dissolution of a customary-law marriage was governed by customary law or by the formal law, and what principles applied to the division.
RULE	The division of property on the dissolution of a customary-law marriage is governed primarily by the customary law of the relevant community, subject to the constitutional requirement of equality and to the provisions of the Dissolution of African Marriages (Disposal of Property) Act. The court must apply customary law in a manner consistent with the Constitution and must not apply customary property rules that are discriminatory or contrary to natural justice.
APPLICATION	The Court of Appeal identified the customary law of the relevant community as the primary source for the division and then applied it subject to the overriding constitutional and statutory constraints. It examined the customary property principles bearing on the spouses' respective entitlements and apportioned the matrimonial property accordingly, filtering the customary rules through the equality and natural-justice requirements.

ANALYSIS	The decision establishes the layered framework that continues to govern customary matrimonial property, and the analysis is clearer for setting out the layers in order of priority. At the base, customary law supplies the primary rules for division, in recognition that the marriage was contracted under customary law and that the parties' property expectations were formed within that system. Above customary law sits the Dissolution of African Marriages (Disposal of Property) Act, the statute specifically directed at property on the dissolution of customary marriages. And overarching both is the Constitution, whose equality guarantee and the associated requirement of natural justice condition the whole exercise. The crucial feature of the reasoning is that the customary rules are not applied mechanically: the Court holds that customary property rules which are discriminatory or contrary to natural justice must yield, so the primary source operates only so far as it is consistent with the superior norms. This filtering of customary law through constitutional and statutory standards anticipates two later developments. It looks forward to <i>Mabuane v Mokgweetsi</i>, where the court does not merely strike down an offending rule but actively supplements an inadequate customary regime with equitable principles to protect a woman's contribution; and it sits within the wider equality project of <i>Dow and Ramantele</i>, which subordinate discriminatory rules, statutory and customary alike, to constitutional equality. <i>Moisakamo</i> is therefore the structural starting point for the law of property on customary divorce, establishing both the primacy of customary law and the constitutional ceiling within which it must operate.
HELD	The Court applied customary law to the division of the matrimonial property, subject to constitutional and statutory requirements, and apportioned the property on that basis.
RATIO DECIDENDI	The ratio decidendi is that property division on the dissolution of a customary marriage is governed primarily by the customary law of the relevant community, subject to the constitutional requirement of equality and the Dissolution of African Marriages (Disposal of Property) Act, and the court must not apply discriminatory customary property rules.
SIGNIFICANCE	This case is important for establishing the framework for property division on customary-marriage dissolution and the role of the courts in applying customary law in this context subject to constitutional and statutory limits.
Mabuane v Mokgweetsi 2011 (1) BLR 365 (High Court)	

FACTS	On the dissolution of a customary marriage a woman who had contributed to the acquisition of matrimonial property sought to protect her interest in that property. The applicable customary-law property rules, however, were said to provide inadequate protection for her contribution. The Court had to decide whether it was confined to those customary rules or whether it could supplement them so as to do justice to her interest.
ISSUE	Whether a woman's property rights under customary law were adequate to protect her interests on the dissolution of a customary marriage, and whether the court could supplement customary law with equitable principles to protect those interests.
RULE	Where customary-law property rules fail to adequately protect a party's legitimate interests, particularly the interests of women who have contributed to the acquisition of matrimonial property, the court may supplement the applicable customary law with equitable principles to achieve a just result. The constitutional requirement of equality demands that women's property rights on divorce be protected.
APPLICATION	The Court examined the woman's contribution to the matrimonial property and tested the applicable customary rules against the need to protect that contribution. Finding the customary rules wanting, it applied equitable principles to supplement them, fashioning a remedy that recognised and protected her interest in the property she had helped to acquire.

ANALYSIS	The decision marks an important advance in remedial technique, and the analysis turns on the difference between negative and positive judicial intervention in customary law. In <i>Moisakamo</i> the court filtered customary property rules, declining to apply those that were discriminatory or contrary to natural justice; that is a negative operation, the disapplication of an offending rule. Here the court goes further and performs a positive operation: confronting a customary regime that simply fails to protect a woman's real economic contribution to the matrimonial property, it supplements the customary law with equitable principles to fashion a just outcome. The driver of this move is the constitutional equality imperative, which the Court treats not merely as a veto over bad rules but as a positive warrant to ensure that women's property rights on divorce are effectively protected. Three implications stand out. First, the decision recognises that formal customary categories may defeat substantive justice where they do not account for a spouse's actual contribution, and it equips the court to correct that mismatch. Second, it deploys equity as a gap-filling and corrective mechanism within the plural system, showing that the development of customary law can proceed by supplementation as well as by invalidation. Third, it advances the broader trajectory, traceable through <i>Dow</i>, <i>Moisakamo</i> and <i>Ramantele</i>, by which constitutional equality reshapes customary family and property law to meet the realities of modern matrimonial life. <i>Mabuane</i> is therefore significant not only for its result but for confirming that courts may build as well as strike, supplementing a deficient customary regime in the service of constitutional values.
HELD	The Court supplemented customary law with equitable principles to protect the woman's property interests on the dissolution of the customary marriage.
RATIO DECIDENDI	The ratio decidendi is that where customary-law property rules fail to protect a party's legitimate interests, especially a woman who has contributed to matrimonial property, the court may supplement the customary law with equitable principles to achieve a just result, the constitutional equality guarantee requiring protection of women's property rights on divorce.
SIGNIFICANCE	This case is significant for establishing the court's power to supplement customary law with equitable principles where the customary law fails to provide adequate protection for constitutional rights, advancing the protection of women's property interests on customary divorce.

D3. Tswana Law on Inheritance

1. Introduction to Tswana Inheritance Law

Inheritance law under Tswana customary law governs the devolution of property upon the death of a member of the community. The general rules reflect the patrilineal and communal character of Tswana society.

Key features of traditional Tswana inheritance law:

- **Patrilineal succession.** Property passes through the male line. The primary heir is the eldest son of the main house (chief wife). Where there is no son the property passes to the nearest male relative in the patrilineal line.
- **Kgosi ya losika (headship of the family).** The family head manages the family property and is responsible for the welfare of the family, particularly widows and orphans.
- **Differential treatment of houses.** In a polygamous household each wife has her own house property; the general estate is allocated among the houses according to seniority.
- **Position of women.** Traditionally women were not heirs under Tswana customary inheritance law; they could inherit from their husbands or receive maintenance from the family estate, but the estate itself passed to male heirs.
- **Children's categories.** The law distinguishes between legitimate children (born of marriage with bogadi), extra-marital children, last-born and first-born children, male and female children, and adopted children, each with different inheritance rights.

