IN THE HIGH COURT OF LESOTHO
HELD AT MASERU

CONSTITUTIONAL CASE NO: 5/2010

In the matter between:

SENATE GABASHEANE MASUPHA	Applicant
and	
HIS WORSHIP, SENIOR RESIDENT MAGISTRATE FOR THE SUBORDINATE COURT OF BEREA	1st Respondent
THE SPEAKER OF THE NATIONAL ASSEMBLY	2nd Respondent
SEMPE GABEASHANE MASUPHA	3rd Respondent
LEPOQO DAVID MASUPHA	4th Respondent
'MATUMAHOLE SEEMOLA MASUPHA	5th Respondent
CHIEF OF HA MAMATHE	6th Respondent
PRINCIPAL CHIEF OF HA MAMATHE THUPA-KUBU AND JOROTANE	7th Respondent
DISTRICT SECRETARY	8th Respondent
DIRECTOR OF CHIEFTAINSHIP AFFAIRS	9th Respondent
MINISTRY OF LOCAL GOVERNMENT AND CHIEFTAINSHIP	10th Respondent
ATTORNEY GENERAL	11th Respondent
SOUTHERN AFRICA LITIGATION CENTRE	Amicus Curiae

AMICUS CURIAE'S HEADS OF ARGUMENT

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INTRODUCTION

1. On 28 September 2011 the Southern Africa Litigation Centre ("SALC") was admitted as amicus curiae in these proceedings. It is permitted to make written and oral submissions and was directed to file these heads of argument by no later than 16 January 2012 – at the same time as the applicant.

2. The SALC addresses paragraphs 3(d) and (e) of the applicant's notice of motion, which calls upon the respondents to show cause why:

    2.1. it shall not be declared that section 10 of the Chieftainship Act, 22 of 1968 ("the Act") is unconstitutional to the extent that it purports to disentitle the applicant to succeed to the principal chieftainship of Ha 'Mamathe, Thupa-kubu and Jorotane on account only of her being a female; and

    2.2. it shall not be declared that a female first-born child of a chief is entitled to be considered for succession to chieftainship.

3. Paragraphs 3(d) and (e) of the notice of motion raise a constitutional issue that requires determination as the applicant has no other remedy in the light of the provisions of section 10 of the Act.

4. Section 10 of the Act provides as follows:

> "(1) In this section a reference to a son of a person is a reference to a legitimate son of that person.
>
> (2) When an office of Chief becomes vacant, the firstborn or only son of the first or only marriage of the Chief succeeds to that office, and so, in descending order, that person succeeds to the office who is the first-born or only son of the first or only marriage of a person who, but for his death or incapacity, would have succeeded to that office in accordance with the provisions of this subsection.
>
> (3) If when an office of Chief becomes vacant there is no person who succeeds under the preceding subsection, the first-born or only son of the marriage of the Chief that took place next in order of time succeeds to that office, and so, in descending order of the seniority of marriages according to the customary law, that person succeeds to the office who is first-born or only son of the senior marriage of the Chief or of a person who, but for his death or incapacity, would have succeeded to that office in accordance with the provisions of this subsection.

(4) If when an office of Chief becomes vacant there is no person who succeeds under the two preceding subsections, the only surviving wife of the Chief, or the surviving wife of the Chief whom he married earliest, succeeds to that office of Chief, and when that office thereafter again becomes vacant the eldest legitimate surviving brother of the male Chief who held the office last before the woman, succeeds to that office, or failing such an eldest brother, the eldest surviving uncle of that male Chief in legitimate ascent, and so in ascending order according to the customary law.

(5) A person is incapable of succeeding to an office of Chief if he is not a citizen of Lesotho.

(6) No succession to an office of Chief in terms of this section or section 11 shall have any effect unless and until the King acting in accordance with the advice of the Minister has approved thereof.

(7) If the King acting in accordance with the advice of the Minister should refuse to approve of the succession to an office of Chief of the first person who has the right to succeed, the person next in order of prior right shall have the right to succeed".

5. It is plain that section 10 of the Act, in particular subsections (1) and (2), and with the limited exception of subsection (4), limits succession to chieftainship to males.

6. In consequence of the provisions of section 10 of the Act, in particular subsections (1) and (2), the applicant is barred from succeeding to the chieftainship on account only of her being a first-born daughter and not a first-born son of her parents. Her mother succeeded and filled the office, albeit a female, in terms of section 10(4) of the Act.

7. We submit that to the extent that section 10 of the Act precludes the applicant from succeeding her parents into the chieftainship on account of her being a first-born daughter and not a first-born son, it unjustifiably denies her equality before the law and the equal protection of the law as contemplated in section 19 of the Constitution of Lesotho ("the Constitution")[1] and discriminates against her on the basis of her sex as contemplated in sections 4 and 18 of the Constitution. We make this submission by reference *inter alia* to:

   7.1. the relevant provisions of the Constitution;

   7.2. Lesotho's international and regional legal obligations; and

   7.3. jurisprudence from comparable countries on equality and non-discrimination.

[1] Adopted in 1993, and amended in 1996, 1997, 1998 and 2001.

8. The heads of argument follow the structure set out in the table of contents above.

BRIEF BACKGROUND FACTS

9. The material background facts that are relevant to the constitutional issue are in summary the following:

9.1. The applicant alleges that she is the first-born daughter of her late parents David Gabashane Masupha and 'Masenate Gabashane Masupha who were married by civil rites. After her father passed away, her mother succeeded into the office of the Principal Chieftainship.[2]

9.2. The applicant further alleges that when her mother passed away, a vacancy was created in the office of the Principal Chief that she must fill as the first-born child.[3]

[2] Founding Affidavit para 4.1.
[3] Founding Affidavit paras 4.3, 4.6-4.7.

9.3. The applicant contends that on a proper construction of section 10 of the Act she is entitled to fill the office of the Principal Chief as the first child. If the provisions of section 10 of the Act bar her from filling the office, she contends that these provisions are unconstitutional by reason of their inconsistency with sections 2, 4, 18 and 19 of the Constitution.[4]

9.4. Certain of the respondents dispute the applicant's contentions on a number of grounds. The main grounds of opposition appear to be the following:

9.4.1. First, that the application does not raise a constitutional issue as the applicant has non-constitutional remedies available to her.[5]

9.4.2. Secondly, that the applicant's parents were married by customary law; that succession to chieftainship is only partially governed by statute and originally by customary law.[6]

9.4.3. Thirdly, that the exclusion of first-born daughters from

[4] Founding Affidavit paras 4.7-4.10.
[5] Opposing Affidavit of Majara Masupha para 3.2(b).
[6] Opposing Affidavit of Majara Masupha paras 5 and 12.

succeeding into chieftainship is supported by section 18(4)(c) of the Constitution and therefore valid.[7]

10. We submit that the respondents' contentions lack merit and should be dismissed.

RELEVANT CONSTITUTIONAL PROVISIONS

Supremacy

11. Section 2 of the Constitution establishes its supremacy. It states that the Constitution is the supreme law of Lesotho and if any other law is inconsistent with it, that other law shall, to the extent of the inconsistency, be void.

