IN THE HIGH COURT OF BOTSWANA
HELD AT LOBATSE

Misca No. 377/99

In the matter between:

SHIKATI CALVIN KEENE KAMANAKAO I	**1st Applicant**
KAMANAKAO ASSOCIATION	**2nd Applicant**
MOTSAMAI KEYECWE MPHO	**3rd Applicant**

And

ATTORNEY GENERAL OF BOTSWANA	**1st Respondent**
KGOSI TAWANA MOREMI II	**2nd Respondent**

Mr. G. Kanjabanga (with him Mr. S. Taimu & Mr. M. Tlhagwane) for the 1st, 2nd and 3rd Applicants

Mr. T. Motswagole (with him Mr. N. Nchunga) for the 1st and 2nd Respondents

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J U D G M E N T

CORAM: NGANUNU C.J.
DIBOTELO J.
DOW J.

NGANUNU C.J.

The First Applicant describes himself in his founding affidavit as the Paramount Chief of the Wayeyi tribe, who was enthroned on 24th April 1999. The second

Applicant is a society registered in terms of the Societies Act (Cap 18:01) whose objective, it is said, is the promotion and maintenance of the Shiyeyi culture and language. Third Applicant is a Senior Wayeyi tribesman and politician, whom it is said, has throughout his life been engaged in a struggle for the freedom of the Wayeyi. The applicants jointly seek, in the main, the nullification of certain provisions of the Constitution and specified Acts which they believe discriminate against their tribe and deny it and members thereof their rights as contained in Sections 3 and 15 of the Constitution. In addition, applicants seek certain declarations against, and or orders for the performance of certain activities by the Government of Botswana. The first respondent is the Attorney General of Botswana who represents the Government whenever it is sued under the State Proceedings (Civil Actions by or against the Government or Public Officers) Act (Cap10:01). The second respondent is the Chief of the Batawana tribe of the Batawana Tribal Territory.

LOCUS STANDI OF THE APPLICANTS

This application was brought to this Court under the provision of Section 18(1) and (2) which reads as follows:

> "(1) Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.
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> 2. The High Court shall have original jurisdiction -
> (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; or
> (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,
> and may make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 16 (inclusive) of this Constitution."

This section therefore enables any person, who alleges that any of the provisions of Sections 3 to 16 inclusive, of the Constitution are being, were or will be contravened in relation to him, to bring an application to the High Court

concerning such breach. The right of such person to sue for redress of any contravention of his constitutional rights under subsection 1, goes together with the grant of extra jurisdiction to the High Court under subsection 2 to hear the application of such person. In this connection the court is given by Section 18(2) powers to consider a wide range of reliefs it may grant to an applicant in an appropriate case. We shall in due course have occasion to refer in detail to the provisions of this section. The provisions of Section 18 are intended, as is provided in Section 3 of the Constitution, to afford protection to the fundamental rights and freedoms granted to the individual. For this reason it is desirable that all persons, individuals and organisations should have access to the High Court to seek redress for any perceived contraventions of their rights. The provisions of Section 18 of the Constitution as to who can approach the Court must therefore be interpreted liberally to give as wide an access to the court as possible. We think that when Section 18(1) provided that "---- if any person alleges that ----," it used the word "person" in its widest sense, including as defined in Section 49 of the Interpretation Act (Cap 01:04) where its meaning

"includes a body corporate and an unincorporated body as well as an individual". This definition of the word "person" under the Interpretation Act is not exhaustive; as made plain by the word "includes..." which suggests that the definition it makes of the word "person" is part only of its meaning. Groups of individuals formally organised or informally organised would also qualify, in our view, as persons under the definition of that word. In the present case that is necessary therefore for the three applicants to establish their locus standi is to show that they have substantial interest in the case. Although the respondents raised the issue of the locus standi of the applicants, we did not understand Mr. Motswagole to press this issue, especially when he was reminded that preliminary objections had been given their time earlier on and those raised had been disposed of by the court in a comprehensive ruling of *the 20th July 2001.* We are of the view that an applicant who alleges a breach of his right, or a right which he shares with or in a group, is entitled to bring an application to vindicate that right for himself and the group, even if in ordinary parlance the right may be referred to as that of a group; provided however that the applicant also shares in that right or has a

substantial and not an insignificant interest in connection with the right. Take for instance the right to worship which, the individual, the congregation or church enjoys. Each of these should, in our view be able to sue to protect that fundamental right for himself and or for the group. The existence of such a fundamental right must dictate that those who would suffer by its loss must have access to the High Court for its protection. In the present case the first applicant says that he is the chief of the tribe whose rights he alleges are being trampled. That capacity alone gives him locus standi in the application. Furthermore the first applicant alleges breaches of rights in relation to himself. That too squarely entitles him to bring an action under Section 3. The 2nd applicant is a society for the promotion of the rights of the Wayeyi. It has made the struggle of the Wayeyi for their culture and language its very objective. It should in our mind therefore be rightly concerned with the enforcement of the Wayeyi rights under the Constitution. It too has locus standi to sue for the enforcement of the Wayeyi rights. The 3rd applicant is alleged to be not only a Wayeyi tribesman, but a life long struggler for the rights of the Wayeyi. He struggles to see that the Wayeyi of

which he is a member should get their rights. He is included in the group and he has made the group's struggle his personal crusade. He has a sufficient interest, in our view, to sue.