Relevant statutes governing inheritance:

- **Administration of Estates Act (Cap 31:01).** Governs the administration of deceased estates.
- **Law of Inheritance Act (Cap 31:02).** Provides rules for intestate succession.
- **Succession (Right of Surviving Spouse and Inheritance Family Provisions) Act (Cap 31:03).** Protects the rights of surviving spouses and dependants.
- **Dissolution of African Marriages (Disposal of Property) Act (Cap 29:06).** Governs property rights on the dissolution of customary marriages.

Section D. Inheritance Cases

Tape v Matoso

2007 (1) BLR 512 (Court of Appeal)

FACTS

A dispute over the devolution of a deceased's estate arose between a female claimant and a male relative, in circumstances where the applicable customary inheritance rule was said to favour the male relative on the basis of sex. The female heir asserted an entitlement that the customary rule, applied mechanically, would deny her. The Court of Appeal had to decide how customary inheritance rules are to be applied in the light of the constitutional equality guarantee.

ISSUE	Whether a female heir was entitled to inherit under customary law in preference to, or on an equal footing with, a male relative, and what principles govern the application of customary inheritance rules in the constitutional era.
RULE	The courts must apply customary inheritance rules with sensitivity to the constitutional requirement of equality and to the evolving character of customary law. Where customary inheritance rules discriminate on the basis of sex in a manner that cannot be justified under the Constitution, the court must apply the Constitution in preference to the customary rule and must not mechanically apply outdated customary rules that have been overtaken by constitutional and social change.
APPLICATION	The Court of Appeal examined the customary inheritance rule relied upon and assessed it against the constitutional equality guarantee. It declined to apply the rule mechanically where doing so would produce unjustified sex discrimination, measuring the effect of the rule on the female heir against the constitutional standard of equal treatment.
ANALYSIS	The decision extends the equality principle of Dow into the specific domain of customary succession and prefigures the definitive statement in Ramantele, and the analysis rests on two ideas working in tandem. The first is that customary law is dynamic and should not be frozen in a discriminatory past: the Court declines to treat an inherited inheritance rule as a fixed command immune from development, recognising that customary law evolves with the society it serves. The second is that the Constitution supplies an overriding norm of equality that customary inheritance rules must satisfy, so that a rule discriminating by sex without justification cannot be applied merely because it is traditional. Put together, these ideas cast the court as an agent of the principled development of customary inheritance law rather than a passive conduit for whatever the old rule prescribes; the judicial task is to apply the living, constitutionally compliant rule, not the frozen, discriminatory one. Two further observations sharpen the case's place in the scheme. It is methodologically continuous with Petrus and Dow, which made the effect of a rule, here the exclusion of a woman from her inheritance, rather than its pedigree the constitutional touchstone. And it is a way-station on the road to Ramantele and the High Court decision in Mmusi v Ramantele, which convert the principle stated here into a clear holding that sex-discriminatory inheritance of the family home is void. Tape v Matoso thus matters as the appellate authority that brought customary succession squarely within the equality guarantee and signalled that female heirs could no longer be excluded by unexamined tradition.

HELD	The Court applied the constitutional framework in assessing the customary inheritance rule, declining to give mechanical effect to a rule producing unjustified sex discrimination.
RATIO DECIDENDI	The ratio decidendi is that customary inheritance rules must be applied consistently with the constitutional guarantee of equality and the evolving character of customary law; where such rules discriminate on the basis of sex without constitutional justification, the Constitution prevails over the customary rule.
SIGNIFICANCE	This case is important for the development of Botswana customary inheritance law in the constitutional era. It confirms that customary inheritance rules must comply with the constitutional guarantee of equality, particularly in relation to the rights of women and female heirs, and it forms part of the line culminating in <i>Ramantele v Mmusi</i> .
Hendrick v Tsawe <i>2008 (3) BLR 447 (High Court)</i>	
FACTS	A dispute over the inheritance of a family estate arose in circumstances where more than one body of customary law, or competing formulations of the applicable customary rule, might govern the devolution. The Court was required to determine which community's customary law applied and how to resolve the conflict between competing customary inheritance rules. The report's emphasis is on the methodology for resolving such conflicts; the detailed estate facts should be confirmed from the report and are not embellished here.
ISSUE	What are the applicable customary-law rules governing the inheritance of the family estate, and how should conflicts between different customary-law rules be resolved?
RULE	Where there is a conflict between different customary-law rules, for example between the rules of different tribal communities, the court must determine which community's customary law applies and then apply that law consistently. Where customary law is unclear or disputed, the court must examine all available evidence of customary practice and apply the rule that best reflects the actual practice of the relevant community.
APPLICATION	The Court applied this methodology by first identifying the community whose customary law governed the estate and then ascertaining that community's inheritance rule on the evidence. Faced with competing formulations, it preferred the rule best supported by evidence of actual practice, applying it consistently to resolve the devolution.

ANALYSIS	The case addresses a conflict-of-laws problem internal to the customary sphere, and the analysis is valuable for showing that legal pluralism in Botswana operates at two levels, not one. The familiar conflict, captured by <i>Angu v Attah</i>, is vertical: customary law against received law, resolved by asking whether the parties and the transaction belong to the customary order. The conflict here is horizontal: one community's customary law against another's, which arises naturally in a multi-ethnic state where individuals and families may have ties to more than one customary tradition through descent, marriage or residence. The Court resolves it in two ordered steps. First, it identifies the governing customary order, determining which community's law applies to the estate before any rule is applied. Second, having fixed the applicable order, it ascertains the content of that community's rule on the evidence, preferring the formulation best supported by proof of actual practice where the rule is unclear or contested. This second step reaffirms the evidence-based, living-law method of <i>Molefe v Seketeme</i> and <i>Letsholo v Sete</i> and the positive-evidence requirement of the <i>Kweneng Land Board</i> cases, now deployed to choose between rival customary rules rather than merely to find a single one. The decision is therefore important for its recognition that the ascertainment of customary law in Botswana sometimes requires a prior choice among customary systems, and for confirming that the same evidentiary discipline governs both the choice of system and the content of the chosen rule.
HELD	The Court applied the applicable customary-law inheritance rules to the estate, having determined which community's law governed and ascertained its content on the evidence.
RATIO DECIDENDI	The ratio decidendi is that where customary-law rules conflict, for instance between different tribal communities, the court must determine which community's customary law applies and apply it consistently, and where the law is unclear it must apply the rule best reflecting the actual practice of the relevant community on the available evidence.
SIGNIFICANCE	This case illustrates the challenges of applying customary inheritance law in a multi-ethnic society and the methodology courts use to resolve conflicts between competing customary rules, reinforcing the evidence-based approach to ascertainment.
Mmusi and Others v Ramantele and Others MAHLB 000836-10 (High Court) (affirmed on appeal as <i>Ramantele v Mmusi</i> CACGB-104-12)	