12. The Court of Appeal ("the LesCA") has previously affirmed the supremacy of the Constitution, holding that "the Court is enjoined to uphold the supremacy of the Constitution in the event of inconsistency (if any) between the impugned Act and the Constitution".[8] This means that where

[7] Ninth Respondent's Opposing Affidavit para 5.
[8] *Sechele v Public Officers' Defined Contribution Pension Fund and Others,* C of A (Civ) No. 43^{B}/10 para 10.

an inconsistency between the impugned Act and the Constitution is established, the Court must declare such Act invalid to the extent of the inconsistency in order to vindicate the supremacy of the Constitution.

13. This Court has powers in terms of section 22 of the Constitution to enforce the protective provisions of the Constitution, which include the power to declare legislation invalid on account of its inconsistency with the Constitution, upon application in terms of section 22(1) of the Constitution. The applicant has brought such an application in the present matter.

14. In the absence of any other redress the applicant was entitled to approach this Court to have the constitutionality of section 10 determined. The proviso to section 22(2) of the Constitution is, in the circumstances, not of application.

Equality and non-discrimination

15. The following provisions in Chapter II of the Constitution entrench the right to equality and non-discrimination:

15.1. Section 4 provides as follows:

"Fundamental human rights and freedoms

(1) Whereas every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms, that is to say, to each and all of the following –

…

(n) freedom from discrimination;

(o) the right to equality before the law and the equal protection of the law; and

(p) the right to participate in government,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest".

15.2. The relevant provisions of section 18 provide as follows:

"(1) Subject to the provisions of subsections (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.

(2) …

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law to the extent that that law makes provision -

(a) …

(b) …

(c) for the application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law; or

(d) …

(e) …

Nothing in this subsection shall prevent the making of laws in pursuance of the principle of State Policy of promoting a society

based on equality and justice for all the citizens of Lesotho and thereby removing any discriminatory law.

(5) …

(6) …

(7) …

(8) The provisions of this section shall be without prejudice to the generality of section 19 of this Constitution".

15.3. Section 19 provides as follows:

"Right to equality before the law and the equal protection of the law

Every person shall be entitled to equality before the law and to the equal protection of the law."

15.4. Section 26 provides as follows:

"Equality and justice

(1) Lesotho shall adopt policies aimed at promoting a society based on equality and justice for all its citizens regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

> (2) In particular, the State shall take appropriate measures in order to promote equality of opportunity for the disadvantaged groups in the society to enable them to participate fully in all spheres of public life."

16. The protections against non-discrimination and the guarantee of equality are in line with, and give effect to, Lesotho's obligations under international and regional law.

16.1. In respect of international law, Lesotho has ratified the International Covenant on Civil and Political Rights (ICCPR), 1966; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1981. We note that Lesotho has filed a reservation to CEDAW to the effect that it shall limit the protection against the discrimination of women under article 2 of CEDAW to the protection provided for under the Constitution. Thus the reservation is limited by the terms of the Constitution.

16.2. In the region, the relevant instruments are the African Charter on Human and Peoples' Rights, 1981; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in

> Africa, 2003; and the formal Declaration on Gender and Development that the SADC issued in 1997.[9]

17. Courts have held that international and regional legal obligations should be taken into account when interpreting the meaning of domestic legislation and the scope of constitutional rights[10].

18. We discuss the provisions of these international and regional instruments below regarding protections against non-discrimination and the guarantees of equality.

Non-discrimination

19. All of these instruments uniformly guarantee freedom from discrimination on the basis of sex similar to the protections generally provided for under section 18 of the Constitution.

20. Article 2(1) of the ICCPR states:

> "Each State Party to the [ICCPR] undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the [ICCPR], without distinction of any kind, such as race, colour, sex,

[9] *Ts'epe v The Independent Electoral Commission and Others* (2005) AHRLR 136 (LesCA 2005) paras 17-21.
[10] *Id.*

> language, religion, political or other opinion, national or social origin, property, birth or other status."

21. Article 2 of the African Charter states:

> "Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

22. Recognizing the deep and resilient nature of discrimination against women, the instruments have specific provisions prohibiting discrimination against women.

23. Article 3 of the ICCPR states:

> "The States Parties to the [ICCPR] undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the [ICCPR]."

24. Article 18(3) of the African Charter states:

> "The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions."

25. The Protocol on Women provides more detailed guidance regarding the prohibition against the discrimination of women and states' obligations to ensure its abolishment in Article 2 entitled "Elimination of Discrimination Against Women". Article 2 states:

> "1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:
>
> a. include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application;
>
> b. enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;
>
> c. integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;
>
> d. take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

e. support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

2. States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men."

(Emphasis added)

26. The right to non-discrimination pervades all other fundamental rights and is necessary to ensure individuals can enjoy all other core rights. In acknowledging this the Human Rights Committee ("HRC"), responsible for providing guidance on the rights enshrined in the ICCPR, has placed an obligation on countries to "ensure to all individuals the rights recognized in the [ICCPR], established in articles 2 and 3 of the [ICCPR]". [11]

27. The HRC further "require[d] that States parties take all necessary steps to enable every person to enjoy those rights. These steps include … the

[11] Human Rights Comm., 68th session, 2000, General Comment No. 28 para.11.

adjustment of domestic legislation so as to give effect to the undertakings set forth in the [ICCPR]."[12]

28. The African Commission on Human and Peoples' Rights ("African Commission"), tasked with providing guidance and adjudicating on the rights enshrined in the African Charter, similarly has noted that article 2 of the African Charter "lays down a principle that is essential to the spirit of the African Charter and is therefore necessary in eradicating discrimination in all its guises"[13] and that it also "imposes an obligation on [African countries] to secure the rights protected in the African Charter to all persons within their jurisdiction".[14]

29. The African Commission has made clear that articles 2 and 3, providing for the right to equality, are non-derogable and therefore must be respected in all circumstances in order for anyone to enjoy all the other rights provided for under the African Charter.[15]

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[12] *Id.* para. 3.
[13] *Purohit and Moore v The Gambia*, Comm. 241/01 para. 49. *See also Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme / Mauritani*a, Comm. 54/91-61/91-98/93-164/97_196/97-210/98 para. 129.
[14] *Amnesty International / Zambia*, Comm. 212/98 para 52. *See also Union interafricaine des droits de l'Homme, Fédération internationale des ligues des droits de l'Homme,RADDHO, Organisation nationale des droits de l'Homme au Sénégal and Association malienne des droits de l'Homme / Angola*, Comm. 159/96 para. 18.
[15] *Purohit and Moore v The Gambia*, Comm. 241/01 para 49.