BACKGROUND OF THE CASE

It is useful to give a short background to this dispute. The Wayeyi people live mainly in the Batawana Tribal Territory in the North West of the Republic of Botswana. It is agreed that they form a separate tribal group with their own ethnic language and culture. As the area in which they live forms part of the Batawana Tribal Territory, they are ruled from Maun by the Chief of the Batawana. The applicants' papers claim that the Wayeyi are numerically strong and that for decades now, they have sought recognition for their tribe and their own traditional leaders and structures, including dikgotla manned by their own headmen. They say that up to now they have not been accorded what they want. In fact they say that they have been ignored and fobbed off so that they eventually agitated to have a paramount chief of their own. That as no authority

would listen to their plea, they eventually nominated, recognised and installed the 1st applicant as their paramount chief. Indeed one of the prayers originally sought but which has now been abandoned was for the court to declare some part of the Batawana Tribal Territory as a tribal area of the Wayeyi where they could, as it were, rule themselves. We have given this background to show the seriousness of the situation, as well as to form a background to the understanding of the reliefs the applicants seek. The applicants emphasise in their papers that they have pursued their demands in a peaceful manner. The reliefs they seek, nevertheless have far reaching consequences for the parties, and indeed for the country as a whole. They have to be stated in detail.

RELIEFS

The applicants apply for the following remedies; and we narrate them as they appear in the application. An order declaring that:

"1. (a) Sections 77, 78 and 79 of the Constitution of Botswana are inconsistent with the fundamental rights provisions of sections 3 and 15 of the Constitution and hence are null and void.

Alternatively:

(b) Sections 77, 78 and 79 are discriminatory on the basis of tribe contrary to sections 3 and 15 of the Constitution of Botswana.

Further alternatively:

(c) Sections 77 and 78 of the Constitution of Botswana are unjustifiably discriminatory on the basis of tribe either expressly or in effect in so far as they afford preferential treatment to ex officio members of the House of Chiefs to the exclusion of Chiefs of other tribes in Botswana.

2. That section 2 of the Chieftainship Act CAP 41:01is unconstitutional in that it is discriminatory on the basis of tribe and therefore ultra vires sections 3 and 15 of the Constitution of Botswana particularly in that it is underinclusive, in that it expressly interpretes "tribe" to mean only eight tribes mentioned therein to the exclusion of other tribes in Botswana.

3.(a) That the Tribal Territories Act Cap. 32:03 is unconstitutional and ultra vires Sections 3 and 15 of the Constitution of Botswana and discriminates against other tribes in so far as it is under inclusive and thus defines Tribal Territories to be Tribal Land held by eight Tswana speaking tribes only.

Alternatively:

(b) The Tribal Territories Act CAP 32:03 and Chieftainship Act are discriminatory either expressly or in effect in so far as they discriminate on the basis of tribes.

4. The 2nd Respondent's decision and/or conduct of not recognising the 1st Applicant as Paramount Chief of the Wayeyi is expressly or in effect discriminatory on the basis of tribe and therefore ultra vires sections 3 and 15 of the Constitution of Botswana.

5.(a) That the 1948 Wayeyi Courts be re-established with the main kgotla at Gumare.

Alternatively

(b) That 2nd Respondent to *(sic)* initiate or put in place a constitutional structure for the appointment and recognition of Chiefs, headman and other Wayeyi traditional authorities that is not discriminatory on the basis of tribe.

6. That the territorial boundaries between Wayeyi and Batawana be created respected and treated as termination line between Batawana and Wayeyi territories.

7. That the 2nd Respondent in conjunction with the Ministry of Education to introduce Shiyeyi language as a National medium of instruction in preprimary, primary and secondary schools and the culture of Wayeyi be part of school curriculum.

8. That the 1st Respondent pay costs of this application.

9. Further and/or alternative relief."

We point out that prayers 3(a), 5(a) and 6 have been expressly abandoned, whereas the applicants offered no submissions with respect to relief Nos 4 and 5(b).

THEMES

The reliefs sought by the applicants resolve themselves into three themes. The first theme is a complaint against the provisions of Sections 77 to 79 of the Constitution. The persistent complaint in the main prayer and its two alternatives is that the sections are in breach of the rights of the applicants as granted by Section 3 of the Constitution and that they discriminate against the applicants

contrary to the prohibition against discrimination contained in the Constitution especially Section 15.