FACTS	Three elderly Ngwaketse sisters had lived in and maintained the family home for decades. On the death of the family head a male relative claimed the home under a customary rule said to vest the family home exclusively in the youngest son, a form of male-preferential ultimogeniture in relation to the home, to the exclusion of female relatives. He sought to evict the sisters. They challenged the rule as unconstitutional sex discrimination. The High Court heard the challenge to the customary rule of male-only inheritance of the family home; its decision was subsequently affirmed by the Court of Appeal.
ISSUE	Whether the Ngwaketse customary rule that the family home passes exclusively to the youngest son on the death of the head of the family was consistent with the constitutional guarantee of equality and freedom from discrimination on the grounds of sex.
RULE	A customary-law rule of inheritance that excludes female heirs from inheriting the family home solely on the basis of their sex violates the constitutional guarantee of equality and freedom from discrimination. The Constitution is the supreme law of Botswana and prevails over any customary rule inconsistent with it; the customary-law exception in the Constitution does not permit sex discrimination in the devolution of property.
APPLICATION	The High Court examined the Ngwaketse rule of male-preferential inheritance of the family home and assessed it against the constitutional equality guarantee. It considered the practical effect of the rule, the exclusion and threatened eviction of the sisters who had occupied and maintained the home, and tested whether the customary-law exception could justify that sex-based exclusion, concluding that it could not.

ANALYSIS	This is the fullest first-instance articulation of the principle that discriminatory custom must yield to constitutional equality, and the analysis is notable for engaging the hardest version of the conflict head-on. The rule asserted was not a marginal practice but a settled principle of devolution of the family home, defended as authentic Ngwaketse custom; the claimants were not abstract rights-holders but women who had actually occupied and sustained the home over many years and faced eviction. Against that background the Court resolves the tension by treating equality as the controlling constitutional norm and by reading the constitutional carve-out for customary law narrowly, so that it cannot be stretched to authorise the very sex discrimination the Constitution condemns. Three features of the reasoning stand out. First, it confronts and rejects the argument from authenticity: that a rule is genuinely customary and long-established does not save it, because the constitutional question is whether the rule, in its effect, discriminates without justification. Second, the analysis is grounded in the lived reality of the litigants, so that the abstract equality guarantee is brought to bear on a concrete injustice, the dispossession of women who had maintained the home. Third, the decision models the proper judicial posture toward discriminatory custom: not wholesale hostility to customary law, but insistence that particular rules conform to constitutional values, consistent with the constructive framing of <i>Tokoyame v Bok</i>. Affirmed on appeal in <i>Ramantele v Mmusi</i>, the judgment became the leading authority of its kind, and it should be read together with that appellate decision and with <i>Dow and Tape</i> as the core of the equality jurisprudence on customary inheritance.
HELD	The customary rule of male-only inheritance of the family home was declared unconstitutional and void; the decision was affirmed on appeal in <i>Ramantele v Mmusi</i>.
RATIO DECIDENDI	The ratio decidendi is that a customary inheritance rule excluding female heirs from the family home solely on the basis of sex violates the constitutional equality guarantee and is void; the Constitution prevails over the inconsistent customary rule, and the customary-law exception does not permit sex discrimination in the devolution of property.
SIGNIFICANCE	This is the most important customary-law case in Botswana. The decision fundamentally transformed customary inheritance law by establishing that female heirs cannot be excluded from inheriting the family home on the basis of sex. It must be read and understood in its full constitutional context: it represents the triumph of constitutional equality over discriminatory customary tradition and is the High Court foundation of the appellate decision in <i>Ramantele</i>.

Matlhodi v Makwapa*Misca F46/1995 (High Court)*

FACTS	A dispute arose concerning the inheritance rights of a child born outside a customary marriage for which bogadi had been paid, that is, an extra-marital child, in the estate of the father. The question was whether such a child had any automatic entitlement to inherit in the father's estate under Tswana customary law. As an older unreported High Court matter the report does not set out the full factual matrix; the precise facts should be confirmed from the judgment, and the analysis is confined to the customary rule on extra-marital children's inheritance and its constitutional implications.
ISSUE	Whether an extra-marital child has inheritance rights under Tswana customary law, and what is the legal position of children born outside a customary-law marriage.
RULE	Under Tswana customary law the inheritance rights of extra-marital children differ from those of children born of a marriage for which bogadi has been paid. Extra-marital children are traditionally regarded as belonging to the mother's family rather than the father's family and consequently do not have automatic inheritance rights in the father's estate. This position must, however, be assessed in the light of the constitutional guarantee of equality for all children regardless of birth status.
APPLICATION	The Court applied the traditional customary rule to the child's claim, locating the child within the mother's family for inheritance purposes and recognising the absence of an automatic entitlement in the father's estate. At the same time the rule was acknowledged to stand in tension with the constitutional equality guarantee, which bears on the differential treatment of children by birth status.

ANALYSIS	The case exposes a point of friction between traditional customary classification and constitutional equality, and the analysis is useful precisely because it sits at the unsettled edge of the equality jurisprudence rather than at its settled core. The customary rule reflects the lineage logic of patrilineal society: family membership, and with it inheritance, is determined by affiliation through bogadi, so that a child born outside such a marriage is regarded as belonging to the mother's family and lacks an automatic claim on the father's estate. That logic is internally coherent within the customary system, but it produces differential treatment of children based on the circumstances of their birth, a distinction the Court recognises as constitutionally suspect. The reasoning therefore does two things at once. It states the traditional rule accurately, neither disguising nor prematurely abolishing it, and it flags that the rule must be assessed against the equality guarantee that protects all children regardless of birth status. The tension is left visible rather than fully resolved, which makes the case a valuable vehicle for examining how far the equality principle, established for sex discrimination in <i>Dow, Tape and Ramantele</i>, extends to discrimination on the further ground of birth status. The trajectory of the wider jurisprudence suggests that birth-status discrimination in inheritance is unlikely to survive sustained constitutional scrutiny, but the case itself marks the frontier rather than the conclusion, and it should be read as posing the question that the equality line will ultimately have to answer.
HELD	The Court applied the relevant customary-law rules on the inheritance rights of extra-marital children, while the position was recognised as subject to the constitutional guarantee of equality for all children regardless of birth status.
RATIO DECIDENDI	The ratio decidendi is that under Tswana customary law extra-marital children are traditionally regarded as belonging to the mother's family and do not have automatic inheritance rights in the father's estate, a position that must be assessed against the constitutional guarantee of equality for all children regardless of birth status.
SIGNIFICANCE	This case illustrates the legal position of extra-marital children under Tswana customary inheritance law and raises important questions about the constitutionality of differential treatment of children based on birth status, questions that fall to be resolved under the equality jurisprudence.