30. Indeed, the right to non-discrimination is such that the HRC has cautioned countries to "ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights."[16]

31. Article 25 of the ICCPR states:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [the prohibition against discrimination] and without unreasonable restrictions:
>
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
>
> …
>
> (c) To have access, on general terms of equality, to public service in his country."

32. Article 13 of the African Charter similarly states:

> "1. Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

[16] Human Rights Comm., 68th session, 2000, General Comment No. 28 para 5.

> 2. Every citizen shall have the right of equal access to the public service of his country."

33. The HRC has noted that the term public affairs in article 25(a) "is a broad concept … [covering] all aspects of public administration".[17] The HRC further notes that "[c]itizens may participate directly by taking part in popular assemblies which have the power to make decisions about local issues or about the affairs of a particular community and in bodies established to represent citizens in consultation with government."[18]

Definition of discrimination

34. The HRC has defined discrimination as "implying any distinction, exclusion, restriction, or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has a purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms".[19]

[17] Human Rights Comm., 68th session, 1996, General Comment No. 25 para 5.
[18] *Id.* para 6.
[19] Human Rights Comm., 37th session, 1989, General Comment No. 18 para 7.

35. This definition of discrimination has been adopted by the African Commission.[20]

36. The African Commission outlined the test to establish whether there has been a violation of the right to non-discrimination as follows:

> "A violation of the principle of non-discrimination arises if: a) equal cases are treated in a different manner; b) a difference in treatment does not have an objective and reasonable justification; and c) if there is no proportionality between the aim sought and the means employed."[21]

(Emphasis added)

Right to equality

37. The ICCPR and the African Charter guarantee the right to equality in similar terms to section 19 of the Constitution.

38. Article 26 of the ICCPR provides for the right to equality and reads as follows:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination…"

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[20] *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa*, Comm. 294/04 para 91.
[21] *Good / Republic of Botswana*, Comm. 313/05 para 219.

39. Article 26 of the ICCPR provides broader protection against discrimination than article 2(1) of the ICCPR. The HRC has explained that:

> "Article 26 not only entitles all persons to equality before the law as well as equal protection of the law but also prohibits any discrimination under the law and guarantees to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[22]

40. The HRC goes further to state: "[t]hus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory."[23]

41. Similarly, article 3 of the African Charter provides for the right to equality and states that:

> "1. Every individual shall be equal before the law.
>
> 2. Every individual shall be entitled to equal protection of the law."

42. The African Commission has defined article 3(2) as meaning "that similarly situated persons must receive similar treatment under the law."[24] In expanding on the content of article 3(2), the African Commission has

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[22] Human Rights Comm., 37th session, 1989, General Comment No. 18 para 1.
[23] *Id.* para 12.
[24] *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa*, Comm. 294/04 para. 99.

favorably quoted the US Supreme Court in *Brown v Board of Education of Topeka*, 347 US 483 (1954), which held that the equal protection of the law in the US Constitution encompassed the right of all persons to be treated equally by the law and courts, both in procedures and in the substance of the law."[25]

43. The African Commission has further noted that for "Article 3 to be applicable, the inequality alleged by the Complainant should follow from the 'law', noting that legislation obviously constitutes the most "unambiguous form of law."[26]

44. For a violation of article 3(2), the African Commission has indicated that one must show that the same treatment has not been accorded one person or that favorable treatment is given to others in the same position.[27]

Comparable jurisdictions

45. Other jurisdictions in Africa have also had to grapple with discriminatory customary and statutory rules in light of guarantees to equality and non-discrimination in their Constitutions.

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[25] *Id.* para. 100.
[26] *Antonie Bissangou / Congo*, Comm. 253/02 para 71.
[27] *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa*, Comm. 294/04 para. 101.

46. Whilst it is important to bear in mind the differences in the constitutions of these countries and the Constitution (of Lesotho), the LesCA and the High Court have previously considered the approaches adopted by these Courts in interpreting and applying the provisions of the Constitution (of Lesotho). We submit that jurisprudence from these countries is relevant and persuasive. We refer to cases in certain of these countries later in these submissions.

THE RELATIONSHIP BETWEEN SECTIONS 18 AND 19 OF THE CONSTITUTION

47. As the respondents contend in effect that section 18(4)(c) of the Constitution precludes a constitutional challenge to section 10 of the Act on the basis of discrimination, it is important for the Court to consider the relationship between sections 18 and 19 of the Constitution.

48. In the *LNGIC* case[28] the LesCA said that the Constitution draws a distinction between the provisions of section 18 and those of section 19. There are significant differences between freedom from discrimination and the right to equality, which must always be appreciated. Although the two may overlap in some respects, they require different treatment, a factor that is not always properly appreciated.[29]

49. The LesCA further said that whilst discrimination is defined by section 18(3) of the Constitution, no meaning has been assigned to the phrases "equality before the law" or "equal protection of the law". Moreover, it is apparent from section 18(8) that the equality provisions have a wider connotation and are given a more extensive application than those relating

[28] *Lesotho National General Insurance Co Ltd v Nkuebe* [2004] JOL 12751 (LesCA).
[29] *Lesotho National General Insurance Co Ltd v Nkuebe* [2004] JOL 12751 (LesCA) paras 10-11; *'Muso Tseuoa v The Minister of Labour and Employment and others,* Constitutional Court Case No. 4/2005 (High Court of Lesotho) typed p 15.

to discrimination.[30] This construction of section 19 is consistent with that adopted by the HRC as discussed in paragraph 39 above.

50. In giving content to the right in section 19 of the Constitution, Melunsky JA said the following in the *LNGIC* case:

> "[17] That brings me to the equality provisions of section 19. When a court has to decide whether a part of a statute is inconsistent with the Constitution, it is important to draw a distinction between what has been called 'mere differentiation', which is often necessary to regulate the affairs of the community in the interest of all its inhabitants, and unfair differentiation. Differentiation which falls into the former category will not normally result in inequality before the law or the unequal protection of the law and will not, therefore, infringe the Constitution. It becomes unfair, however, when there is no rational connection between the differentiation and the purpose for which it appears in legislation (see *Prinsloo v Van der Linde and another* 1997 (3) SA 1012 (CC) at 1024–1025, paragraphs [23]–[25]). As Didcott J pointed out in this case at 1033, paragraph [52]:
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> > ' . . . mere differentiation can never amount, in itself and on its own, to discrimination or unequal treatment in the constitutional sense. The law differentiates between categories of people on innumerable scores which sound unobjectionable and may often

[30] *Lesotho National General Insurance Co Ltd v Nkuebe* [2004] JOL 12751 (LesCA) para 11.

> be unavoidable . . . .What surely counts at least in . . . all . . . instances of differentiation is always how rational in its basis, nature, scope and objectives the particular one appears to be, and sometimes how fair it also looks in those respects. It follows that I cannot imagine our denunciation of any differentiation which we evaluated as both fair and rational.'
>
> [18] In determining whether there is equality before the law and the equal protection of the law to every person, regard must be had to the nature, scope and object of the impugned legislation, apart from other relevant factors. …"
>
> (Emphasis added)

51. In holding as stated above, the LesCA effectively found that the nature of the protection entrenched by section 19 of the Constitution is similar in content and application to that contained in section 9(1) of the Constitution of the Republic of South Africa, 1996.[31]

52. In Woolman *et al Constitutional Law of South Africa* (2nd ed) Catherine Albertyn and Beth Goldblatt give a helpful account of the approach of the Constitutional Court in South Africa to the interpretation and application of

[31] Which provides that:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law".

section 9(1) of the Constitution of the Republic of South Africa. They say *inter alia* the following:

> "(i) *Has there been a differentiation between individuals or groups?*
>
> Differentiation between individuals or groups triggers … s 9(1) scrutiny. The Constitutional Court has suggested that this differentiation can either be direct or indirect, although there is no reported case on differentiation. If there is no differentiation, then there can be no violation of … s 9(1). If the differentiation is on a prohibited ground, then it is possible to proceed directly to an enquiry under … s 9(3) or (4). … s 9(1) is thus not a necessary step in an equality claim. …
>
> (ii) *Does the differentiation have a rational connection to a legitimate government purpose?*
>
> The interrogation of this relationship involves first, the identification of a legitimate purpose, and second, the finding of a rational connection between the differentiation and this purpose. It is not sufficient to identify a generic purpose for the impugned provision or conduct. In *Van der Merwe v Road Accident Fund*[32] the Constitutional Court warned that '[a] court remains obliged to identify and examine the specific government object sought to be achieved'. …"[33]
>
> (Emphasis added)

[32] 2007 (1) SA 176 (CC).
[33] At 35-17 to 35-22 para (b).

53. In *Prinsloo v Van der Linde and another*,[34] which the LesCA followed in the *LNGIC* case, the Constitutional Court in South Africa explained the "rational connection" test on the basis that the state is bound to act in a rational manner:

> "It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation."

54. In the *New National Party* case,[35] the Constitutional Court in South Africa described the test applicable to an allegation of irrationality in relation to legislation as follows:

> "The … constitutional [constraint] placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or

[34] *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) para 25. See also *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC) at paras 12-13; *S v Lawrence* 1997 (4) SA 1176 (CC) para 44 (applying section 26(2) of the interim constitution); *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC) at paras 73-86 (applying section 22 of the final Constitution).
[35] *New National Party of SA v Govt of the RSA* 1999 (3) SA 191 (CC) para 19.

> arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional.”

55. In this context then, section 19 of the Constitution protects against arbitrary and irrational state action, including by way of legislation. As is made plain in the *LNGIC* case, this protection is wider in scope than that provided by section 18 of the Constitution.

DOES SECTION 10 OF THE ACT INFRINGE SECTION 18 OF THE CONSTITUTION?

Analysis[36]

56. It is now well established that the enquiry proceeds as follows:[37]

56.1. Is the infringement of the Constitution established?

56.2. If so, is the infringement in question justified?

57. Two points are important in relation to establishing the infringement:

57.1. The applicant bears the onus of proving the infringement.

57.2. In interpreting the constitutional protection and establishing its content and scope for purposes of determining the alleged infringement, Courts are required to adopt a generous and purposive interpretation of rights aimed at realising the full measure of the protection guaranteed in the Constitution,[38] as well as giving effect to the international and regional legal obligations of the country.[39]

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[36] Not repeated in respect of sections 4 and 19.
[37] See for example *Sechele v Public Officers' Defined Contribution Pension Fund and Others,* C of A (Civ) No. 43^{B}/10 para 11.
[38] *Sechele v Public Officers' Defined Contribution Pension Fund and Others,* C of A (Civ) No. 43^{B}/10 para 12; *Ts'epe v The Independent Electoral Commission and Others* (2005) AHRLR 136 (LesCA 2005) para 15.
[39] *Ts'epe v The Independent Electoral Commission and Others* (2005) AHRLR 136 (LesCA 2005) para 22.

58. In relation to justification, the following points are important:

58.1. Although the justification of an infringement does not always depend on evidence, the onus of proving it depends upon the person averring it, and it must be discharged "clearly and convincingly".[40]

58.2. In this case no attempt has been made to justify any infringement of section 18, save the respondent's contention that section 18(4)(c) of the Constitution precludes any challenge against section 10 of the Act on the basis of non-discrimination, i.e. in terms of section 18(1) and (3). There is likewise no attempt to justify the infringement of sections 4 and 19.

59. We make two submissions regarding the respondent's reliance on section 18(4)(c) of the Constitution to preclude the present constitutional challenge:

59.1. The first is that section 18(4)(c) does not preclude a constitutional challenge against section 10 of the Act on the basis of section 18(1) and (3).

[40] *Ts'epe v The Independent Electoral Commission and Others* (2005) AHRLR 136 (LesCA 2005) paras 24-25.

59.2. The second is that, in any event, section 18(4)(c) does not preclude a challenge against section 10 of the Act on the basis of section 19 and/or 4(1)(p) read with section 20 of the Constitution.

60. We submit that section 18(4)(c) must be strictly construed as it limits rights protected by section 18(1) and (3). Its reach is expressly limited to rules of the customary law of Lesotho and not statutes and must be construed in that way. When properly construed in this way, it is clear that section 18(4)(c) does not preclude a constitutional challenge against section 10 of the Act.

60.1. First, the present constitutional challenge is expressly directed at the provisions of section 10, especially subsections (1) and (2), and not the rules of customary law that might inform these provisions.

60.2. In its express terms, section 10 only regulates by reference to customary law in subsections (3) in relation to the seniority of marriages in question, and in subsection (4) in relation to legitimate elder surviving brothers. Succession by only first-born sons is expressly regulated by the provisions of the statute itself in subsections (1) and (2). The Act also expressly regulates the process of appointment to chieftainship.

60.3. It is the effect of subsections (1) and (2) read together that preclude succession by first-born daughters.

60.4. Section 3 of the Act makes it plain that in the hierarchy of the laws of Lesotho, the Act prevails over customary law to the extent of any inconsistency. Section 3 of the Act provides as follows in this regard:

> "3. The customary law and the Declaration of Basuto Law and custom commonly known as Part 1 of the Laws of Lerotholi, relating to the matters provided for in the Constitution and this Act concerning the office of the Chief, have no effect to the extent that they are inconsistent with the provisions of the Constitution and this Act in that behalf".

60.5. Any changes to permit succession by first-born daughters have, therefore, to be made to the Act. Any changes to customary law as an evolving and living system of law would have no effect unless the Act is changed, because the Act prevails over customary law.