KEY POINTS: SECTION D

Tswana land tenure is communal: land is held in trust by the chief, now administered by Land Boards under the Tribal Land Act, with use-specific rather than proprietary rights. Customary land power is evidence-bound (**Selaki and Sekgome**) and rights are kept distinct (**Gaoetswe**: water rights do not engross land). In family law, customary marriage is processual and characterised on the evidence (**Mphoyakgosi**), and property on divorce is governed by customary law subject to the Constitution and the Disposal of Property Act (**Moisakamo**), which courts may supplement with equity (**Mabuane**). In inheritance, the patrilineal tradition yields to constitutional equality: **Dow** supplies the method, **Tape v Matoso** applies it to succession, and **Mmusi v Ramantele** voids the male-only inheritance of the family home; **Matlhodi** leaves open the parallel question of birth-status discrimination.

Section E. Contemporary Challenges

Conflict Situations, Judicial Ascertainment, Codification, Human Rights and Chieftainship

E1. Continuing Conflict Situations

The coexistence of customary law and formal law within the same legal system inevitably produces situations of conflict and tension. Some of the most significant contemporary conflict situations include:

- **Customary law against constitutional rights.** The most fundamental tension in contemporary Botswana customary law is between customary norms and practices and the constitutional guarantees of equality, dignity and fundamental rights. Cases such as *Ramantele v Mmusi* and *AG v Dow* illustrate this tension.
- **Gender discrimination in customary law.** Many customary rules, particularly in inheritance, property rights and family law, discriminate on the basis of sex; the constitutionality of such rules has been increasingly challenged in the courts.
- **Chieftaincy disputes.** Disputes about the succession to chieftaincy and the extent of chiefly powers continue to generate litigation at the intersection of customary law and the formal legal system.
- **Land rights conflicts.** The interaction between customary land tenure and the formal land-administration system under the Tribal Land Act continues to generate significant disputes.

Section E. Conflict Cases

Kgafela Kgafela and Others v The State

High Court CLHLB-000661-10 (delivered 11 March 2011, Lesetedi, Dibotelo and Letsididi JJ)

FACTS

The kgosi of the Kgatla and others were prosecuted in connection with the administration of traditional corporal punishment, the infliction of lashes at the direction of the kgosi as part of customary disciplinary practice within the tribe. The accused asserted the lawfulness of the practice as a deeply embedded custom of the Kgatla, exercised under the authority of the kgosi. The matter came before a full bench of the High Court, which had to decide whether the customary practice of kgosi-directed corporal punishment could be reconciled with constitutional rights and the general law.

ISSUE

Whether the customary practice of the Kgatla of administering lashes (traditional corporal punishment) at the direction of the kgosi was lawful under Botswana law, and whether it was consistent with constitutional rights.

RULE	The customary practice of administering corporal punishment at the direction of the kgosi, however long-established and however deeply embedded in tribal custom, is not lawful where it violates constitutional rights. A customary practice that constitutes assault or inhuman or degrading treatment cannot be justified by its customary character and is void to the extent of its inconsistency with the Constitution. The kgosi, and those acting under the kgosi's direction, have no legal authority to administer corporal punishment.
APPLICATION	The Court examined the constitutional validity of kgosi-directed corporal punishment and measured it against the constitutional prohibition on inhuman or degrading treatment and against the general criminal law of assault. It treated the customary pedigree of the practice as legally irrelevant to the question of validity, focusing instead on whether the infliction of lashes crossed the constitutional threshold and whether any lawful authority sanctioned it.
ANALYSIS	The decision applies, in the charged context of chiefly authority, the principle established in <i>Petrus</i> that the customary or traditional character of a coercive practice provides no immunity from constitutional and legal scrutiny, and the analysis is significant for confronting two arguments of authority at once. The first is the argument from custom: that a practice deeply embedded in Kgatla tradition is thereby lawful. The Court rejects it on the <i>Petrus</i> principle, holding that antiquity and cultural significance cannot rescue a practice that, in its effect, amounts to assault or to inhuman or degrading treatment; the constitutional question turns on what the practice does to the person, not on its lineage. The second is the argument from office: that the kgosi, as traditional ruler, possesses authority to direct corporal punishment. The Court rejects this too, holding that the kgosi's authority does not extend to acts the Constitution and the general law forbid, and that neither the chief nor those acting on his direction have legal power to inflict such punishment. Three threads of the wider jurisprudence converge here. The decision continues the constitutional-supremacy line of <i>Petrus</i> and the equality line of <i>Dow</i> and <i>Ramantele</i> in subordinating custom to the Constitution. It marks the outer limit of chiefly power in the modern state, complementing the account of reduced and supervised chieftaincy that runs from <i>Tshekedi Khama</i> through <i>Gaseitsiwe</i> . And it exemplifies the constructive posture of <i>Tokoyame</i> , under which custom is respected but developed and constrained in conformity with constitutional values. <i>Kgafela</i> is thus a landmark statement that no customary practice, however culturally weighty and however august the authority directing it, can override fundamental constitutional rights.
HELD	The Court held that the customary practice of administering corporal punishment at the direction of the kgosi was unconstitutional and unlawful, and that the kgosi had no legal authority to administer such punishment.

RATIO DECIDENDI	The ratio decidendi is that a customary practice of kgosi-directed corporal punishment, however long-established, is unlawful where it constitutes assault or inhuman or degrading treatment; its customary character cannot justify it and it is void to the extent of its inconsistency with the Constitution, the kgosi having no legal authority to administer it.
SIGNIFICANCE	This case is a landmark in the contemporary development of Botswana customary law. It directly addresses the tension between deep-rooted customary practices and constitutional rights and confirms that no customary practice, however culturally significant, can override constitutional rights. It must be read alongside <i>Petrus v The State</i> as illustrating the consistent constitutional approach to customary practices that violate fundamental rights.
Tidimalo Jokase v Gaelebale Mpho Seakgosing and Another <i>High Court MAHLB-000661-10 (10 February 2010, Lesetedi J)</i>	
FACTS	The dispute concerned customary-law practices affecting the rights of a woman in family and property matters. The applicant's entitlements turned on customary rules whose compatibility with the constitutional equality guarantee was in question. The matter came before the High Court, which addressed the application of constitutional equality to customary-law disputes affecting women. The report's focus is on that principle; the detailed facts should be confirmed from the judgment and are not reconstructed beyond what the holding supports.
ISSUE	Whether customary-law practices affecting the rights of women in family and property matters were consistent with the constitutional guarantee of equality.
RULE	Constitutional rights, particularly the right to equality, apply to all persons in Botswana regardless of the customary-law context in which disputes arise. Courts must be vigilant in identifying and striking down customary-law rules and practices that discriminate against women, or other groups, in a manner inconsistent with the Constitution.
APPLICATION	The Court examined the customary practices at issue and assessed their consistency with the constitutional equality requirement, applying the principle that the equality guarantee penetrates the customary sphere and that discriminatory customary rules affecting women must give way where they cannot be constitutionally justified.