60.6. The effect of the enactment of section 10 is that in matters of succession, customary law is no longer living law or fluid such as to permit changes by the community itself, it is statutory law that can

only be changed by Parliament, for instance in order to achieve the value of equality that underlies the Constitution.

60.7. It is also not proven by any of the respondents that the institution of chieftainship created by the Act, including all the procedures that it creates, is in all respects identical to that which existed in customary law prior to the enactment of section 10 of the Act.[41] The best that the respondents appear to contend for is that chieftainship is partly regulated by the Act and partly by customary law. We have submitted above the limited extent to which the Act defers to customary law in section 10 and that on its own express terms it prevails over customary law.

60.8. Secondly, the legislature's failure to make provision for succession by first-born daughters in section 10 of the Act, or to allow all first-born children to be considered for succession irrespective of their sex, means that the legislature has failed to meet its obligations under the proviso to section 18(4) read with section 26(1) of the Constitution. These obligations are not affected by section 18(4)(c)

[41] Whilst section 10 of the Act fixes succession to be by right of birth, it appears that "in traditional law the succession of chiefs was governed by heredity modified by expediency, and that although Lerotholi enshrined the principle of pure heredity in his Laws, that principle was not always followed". See Patrick Duncan *A Handbook Based on Decided Cases in Basutoland* (1960) at 54.

of the Constitution. On the contrary, they exist despite the provisions of section 18(4)(c) as section 18(4)(c) has no bearing on them. They require the attainment of equality that is substantive and not merely formal,[42] which section 10 of the Act fails to achieve.

61. In any event, section 18(4)(c) does not preclude a constitutional challenge to section 10 of the Act based on section 19 of the Constitution which, as submitted above, is distinct from and has a wider scope than section 18 of the Constitution.

62. The scheme of sections 18 and 19, as made clear by section 18(8) of the Constitution, makes it plain that it envisages that discriminatory rules of customary law may be unconstitutional because they are arbitrary or irrational and not merely because they discriminate as contemplated in section 18(3). Where this is the case, the Constitution makes such rules void.

63. We submit, therefore, that even if section 10 of the Act may be found to reflect or embody rules of the customary law of Lesotho on chieftainship,[43] and that to this extent section 18(4)(c) of the Constitution applies, section

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[42] *Ts'epe v The Independent Electoral Commission and Others* (2005) AHRLR 136 (LesCA 2005) paras 10 and 22.

[43] In particular, succession through the male line under the Laws of Lerotholi. See Laurence Juma "The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho" *23 Pace Int'l L. Rev. 92* 14.

10 of the Act is still open to constitutional challenge on the basis of its inconsistency with section 19 of the Constitution.

63.1. First, there is the proviso or qualification that "[n]othing in this subsection [i.e. subsection (4)] shall prevent the making of laws in pursuance of the principle of State Policy of promoting a society based on equality and justice for all the citizens of Lesotho and thereby removing any discriminatory law". This entitles, and indeed obliges, Parliament to make laws to remove discriminatory law, including rules of the customary law of Lesotho that are discriminatory in order to achieve both formal and substantive equality. It is clear that the Constitution has placed equality at its core as a value to be protected and achieved.

63.2. Secondly, section 18(8) makes it plain that the provisions of section 18 of the Constitution, including subsection (4)(c), "shall be without prejudice to the generality of section 19 of this Constitution". Thus section 18(4)(c) has no bearing on section 19.

63.3. Thirdly, section 19, which is wider in scope than section 18, guarantees equality before the law and equal protection of the law to every person in Lesotho. To the extent that section 10 of the Act

denies the applicant the right to succeed to the chieftainship on account of her being a first-born daughter of her parents and not a first-born son, the differentiation between first-born daughters and first-born sons must be proved to be rational in the sense enunciated by Melunsky JA in the *LNGIC* case. We submit below that no such rational basis exists or has been shown to exist by any of the respondents. This is particularly the case as being female on its own cannot provide the rational objective justification because wives are entitled to succeed. The differentiation must be based on some attribute that is considered to be unique to daughters as opposed to sons.

64. Lastly, section 10 of the Act is also open to challenge in terms of section 4(1)(p) and 20 of the Constitution to the extent that these provisions are applicable. This is so despite section 18(4)(c) of the Constitution as it does not, on its express terms, refer to the provisions of sections 4 and 20 of the Constitution.

The infringement

65. Section 10 clearly discriminates against first-born daughters. It favours first-born sons. This discrimination is based on sex because it favours succession according to the male line.

66. Although first-born daughters are also related to chiefs by blood, there is an absolute bar against them succeeding to chieftainship. They are not even permitted to succeed on the limited basis provided for in section 10(4) of the Act as are wives of chiefs.

67. We submit that discrimination based on sex as contemplated in section 18(1) and (3) of the Constitution, and as contained in the international and regional instruments discussed above, is established. Such discrimination is presumptively unfair and calls for objective justification.

68. There has been no attempt in the respondents' affidavits to provide any justification for the discrimination.

69. It falls to be declared inconsistent with the Constitution unless section 18(4)(c) is shown to apply. We have submitted above that section 18(4)(c) of the Constitution does not assist the respondents.

70. Such a declaration of unconstitutionality would give effect to the international and regional law obligations of Lesotho as outlined above. It would also not be out of step with the approach adopted in comparable jurisdictions to discriminatory rules of customary law.

Comparable jurisdictions

71. *In Re Wachokire,*[44] the Kenyan Magistrate Court relied on Kenya's obligations under the African Charter and CEDAW in holding that denying women the right to inherit under Kikuyu customary law violated section 82(1) of the Kenyan Constitution which prohibited discrimination on the basis of sex.

72. In *Ephraim v Pastory*[45] the Tanzanian High Court found that the rule of the Haya customary law according to which daughters had no power to sell inherited land was inconsistent with the Bill of Rights and international and regional law. In reaching its decision the Court referred to the treaties that Tanzania has ratified including the ICCPR and the African Charter. The High Court furthermore stated that "the principles enunciated in the above-named documents are a standard below which any civilised nation will be ashamed to fall, It is clear…that the customary law under discussion flies in

[44] *In re Wachokire*, Succession Cause No. 192 of 2000 *discussed in The Role of the Judiciary in Promoting Gender Justice in Africa* (UNDP, 2008) 19.
[45] *Ephraim v Pastory*, (2001) AHRLR 236.

the face of our Bill of Rights as well as the international conventions to which we are signatories."

73. The Botswana Court of Appeal in *Attorney General v Dow*[46] dealt with the constitutionality of section 4(1) of the Citizenship Act of 1984 that awarded citizenship on a patrilineal basis. The Botswana High Court interpreted the Constitution's anti-discrimination grounds to extend to the protection against discrimination on the basis of gender and struck down the statute. The Court relied on international human rights treaties ratified by Botswana to inform its conclusion that the omission of the word sex from the list of prohibited grounds for discrimination in the Botswana Constitution does not imply that discrimination on this basis is constitutionally tolerable.

74. The South African Constitutional Court in *Bhe v Khayelitsha Magistrate and Others*[47] was confronted with a similar issue of whether the rule of male primogeniture with respect to inheritance and succession violated the constitutional rights to dignity and equality among others. The Court looked at two distinct questions: whether section 23 of the Black Administration Act violated the constitution and whether the rule of male primogeniture under the customary law on inheritance and succession violated key constitutional rights. The Court held that section 23 and the customary law

[46] *Attorney General v Dow*, (1992) BLR 119.
[47] *Bhe v Khayelitsha Magistrate and Others*, 2005 (1) SA 580 (CC).

rule of male primogeniture violated the rights to dignity and equality under the constitution.

75. The Court made a clear distinction between the Black Administration Act, which arguably gave recognition to customary law at the time of its enactment, and the rule of male primogeniture under customary law, making clear that the two are distinct from each other given that one is legislated. The Court noted: "It is important to appreciate the distinction between the legal framework based on section 23 of the [Black Administration] Act and the place occupied by customary law in our constitutional system" clearly indicating the distinction between statute and customary law.[48] This is relevant in this case to the treatment of section 10 of the Act and the application of section 18(4)(c) of the Constitution.

76. The Court further reasoned, after holding that section 23 of the Black Administration Act was invalid, that the effect of such an invalidation meant that the "customary law governing succession [is] applicable."[49]

77. The difference between statute, even that which purports to be a reflection of customary law and customary law is reinforced by Ngcobo J in his concurrence where he rejects the constitutional validity of section 23 of the

[48] *Bhe v Khayelitsha Magistrate and Others*, 2005 (1) SA 580 (CC) para 41.
[49] *Id.* para 74.

Black Administration Act but then turns to the issue of the rule of male primogeniture under customary law, spending significant time outlining the sources for customary law and highlighting the notion of a constantly developing and growing customary law.

78. In reaching its decision, the Court helpfully outlined the nature of customary law, highlighting the importance of a "living" customary law which is regularly developing to meet changing community needs. The Court held that "[t]rue customary law will be that which recognizes and acknowledges the changes which continually take place."[50] Such living change is made impossible once customary law is enacted in statute and rendered rigid and inflexible, as is the case with section 10 of the Act.

79. Indeed, the Court noted that customary law as found in statutes "is generally a poor reflection, if not a distortion of the true customary law."[51] Applying this reasoning to the Black Administration Act, the Court found that the Act's "effect has been to ossify customary law."[52]

80. The Constitutional Court in South Africa in *Shilubana and Others v Nwamitwa*[53] held that the decision to institute a woman as chief was

[50] *Bhe v Khayelitsha Magistrate and Others*, 2005 (1) SA 580 (CC) para 86.
[51] *Id.* para 86.
[52] *Id.* para 72.
[53] *Shilubana and Others v Nwamitwa*, 2009 (2) SA 66 (CC).

constitutional. In the case the respondent argued that permitting a woman to succeed to chieftainship would lead in the next generation to a chief who is not fathered by a chief, which would lead to confusion and chaos in the community. The Court categorically rejected that argument. In rejecting the argument, the Court said the following:

> "[79] Mr Nwamitwa submits that the effect of upholding the installation of Ms Shilubana would be chaos. It is argued that if she is recognized as Chief, then in the next generation, for the first time, the Valoyi will have a Hosi who is not fathered by a Chief. This argument is not convincing. It involves the same inappropriate reasoning as that underlying the *Van Breda* test [See above [52]-[56]. If women are to be Chiefs, the practice that a Hosi [chief] always has to be fathered by the previous Hosi must necessarily change. The actions of a traditional authority cannot be illegitimate because they involve a departure from past practice. …
>
> [81] It is true that Ms Shilubana's installation leaves unanswered some questions relating to how the Valoyi succession will operate in future. However, customary law is living law and will in future inevitably be interpreted, applied and, when necessary, amended or developed by the community itself or by the courts. This will be done in view of existing customs and traditions, previous circumstances and practical needs, and of course the demands of the Constitution as the supreme law. …"

81. In Nigeria, the Court of Appeal in *Mojekwu v Mojekwu*,[54] cited in the South African case of *Bhe* referred to above, also addressed a customary law rule of male primogeniture. The Court held that the rule was unconstitutional and contrary to democratic values. The Court held that "[a]ny form of societal discrimination on the ground of sex, apart from being unconstitutional, is [an] antithesis to a society built on the tenets of democracy which we have freely chosen as a people…Accordingly… discrimination against a particular sex is to say the least an affront on the Almightly God Himself."[55]

82. In Ghana, the High Court in *Akrofi v Akrofi*,[56] declared that the daughter of the deceased was "within the range of persons…entitled to succeed to her father's estate."

[54] *Mojekwu v Mojekwu* [1997] 7 NWLR 283.
[55] *Bhe* para 194.
[56] *Akrofi v Akrofi*, [1965] GLR 13 para 2.

DOES SECTION 10 OF THE ACT INFRINGE SECTION 19 OF THE CONSTITUTION?

83. Section 10 of the Act plainly differentiates between first-born daughters and first-born sons as regards the right to succeed to chieftainship. We submit that it manifests a "naked preference".

84. There is no legitimate government purpose served by the differentiation. None of the respondents suggests that the differentiation itself serves any legitimate government purpose. Such a government purpose cannot be the retention of a discriminatory customary rules for its sake.

85. The only possible purpose is that suggested by Mr Nwamitwa in *Shilubana* which the Constitutional Court in South Africa rejected, i.e. to avoid the possibility that in the generation following succession by a first-born daughter a person not fathered by a chief may succeed to chieftainship. This contention must be rejected for the same reasons advanced in *Shilubana*, which have been quoted above.

86. In any event, even if the Court were to regard that purpose as being somewhat legitimate, there is no rational connection between such purpose and a complete bar against first-born daughters succeeding to chieftainship as no dispensation similar to that provided by section 10(4) of the Act in

respect of wives of chiefs, and that adopted in *Shilubana*, unsatisfactory as it might be, is completely precluded in the case of first-born daughters.

87. There is also no room for succession by a first-born daughter who might choose not to marry.

88. We submit for the above reasons that section 10, especially subsections (1) and (2), ujustifiably infringe section 19 of the Constitution.

DOES SECTION 10 OF THE ACT INFRINGE SECTIONS 4(1)(P) AND 20 OF THE CONSTITUTION?

89. Commentators on the office of chieftainship characterise it as an administrative and political office.[57] It involves involves the administration of a community's public affairs. We submit that this characterisation falls within the wide concept of public affairs in section 20(1)(b) of the Constitution and is in line with the approach adopted by the HRC as discussed in paragraph 33 above.

90. Whilst succession to chieftainship is by birth, save in the case of section 10(4) of the Act, there is consideration by the King under section 10(6) and (7) that may result in the rejection of an otherwise qualified successor to the office. There is therefore an element of preference or selection governed by other (unexpressed) considerations over and above the person's birth-right.