ANALYSIS	The decision reinforces the now-settled position that the customary context does not insulate a rule from constitutional equality review, and the analysis is notable for the active duty it places on the judiciary. The Court does not frame the equality guarantee as a passive backstop to be invoked only when a litigant raises it, but as imposing a positive obligation of vigilance: courts must themselves identify and strike down customary rules and practices that discriminate against women or other groups inconsistently with the Constitution. This framing reflects an understanding that the subordination of women under customary family and property rules is precisely the mischief the equality guarantee targets, and that discriminatory custom may persist unless the courts are alert to it. Two contextual points sharpen the case's significance. It was decided by Lesetedi J, who also sat on the full bench in Kgafela, and it is of a piece with the equality reasoning of Dow, Tape and the Mmusi and Ramantele litigation, so it forms part of a coherent and deliberate judicial project rather than an isolated pronouncement. And it complements the constructive posture of Tokoyame: vigilance against discriminatory custom and the principled development of customary law in conformity with constitutional values are two sides of the same judicial responsibility. The case thus contributes to the steady consolidation of the principle that constitutional equality reaches into, and reshapes, the customary sphere.
HELD	The Court applied constitutional equality principles to the customary-law dispute, affirming that discriminatory customary practices affecting women are subject to constitutional scrutiny and may be struck down.
RATIO DECIDENDI	The ratio decidendi is that constitutional rights, particularly equality, apply to all persons regardless of the customary-law context, and courts must identify and strike down customary rules and practices that discriminate against women or other groups inconsistently with the Constitution.
SIGNIFICANCE	This case contributes to the growing body of Botswana jurisprudence on the relationship between customary law, women's rights and constitutional equality, underscoring the judiciary's protective role in the customary sphere.

E2. Judicial Ascertainment of Customary Law

One of the most practically important challenges in the application of customary law is how courts ascertain the content of the applicable customary rule. Several approaches have been taken:

- **Expert witnesses.** Persons knowledgeable in customary law may give evidence of its content; courts must assess the credibility and authority of such evidence.
- **Academic works.** Works such as Schapera's Handbook are frequently cited, but their authority is limited by the static and potentially outdated nature of written records.

- **Judicial notice.** In some cases courts take judicial notice of well-known customary rules without requiring formal proof.
- **Assessors.** In customary courts, assessors knowledgeable in customary law assist the presiding officer in ascertaining the applicable rule.
- **Proof on the evidence.** Where customary law is genuinely uncertain it must be proved as a question of fact through evidence.

Section E. Ascertainment Case

Kweneng Land Board v Kabelo Lister Matlho and Pheto

1991 BLR 292 (Court of Appeal)

FACTS	In the context of a contest over customary land tenure administered by the Kweneng Land Board, a party contended that customary land law had changed, that it had modernised to accommodate demands for more individualised land tenure. The Court of Appeal was required to decide what methodology governs the ascertainment of the current content of customary law and what proof is needed to establish that customary law has changed. This is the Court of Appeal authority on ascertainment; it is considered in Section C as to Land Board revocation powers and revisited here for its ascertainment holding.
ISSUE	Whether positive evidence was required to establish that customary law had changed, and what methodology courts should use to ascertain the current content of customary law.
RULE	The content of customary law must be established by evidence. Where a party alleges that customary law has changed, for example to accommodate modern demands for individual land tenure, they must adduce positive evidence establishing that such a change has in fact occurred in the practice of the relevant community. Courts cannot simply assume that customary law has changed or modernised without evidence of actual change in community practice.
APPLICATION	The Court of Appeal examined the evidentiary basis for the asserted change in customary land law and applied the requirement of positive proof. It asked whether evidence of actual change in the community's practice had been led, treating the sufficiency of that evidence as decisive of whether the alleged modernised rule could be recognised.

ANALYSIS	The decision establishes the cornerstone evidentiary principle of Botswana's ascertainment jurisprudence, and the analysis is best understood as a careful reconciliation of two commitments that pull in opposite directions. The first commitment is to the dynamic, living character of customary law, affirmed in <i>Molefe v Seketeme</i> and <i>Letsholo v Sete</i>, under which the law to be applied is the law the community actually observes and not a frozen historical record. The second is to legal certainty and the orderly proof of law, which would be undermined if courts accepted unsubstantiated claims that the rule had shifted. The Court reconciles them through a presumption coupled with a burden: customary law is presumed to continue as previously recognised, and the party asserting that it has changed bears the burden of proving the change by positive evidence of actual community practice. This single device serves both commitments at once. It honours the dynamism of customary law by making genuine, demonstrated change cognisable and by refusing to freeze the law against real social development. And it protects certainty by preventing ossifying assumptions on one side and opportunistic invention on the other, since change is recognised when and only when it is proved. The principle is the methodological foundation on which the later cases build: <i>Kweneng Land Board v Selaki</i> and <i>Sekgome</i> applies it to a fresh assertion of changed land law, and <i>Hendrick v Tsawe</i> extends the evidence-based method to the choice between competing customary rules. For the student this is the leading authority on how the content of customary law, and any change in it, is established in the Botswana courts.
HELD	The Court held that positive evidence of change in customary law is required, and that an alleged change unsupported by evidence of actual community practice will not be recognised.
RATIO DECIDENDI	The ratio decidendi is that the content of customary law must be established by evidence, and a party alleging that customary law has changed must adduce positive evidence that the change has actually occurred in the practice of the relevant community; change will not be assumed without such evidence.
SIGNIFICANCE	This is the foundational Botswana authority on the evidentiary requirements for establishing the content of customary law. The requirement of positive evidence of change is directly applicable to all cases where the content of customary law is in dispute and anchors the modern law of judicial ascertainment.

E3. Codification and Law Reform

The codification of customary law, the reduction of customary law to written, systematic rules, has been both advocated and criticised in the context of Southern African legal systems.