91. First-born daughters are barred by section 10 of the Act from even putting themselves forward for consideration by the King – or contesting the office of chief. We submit that this infringes the provisions of section 4(1)(p) and 20 of the Constitution, especially 20(1)(b) in relation to taking part in the conduct of public affairs. First-born daughters are denied the right to

[57] Patrick Duncan *Sotho Laws and Customs* (1960) 47; Laurence Juma "The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho" *23 Pace Int'l L. Rev. 92* 13.

take part in the conduct of public affairs as chiefs irrespective of their birth to a chief.

92. There is no justification for the infringement of section 4(1)(p) and 20(1)(b) of the Constitution.

THE HIV/AIDS EPIDEMIC

93. The SALC submits that the strict approach to the interpretation of section 18(4)(c) of the Constitution that it advances is also supported by societal considerations such as the proper response to the HIV/AIDS epidemic and the role that the achievement of equality and the eradication of non-discrimination would contribute to such a fight. It puts forward the considerations set out below to the extent this Honourable Court finds it useful.

94. It has long been recognized that discriminatory laws and norms, especially those impacting vulnerable groups such as women, serve to further entrench the HIV/AIDS pandemic and limit government's ability to effectively address the epidemic. Though the HIV pandemic is not directly raised in this case, the issue before this Honourable Court will have an impact on Lesotho's ability to effectively respond to its HIV pandemic.

95. As early as the 1980s, the World Health Organization (WHO) based its HIV/AIDS strategy on the recognition, promotion and protection of human rights, with one of the fundamental values being equality and non-discrimination in law and practice.[58]

[58] Gruskin *et al.*, "History, principles, and practice of health and human rights," *The Lancet*, Vol. 370:449-55 (4 Aug 2007) at 449.

96. In more recent years, governments have recognized the importance of addressing legal inequalities, particularly those facing women, as a central component in responding to HIV/AIDS. The Declaration of Commitment on HIV/AIDS issued by heads of states and governments in 2001 found gender equality to be a "fundamental element[] in the reduction of the vulnerability of women and girls to HIV/AIDS."[59] Justice Irene Mambilima of the Zambian Supreme Court has warned that "until international norms against discrimination and violence against women are domesticated, [the AIDS pandemic] will continue."[60]

97. The focus on eradicating gender inequalities is due in large part to the recognition that they contribute to the disproportionate impact HIV/AIDS has on women throughout the world. Globally, HIV is the leading cause of death for women of reproductive age.[61]

98. The situation for women in sub-Saharan Africa is worse. In 2004, sub-Saharan Africa was the only region in the world where the rate of HIV prevalence was higher amongst women than men.[62] As of 2006, almost

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[59] Declaration of Commitment on HIV/AIDS, U.N. Doc. A/RES/47/1 (2 Aug 2001) at para 14.
[60] *The Gender and Legal Dimensions of HIV/AIDS: Women's Access to Justice and the Role of the Judiciary* (International Association of Women Judges, 21 June 2005) 4 (quoting from a 15 Dec 2004 speech by Hon. Justice Irene C. Mambilima).
[61] *Women and Health: Today's Evidence Tomorrow's Agenda* (World Health Organization, 2009) 43.
[62] *Facing the Future Together: Report of the Secretary General's Task Force on Women, Girls and HIV/AIDS in Southern Africa* (UNAIDS & Global Coalition on Women and AIDS, July 2004) 8.

two-thirds of young people living with HIV in sub-Saharan Africa were female. [63]

99. The disproportionate impact of HIV/AIDS on women in southern Africa extends beyond higher rates of HIV infection. Despite their comparatively limited economic resources, women and girls are the primary caregivers to people living with HIV/AIDS.[64] In southern Africa women head almost 35% of households with children.[65]

100. The disproportionate impact of HIV on women is similarly apparent in Lesotho where according to the country's National HIV/AIDS Strategic Plan, the HIV prevalence is highest amongst individuals aged 15 to 49 and of these 55% are women.[66] This is particularly true among young women where according to the latest UN statistics, nearly 8% of young women aged 15-19 are living with HIV, compared to about 3% of their male counterparts.[67]

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[63] *Id.*; Gruskin *et al.*, "Reproductive Health and HIV: Do International Human Rights Law and Policy Matter?," *McGill International Journal of Sustainable Development Law and Policy*, Vol. 3, No. 1:69-101 (2008) 77-78.
[64] Varga, *A Network Approach to Women's Property and Inheritance Rights in the Context of HIV/AIDS: the Case of the Justice for Widows and Orphans Project in Zambia*, (International Center for Research on Women, 2006) 2.
[65] *Facing the Future Together: Report of the Secretary General's Task Force on Women, Girls and HIV/AIDS in Southern Africa* (UNAIDS & Global Coalition on Women and AIDS, July 2004) 8.
[66] Lesotho's National HIV/AIDS Strategic Plan (2006-2011) 7.
[67] *Global Report: Fact sheet-sub Saharan Africa* (UNAIDS 2011).

101. The significantly higher numbers of women living with HIV and the disproportionately negative impact of HIV/AIDS on women is primarily due to two reasons: physiological vulnerabilities making women more susceptible to HIV when transmitted through heterosexual sex and entrenched social, economic, and legal gender inequalities, including laws which discriminate against women.[68]

102. In particular, laws that discriminate against women with respect to key constitutional rights further fuel the HIV/AIDS pandemic by reducing women's economic autonomy and thus their ability to protect themselves against transmission and to mitigate HIV's negative impact.[69] This is because rights violations contribute to women's "poverty, disease, violence, and homelessness," all of which are significant risk factors in the context of preventing and coping with HIV/AIDS.[70]

103. Lesotho has long recognized the need to equalize or address legally entrenched gender equality to ensure an effective response to HIV prevention and treatment. In recent years, Lesotho has taken considerable

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[68] *See AIDS Epidemic Update 2009* (UNAIDS, Nov 2009) 22.
[69] *See, e.g.*, *Economic Security for Women Fights AIDS* (The Global Coalition on Women and AIDS, 8 Mar 2006); *A Dose of Reality: Women's Rights in the Fight Against HIV/AIDS* (Human Rights Watch, March 2005) 2-3; Strickland, *To have and to hold: women's property and inheritance rights in the context of HIV/AIDS in sub-Saharan Africa* (International Center for Research on Women, June 2004).
[70] *Policy Paralysis: A Call for Action on HIV/AIDS-Related Human Rights Abuses against Women and Girls in Africa* (Human Rights Watch, Dec 2003) 7.

steps to ensure equality between men and women under law having passed the Legal Capacity of Married Persons Act 9 of 2006 abolishing marital power in 2006.