Arguments for codification:

- Codification promotes certainty and accessibility of the law.
- Written rules are easier to apply consistently and to subject to scrutiny for conformity with constitutional rights.
- Codification can preserve customary rules that might otherwise be lost through social change and urbanisation.

Arguments against codification:

- Codification freezes customary law at a particular point in time, preventing organic evolution.
- Codified customary law tends to reflect the version favoured by courts and legislators, which may diverge significantly from the living law of the community.
- Codification may privilege the perspectives of elites and may marginalise the voices of ordinary community members, particularly women.
- The diversity of customary law within Botswana cannot be adequately captured in a single code.

Van Niekerk, "Customary Law in Botswana: Substitution or Adaptation?" (1970): Van Niekerk argues that the challenge for post-colonial Botswana is not whether to replace customary law with the received law, but how to adapt customary law to meet the demands of a modern constitutional democratic state. He advocates a process of principled adaptation rather than wholesale substitution.

Roberts, "The Recording of Customary Law: Some Problems of Method" (1971): Roberts identifies the methodological challenges in recording and codifying customary law, particularly the problem of accurately capturing the dynamic and context-specific character of customary norms in a static written form.

E4. Customary Law and Human Rights: Gender Equality and Self-Determination

The relationship between customary law and human rights is one of the most contested and important issues in contemporary African legal scholarship. The tension arises primarily because many customary rules, particularly in family law, inheritance and property rights, discriminate on the basis of sex, age or birth status in ways that appear inconsistent with international human-rights norms and constitutional equality guarantees.

Radijeng, "Customary Law and Gender Equality: The Legal Status of Women in Botswana" (D.Phil Thesis, Oxford, 2004): Radijeng provides the most comprehensive analysis of the intersection of customary law and gender equality in Botswana. Her key findings are set out below.

- Women in Botswana continue to face significant discrimination under customary law in areas including marriage, property rights, inheritance and child custody.
- The constitutional guarantee of equality provides an important framework for challenging discriminatory customary rules, but significant gaps remain in its implementation.
- The interaction between customary law and the formal legal system creates strategic opportunities for women to use both systems, a phenomenon she calls forum shopping.

- Law reform in this area requires not only changes to legal rules but also changes in social attitudes and enforcement mechanisms.

Griffiths, In the Shadow of Marriage: Gender and Justice in an African Community (1997): Griffiths examines the gendered character of customary-law dispute resolution in Botswana, arguing that the formal and customary systems both tend to disadvantage women in family and property disputes, though in different ways.

Section E. Human Rights Case

Shikati Calvin Keene Kamanakao I and Others v Attorney General of Botswana

Misca 377/1999 (High Court)

FACTS

Members of the Wayeyi community challenged the statutory framework governing the recognition of chiefs and succession to chieftaincy, contending that the Chieftainship Act's provisions accorded recognition and representation to certain principally Tswana tribes while denying equivalent status to the Wayeyi. They argued that this differential treatment discriminated against the Wayeyi on the ground of ethnicity. The matter came before the High Court as a constitutional challenge to ethnically differential treatment in the law of chieftaincy.

ISSUE

Whether the Chieftainship Act's provisions on the recognition of chiefs and succession to the chieftaincy of the Wayeyi tribe discriminated against the Wayeyi people on the grounds of ethnicity, and whether this was consistent with the constitutional guarantee of equality.

RULE

The constitutional guarantee of equality and freedom from discrimination applies to all persons in Botswana regardless of their ethnic identity. Where legislation or government policy discriminates against members of a particular ethnic community in a manner that cannot be constitutionally justified, it violates the constitutional guarantee of equality; the claim of an ethnic community to equal treatment in matters of chieftaincy is constitutionally protected.

APPLICATION

The High Court examined the impugned provisions of the Chieftainship Act affecting the Wayeyi and assessed the differential treatment against the constitutional equality guarantee. It considered whether the distinction drawn between recognised tribes and the Wayeyi could be constitutionally justified, applying the equality standard to the domain of ethnic recognition and customary governance.

ANALYSIS	The decision extends the equality principle beyond the sex-discrimination context of Dow and Ramantele into the terrain of ethnic equality and group recognition, and the analysis is significant for reaching the structures of customary governance themselves rather than merely particular customary rules. The challenge was not to a rule of inheritance or marriage but to the way the state, through the Chieftainship Act, recognises and represents traditional communities, a scheme said to privilege the principal Tswana tribes and to subordinate the Wayeyi. The Court affirms that the constitutional commitment to equality applies regardless of ethnic identity and that the state's recognition of traditional authority may not rest on unjustified ethnic hierarchy. Two dimensions give the case its weight. First, it connects to the long-running theme, traceable to Section A and to Magang's critique, that the equation of Botswana customary law with Tswana law marginalises non-Tswana communities; the decision treats that marginalisation, when embedded in legislation, as raising a genuine constitutional concern rather than a merely political grievance. Second, it engages the language of minority recognition and self-determination within a constitutional democracy, signalling that equality has a collective and ethnic dimension alongside its individual and sex-based dimension. The case thus broadens the equality jurisprudence from the protection of individuals against sex-discriminatory rules to the protection of communities against ethnically discriminatory governance, and it situates the politics of chieftaincy recognition firmly within constitutional control.
HELD	The Court held that the constitutional guarantee of equality applied to the Wayeyi's claim to equal treatment in matters of chieftaincy recognition and succession, subjecting the ethnically differential statutory provisions to constitutional scrutiny.
RATIO DECIDENDI	The ratio decidendi is that the constitutional guarantee of equality and freedom from discrimination applies regardless of ethnic identity, so that legislative provisions discriminating against an ethnic community in matters of chieftaincy recognition without constitutional justification violate the equality guarantee and are subject to constitutional scrutiny.
SIGNIFICANCE	This case raises important issues about the intersection of customary law, ethnic identity and constitutional rights. It confirms that constitutional equality extends to matters of ethnic identity and customary governance, and that legislative provisions discriminating on the basis of ethnicity in customary-law matters are subject to constitutional scrutiny, broadening the equality jurisprudence beyond sex to ethnicity.

E5. Chieftainship in the 21st Century

The institution of chieftaincy in Botswana has undergone profound transformation since the colonial period. The chief's authority has been progressively circumscribed by legislation and by the development of democratic governance, but the institution retains significant social, cultural and symbolic importance.

The Chieftainship Act (Cap 41:01) is the principal statute governing chieftaincy in Botswana. It provides for the recognition of chiefs, the powers and functions of chiefs and the procedures for the suspension and removal of chiefs.

Key issues regarding chieftainship in contemporary Botswana:

- **Reduced authority.** The chief's legislative, executive and judicial powers have been significantly reduced by modern legislation; land administration has been transferred to Land Boards and formal judicial functions have been largely assumed by the state court system.
- **Symbolic and cultural importance.** The chief retains great symbolic importance as the custodian of customary traditions and as a focal point for community identity and cohesion.
- **The House of Chiefs.** Established by the Constitution as an advisory body that considers bills and matters affecting customary law, the House of Chiefs provides a formal mechanism for the participation of traditional leaders in national governance.
- **Succession disputes.** Disputes about the succession to chiefly office continue to generate significant litigation, raising questions about the relationship between customary succession rules and democratic governance.

Section E. Chieftainship Case

Gaseitsiwe v The Attorney General

[1996] BLR 54 (Court of Appeal)

FACTS

The Minister, purporting to act under the Chieftainship Act, moved to suspend the powers of a chief on the footing that the chief was not a fit and proper person to exercise chiefly powers. The chief challenged the suspension, raising both the existence and the limits of the Ministerial power and the procedural protections to which a chief was entitled before such a power was exercised. The matter reached the Court of Appeal, which examined the scope of the Minister's supervisory power over traditional leaders.

ISSUE

Whether the Minister had the power under section 12 of the Chieftainship Act to suspend the powers of a chief, and whether the chief was a fit and proper person to exercise chiefly powers, together with the procedural requirements for the exercise of that power.

RULE	Section 12 of the Chieftainship Act gives the Minister broad discretionary powers to suspend the powers of a chief where the chief is not a fit and proper person to exercise those powers. The exercise of this discretion is subject to judicial review on the grounds of procedural unfairness, unreasonableness and inconsistency with constitutional principles; the chief has the right to be heard before the Minister exercises the power of suspension.
APPLICATION	The Court of Appeal examined the Ministerial power of suspension under section 12 and the procedural requirements for its exercise. It affirmed the existence of the power while subjecting its exercise to the disciplines of natural justice, in particular the chief's right to be heard, and of judicial review for unfairness, unreasonableness and constitutional consistency.
ANALYSIS	The decision situates chieftaincy within the modern administrative-law and rule-of-law framework, and the analysis is best read as the contemporary continuation of a story that begins in the colonial period. In Tshekedi Khama the colonial executive supervised and could remove chiefs, subordinating indigenous authority to external power; Gaseitsiwe shows that executive supervision of chiefs survives into the independent constitutional state, now in the form of a Ministerial power to suspend a chief considered unfit. The crucial development is that this surviving power is no longer unfettered. The Court accepts that section 12 confers a broad discretion but holds that its exercise is disciplined in two ways: by natural justice, so that the chief must be heard before suspension, and by judicial review, so that the decision may be set aside for procedural unfairness, unreasonableness or constitutional inconsistency. Three observations follow. First, the decision brings the supervision of traditional leaders within the ordinary administrative-law constraints that govern executive action generally, treating the suspension of a chief as a reviewable administrative decision rather than an act of untrammelled prerogative. Second, it imports the same audi alteram partem principle that disciplines customary land administration in Kweneng Land Board v Matlho, revealing a consistent insistence across the customary field that power, whether over land or over office, is law-bound and procedurally constrained. Third, it completes the modern picture of chieftaincy as a recognised but supervised institution, retaining symbolic and cultural significance while its coercive and governmental authority is both reduced and subjected to the rule of law. Gaseitsiwe is therefore the leading authority on executive supervision of chiefs and a key illustration of the rule-of-law framework within which contemporary chieftaincy operates.
HELD	The Court affirmed the Ministerial power of suspension under section 12 of the Chieftainship Act, subject to compliance with natural justice and constitutional requirements, including the chief's right to be heard.

RATIO DECIDENDI	The ratio decidendi is that section 12 of the Chieftainship Act confers broad discretionary power on the Minister to suspend a chief who is not a fit and proper person, but that power is subject to judicial review for procedural unfairness, unreasonableness and constitutional inconsistency, and the chief must be heard before suspension.
SIGNIFICANCE	This case is a leading authority on the power of the Minister to supervise and control traditional leaders under the Chieftainship Act. It confirms that executive authority over traditional leaders is subject to the rule of law and the requirements of natural justice, completing the picture of chieftaincy as a recognised but legally supervised institution in the modern state.

KEY POINTS: SECTION E

The enduring tensions of customary law are constitutional. No customary practice, however embedded, and no chiefly authority, however august, can override fundamental rights (**Kgafela Kgafela; Tidimalo Jokase**). Customary law is ascertained as living law and any change must be proved by positive evidence (**Kweneng Land Board v Matlho**). Codification is contested because it risks freezing a dynamic body of law. Constitutional equality reaches both sex discrimination and ethnic discrimination in customary governance (**Kamanakao**). Chieftaincy survives as a recognised but reduced and supervised institution, its executive supervision disciplined by natural justice and judicial review (**Gaseitsiwe**).

Key Statutes and Reading List

Principal legislation, prescribed texts and readings

Key Statutes in LAW 106 Customary Law

Constitution of Botswana 1966

The supreme law of Botswana. Relevant to customary law through section 15 (equality and non-discrimination), section 2 (constitutional supremacy) and Chapter II (fundamental rights). All customary-law rules must conform to the Constitution.

Chieftainship Act (Cap 41:01)

Governs the recognition, powers and functions of chiefs in Botswana. Provides for the suspension and removal of chiefs by the Minister (s 12). Establishes the framework within which chiefly authority operates in the modern state.

Customary Courts Act (Cap 04:05)

The principal Act governing customary courts in Botswana. Provides for the establishment, constitution and jurisdiction of customary courts; the right of appeal to higher courts; and the procedure to be followed in customary court proceedings.

Customary Law Act (Cap 16:01)

Provides the basic framework for the application of customary law in Botswana. Defines customary law; identifies persons subject to customary law (s 2); and provides the repugnancy proviso. Formerly called the Common Law and Customary Law Act.

Marriage Act 2000 (Cap 29:01)

Introduced compulsory registration of customary marriages. Governs the formal requirements for both statutory and customary marriages in Botswana.

Dissolution of African Marriages (Disposal of Property) Act (Cap 29:06)

Governs the division of property on the dissolution of customary-law marriages. Provides for the allocation of matrimonial property between the parties on customary-law divorce.

Tribal Land Act (Cap 32:02)

The principal Act governing tribal land in Botswana. Established Land Boards as the bodies responsible for allocating and administering tribal land. Provides for certificates of customary land grant and the conversion of customary grants to common-law leases.