104. The National HIV/AIDS Strategic Plan confirms this notion that "women and girls are disproportionately vulnerable to HIV infection and to the impact of the epidemic due to their lower socio-economic position in both traditional and legal settings"[71]

105. The Strategic Plan highlights the importance of addressing gender inequality as a key aspect of responding effectively to HIV and requires government to reduce the vulnerability of women and girls to risk of HIV infection due to their socio-cultural status, including the need to promote socio-economic and political empowerment of women and girls.[72]

[71] Lesotho's National HIV/AIDS Strategic Plan (2006-2011) 30.
[72] Lesotho's National HIV/AIDS Strategic Plan (2006-2011) 28-30.

CONCLUSION

106. We submit for the reasons advanced above that the declaration sought in paragraphs 3(d) and (e) of the applicant's notice of motion should be granted.

107. As regards paragraph 3(e) of the notice of motion, section 22(1) of the Constitution empowers this Court to "make such orders, issue such process and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 4 to 21 (inclusive)" of the Constitution.

108. We submit that an order that is appropriate in the circumstances to secure the applicant's rights in terms of sections 4, 18 and 19 include the device of severing the word "son" wherever it appears in section 10 of the Act and to read-in, in its place, the word "child".

109. In South Africa, the Constitutional Court has held that the power to read-in words into a statute as a matter of remedy after finding a statute unconstitutional derives from section 172(1)(b) of the Constitution, which entitles a Court to "make an order that is just and equitable …".[73]

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[73] See, for example, *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) paras 23, 63-88.

110. We submit that an "appropriate" order as contemplated in section 22(1) of the Constitution (of Lesotho) is also one that would be just and equitable in the circumstances and therefore this Court can employ the device of reading-in to remedy the unconstitutionality of section 10 of the Act.

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16 JANUARY 2012

LIST OF AUTHORITIES

CASES

Lesotho

1. *Lesotho National General Insurance Co Ltd v Nkuebe* [2004] JOL 12751 (LesCA)
2. *'Muso Tseuoa v The Minister of Labour and Employment and others,* Constitutional Court Case No. 4/2005 (High Court of Lesotho)
3. *Sechele v Public Officers' Defined Contribution Pension Fund and Others,* C of A (Civ) No. $43^{B}/10$
4. *Ts'epe v The Independent Electoral Commission and Others* (2005) AHRLR 136 (LesCA 2005)

Foreign

5. *Affordable Medicines Trust v Minister of Health* 2006 (3) SA 247 (CC)
6. *Akrofi v Akrofi*, [1965] GLR 13
7. *Amnesty International / Zambia*, Comm. 212/98
8. *Antonie Bissangou / Congo*, Comm. 253/02
9. *Attorney General v Dow*, 1992 BLR 119
10. *Banda v Lekha*, [2005] MWIRC 44
11. *Bhe v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC)
12. *Ephraim v Pastory*, (2001) AHRLR 236
13. *Good / Republic of Botswana*, Comm. 313/05
14. *In re Wachokire*, Succession Cause No. 192 of 2000
15. *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* 1999 (2) SA 1 (CC)
16. *Longwe v Intercontinental Hotel*, 1992/HP/765
17. *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme / Mauritani*a, Comm. 54/91-61/91-98/93-164/97_196/97-210/98
18. *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others 2000 (2) SA 1 (CC)*
19. *New National Party of SA v Govt of the RSA* 1999 (3) SA 191 (CC)
20. *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC)
21. *Purohit and Moore v. The Gambia, Comm.* 241/01
22. *S v Lawrence* 1997 (4) SA 1176 (CC)
23. *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC)

24. *Union interafricaine des droits de l'Homme, Fédération internationale des ligues des droits de l'Homme,RADDHO, Organisation nationale des droits de l'Homme au Sénégal and Association malienne des droits de l'Homme / Angola, Comm.* 159/96
25. *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa, Comm.* 294/04

INTERNATIONAL AND REGIONAL TREATIES AND JURISPRUDENCE

1. *African Charter on Human and Peoples' Right*, 21 I.L.M. 58 (1982)
2. Declaration of Commitment on HIV/AIDS, U.N. Doc. A/RES/47/1 (2 Aug 2001)
3. *International Covenant on Civil and Political Rights*, 999 UNTS 171
4. *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3
5. *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, OAU Doc. CAB/LEG/66.6
6. *Vienna Convention on the Law of Treaties*, 1155 UNTS 331
7. Human Rights Comm., 37th session, 1989, General Comment No. 18
8. Human Rights Comm., 68th session, 1996, General Comment No. 25
9. Human Rights Comm., 68th session, 2000, General Comment No. 28

LITERATURE

10. *AIDS Epidemic Update 2009* (UNAIDS, Nov 2009)
11. Bradshaw, Y and Ndegwa, S, The Uncertain Promise of Southern Africa (2000)
12. *A Dose of Reality: Women's Rights in the Fight Against HIV/AIDS* (Human Rights Watch, March 2005)
13. Duncan Patrick *Sotho Laws and Customs (1960) 47*
14. *Economic Security for Women Fights AIDS* (The Global Coalition on Women and AIDS, 8 Mar 2006)
15. *Facing the Future Together: Report of the Secretary General's Task Force on Women, Girls and HIV/AIDS in Southern Africa* (UNAIDS & Global Coalition on Women and AIDS, July 2004)
16. *The Gender and Legal Dimensions of HIV/AIDS: Women's Access to Justice and the Role of the Judiciary* (International Association of Women Judges, 21 June 2005)
17. *Global Report: Fact sheet-sub Saharan Africa* (UNAIDS 2011)
18. Juma Laurence "The Laws of Lerotholi: Role and Status of Codified Rules of Custom in the Kingdom of Lesotho" *23 Pace Int'l L. Rev. 92* 13

19. Gruskin *et al.*, "History, principles, and practice of health and human rights," *The Lancet*, Vol. 370:449-55 (4 Aug 2007)
20. Gruskin *et al.*, "Reproductive Health and HIV: Do International Human Rights Law and Policy Matter?," *McGill International Journal of Sustainable Development Law and Policy*, Vol. 3, No. 1:69-101 (2008)
21. Lesotho's National HIV/AIDS Strategic Plan (2006-2011)
22. *Policy Paralysis: A Call for Action on HIV/AIDS-Related Human Rights Abuses against Women and Girls in Africa* (Human Rights Watch, Dec. 2003)
23. Strickland, *To have and to hold: women's property and inheritance rights in the context of HIV/AIDS in sub-Saharan Africa* (International Center for Research on Women, June 2004).
24. *The Role of the Judiciary in Promoting Gender Justice in Africa* (UNDP, 2008).
25. Varga, *A Network Approach to Women's Property and Inheritance Rights in the Context of HIV/AIDS: the Case of the Justice for Widows and Orphans Project in Zambia*, (International Center for Research on Women, 2006)
26. *Women and Health: Today's Evidence Tomorrow's Agenda* (World Health Organization, 2009