Administration of Estates Act (Cap 31:01); Law of Inheritance Act (Cap 31:02); Succession (Right of Surviving Spouse and Inheritance Family Provisions) Act (Cap 31:03)

Govern the administration of deceased estates, intestate succession and the protection of surviving spouses and dependants respectively, and interact with customary inheritance law.

Full Reading List

Primary Texts

Isaac Schapera, *A Handbook of Tswana Law and Custom* (1938, reissued 1994). The foundational text for Tswana customary law.

Comaroff and Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (1981). Essential for understanding how customary law operates in practice.

Section A: Legal Nature of Customary Law

M Channock, *Law, Custom and Social Order: The Colonial Experience of Malawi and Zambia* (1998), Chapter 1.

GR Woodman, "Some Realism About Customary Law: The West African Experience" (1969) *Wisconsin Law Review* 128.

GO Radjeng, *Customary Law and Gender Equality: The Legal Status of Women in Botswana* (D.Phil, Oxford, 2004), Preface and Chapter 2.

JP De Jong, "Customary Law: A Confusing Fiction" in *Folk Law* (1994) Volume 1.

WM Reisman, "Toward a General Theory about African Law, Social Change and Development" (1981).

AJGM Sanders, "The Characteristic Features of Southern African Law" (1981) CILSA.

DN Magang, "Customary Law as Administered in Botswana" (1981).

AL Molokomme, "Customary Law in Botswana: Past, Present and Future" (1994).

Schapera, *Handbook of Tswana Law*, Chapters 2, 3, 13.

Comaroff and Roberts, *Rules and Processes*, Chapters 3 and 6.

Gillet, "The Survival of Chieftaincy in Botswana" (1975) 7 *Botswana Notes and Records* 103.

Grant, "Reduced to nothing? Chieftaincy and a Traditional Town" (1980) 12 *Botswana Notes and Records*.

Otlhogile, "Aspects of Administration of Justice in Colonial Bechuanaland"; "A History of Botswana Through Case Law" (1997); "Tshekedi Khama v The High Commissioner: The Making of a Court" (1993).

AJGM Sanders, "Bechuanaland and the Law in Politicians' Hands" (1992).

Section B: The Dual Legal System

Aguda, "Legal Development in Botswana 1885 to 1966" (1973) 5 *BNR* 52.

AL Molokomme, "The Reception of Roman Dutch Law in Botswana" (1985) *Lesotho Law Journal* 121.

JH Pain, "The Reception of English and Roman-Dutch Law in Africa" (1978).

Schapera, *Handbook of Tswana Law*, Chapter 16.

Kollewijn, "Conflicts of Western Law and Non-Western Law" (1951).

Unsworth, "The Conflict of Laws in Africa" (1944).

Lewin, "The Interaction of English Law and Common Law in South Africa" (1941).

Ajayi, "The Interaction of English Law with Customary Law in Western Nigeria" (1960).

Bennett, "Conflict of Law in South Africa: Cases involving Customary Law" (1980).

Section C: Customary Courts

- CMG Himsworth, "The Botswana Customary Law Act, 1969" (1972) 16 JAL 6.
- Simon Roberts, "The Survival of the Traditional Tswana Courts" (1972) 16 JAL 103.
- IG Brewer, "A Note on the Botswana Customary Courts (Amendments) Act 1972" (1973).
- CM Fombad, "Customary Courts and Traditional Justice in Botswana" (2004) 15 Stellenbosch Law Journal 1.
- AL Molokomme, *Children of the Fence*, Chapter 2.
- Otlhogile, *A History of the Higher Courts*, Chapter 1; "Assessors and the Administration of Justice" (1995).
- Himonga and Bosch, "The Application of African Customary Law under the Constitution of South Africa" (2000) SALJ 306.

Section D: Substantive Law

- Schapera, *Handbook of Tswana Law*, Chapter 11 (land), Chapter 13 (inheritance).
- Roberts, "A Restatement of the Kgatla Law of Land and Natural Resources."
- Hitchcock, "Water, Land and Livestock: The Evolution of Tenure and Administration Patterns in Botswana."
- Ng'ong'ola, "Land Problems in some Peri-Urban Villages in Botswana" (1992) JAL 140.
- GO Radijeng, *D.Phil Thesis*, Chapters 4 and 5 (women, property rights, divorce).
- Otlhogile, "The Law of Inheritance in Botswana" in *Inheritance Laws in Southern Africa*.
- Comaroff and Roberts, *Rules and Processes*, Chapter 6.

Section E: Contemporary Challenges

- Van Niekerk, "Customary Law in Botswana: Substitution or Adaptation?" (1970) 3 CILSA 242.
- Roberts, "The Recording of Customary Law: Some Problems of Method" (1971) 3 BNR 12.
- Allott, "Reforming the Law in Africa: Aims, Difficulties and Techniques" (1981).
- Sanders, "In Search of Disciplined Law Reform" (1981).
- Van Niekerk, "Indigenous Law and the Constitutional Right to Equal Protection" (1997).
- Van Niekerk, "Indigenous Law and Narrative: Rethinking Methodology" (1999) 32 CILSA 208.
- GO Radijeng, *D.Phil Thesis*, Preface, Chapter 1, Chapter 6, Chapter 7.
- Griffiths, *In the Shadow of Marriage* (1997), Preface and Chapter 1.
- Howell, "The Otieno Case: African Customary Law versus Western Jurisprudence" (1989).
- Van Doren, "Death African Style: The Case of S.M. Otieno" (1988) 36 AJCL 329.
- Parson, *Succession to High Office in Botswana*.
- Schapera, *Tribal Innovators: Tswana Chiefs and Social Change* (1970).
- Proctor, "The House of Chiefs and the Political Development of Botswana" (1968) 6 JMAS 59.
- Sekgoma, "The Nature, Structure and Functions of Chieftainship in Contemporary Botswana" (1994).
- Morapedi, "Demise or Resilience: Customary Law and the Changing Order in Africa: The Case of Chieftainship in Botswana."

A PRACTICAL CAUTION FOR STUDENTS

These notes supplement but do not replace the primary sources and the prescribed reading. Students must read all cited cases and statutory provisions in full. Several of the decisions analysed here are unreported or older Botswana matters for which the published record does not set out a full factual narrative; for those cases the Rule and Ratio are stated fully, while the Facts and Application are confined to what the record supports. For all Botswana cases the precise facts should be verified from the law reports, and statutory section numbers (including the provisions of the Customary Law Act, the Customary Courts Act, the Tribal Land Act and the Chieftainship Act) should be confirmed against the current statute text, as numbering can differ between editions.