The next complaint of the applicants relates to the Chieftainship and the Tribal Territories Acts. To understand the complaints of the applicants in relation to these two Acts of Parliament it is necessary to explain that the Tribal Territories and the Chieftainship Acts form a scheme together with Sections 77 and 78 of the Constitution; whereby the greater part of the land mass of the territory of the Republic of Botswana is divided by the Tribal Territories Act into seven Tribal areas designated to be those of the Bakgatla, Bakwena, Bamalete, Bangwato, Bangwaketsi, Batawana and Batlokwa tribes. By Sections 77 and 78 of the Constitution a House of Chiefs is established as one of the Houses of the Parliament of Botswana. The House of Chiefs so established has three categories of membership. The first category consists of automatic members who by Section 78 are the chiefs of the seven tribal territories under the Tribal Territories Act plus the chief of the Barolong tribe. Only these eight communities qualify for the designation of "tribe" and these tribes alone qualify to have

traditional leaders who are recognised as "chiefs" under the Chieftainship Act. No other communities in Botswana are recognised as tribes even if they are ethnically separate and they are organised along tribal lines; nor could their traditional leaders be known as chiefs under the Chieftainship Act. Where the traditional leaders of other communities are recognised at all in the Act, they are referred to by lesser titles such as subchiefs and not all their leaders are or can be members of the House of Chiefs. As the Wayeyi are not mentioned as a tribe in any of the laws of Botswana they therefore cannot have a recognised chief and they do not have any representation in the House of Chiefs. That is really the basis of their complaint.

The complaint of the applicants in essence, in regard to these two Acts is that they discriminate against their people and their tribe by not including them in the provisions of the Chieftainship Act; especially in the definitions in that Act of the words "chief" and "tribe" which in effect omit to mention the Wayeyi. In the case of the Tribal Territories Act, the complaint is that its provisions are expressly discriminatory or they have a discriminatory effect.

The last theme in the case of the applicants requires that this court should issue orders to compel the government to undertake a series of actions to accommodate the grievances of the Wayeyi people as a separate tribe that ought, according to the applicants, to have its own traditional tribal structure with a language and culture recognised for development in this country. As can be seen the applicants also ask for costs of their application. The grouping of the application into the above themes is for convenience of treatment only but each substantive request for a relief shall, if need be, be dealt with separately.

SECTIONS 77, 78 AND 79 – AS NULL AND VOID

The applicants allege that Sections 77 to 79 of the Constitution are "inconsistent with the fundamental rights provisions of Sections 3 and15 of the Constitution and hence they are null and void" and it should be so declared. In the alternative the applicants argue that those sections are discriminatory on the basis of tribe contrary to Sections 3 and 15. Further alternatively, it is said that the sections are unjustifiably discriminatory on the basis of tribe either expressly or in their effect because they afford preferential treatment to the eight tribes, by making

their chiefs ex officio members of the House of Chiefs to the exclusion of chiefs of other tribes in Botswana. We understand this last ground to be that the sections are discriminatory because they accord to each of the eight tribes previously mentioned the right to ex officio membership of the House of Chiefs to their chiefs, without giving the same treatment to other tribes of Botswana, especially the Wayeyi and its leadership.

In support of the main relief Mr. Kanjabanga for the applicants argued with conviction that whilst the provisions of Section 3 of the Constitution grant fundamental rights and freedoms to all persons in Botswana, especially the right of equality and equal treatment before or under the law, *Sections* 77 to 79 of the Constitution do not treat the Wayeyi tribe and applicants as equal with the eight mentioned tribes who have chiefs that have automatic membership to the House of Chiefs as ex officio members. The Batawana and the Bangwaketse, to mention only two of the eight tribes, are specifically mentioned in Section 78 of

the Constitution as tribes whose chiefs qualify under Section 77 for ex officio membership of the House.

Section 3 of the Constitution provides that:

> "Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely –
>
> (a) life, liberty, security of the person and the protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and
>
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation,
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> 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 individual does not prejudice the rights and freedoms of others or the public interest."

This Court points out that the rights declared in Section 3 of the Constitution inhere in every person in Botswana without exception or discrimination.

The applicants point out that paragraph (a) quoted above specifies "the protection of the law" as a fundamental right and entitlement of each individual. They contend that the right to protection under the law requires that protection to be equal to that rendered to others, resulting in practice to an equality of treatment under any law. They therefore contend that any provision of the Constitution or other law that affords inequality in treatment is in breach of that right. They further argued that to the extent that *Sections* 77 to 79 deal only with certain tribes and omit altogether to mention others, then such sections do not give equal treatment to all the tribes of Botswana and therefore they should be deemed null and void. In particular it was pointed out that in according ex officio membership of the House of Chiefs to eight tribes only, the sections were discriminatory of other tribes; and also to that extent the sections failed to afford equal treatment under the law to other tribes and their members. The Wayeyi,

the applicants say, suffer from that unequal treatment meted by the provisions of the Constitution.

Mr. Kanjabanga also anchored his contention on the existence of a natural law, which he contends invests every individual with fundamental rights, including the right to equal protection of the law, which allows of no exception. He contended that any differential treatment would be repugnant to the provision for equality before the law and for equal protection of the law. He quoted extensively from the judgment of Justice Tanaka in the South West Africa case which was heard by the International Court of Justice in the Hague. **SOUTH WEST AFRICA SECOND PHASE ICJ REPORTS 1966 AT PP 304-315**

Whilst Sections 3 to 15, which deal with fundamental rights and freedoms, are contained in Chapter II of the Constitution and thus appear at the apex of the Constitutional document itself, Sections 77 to 79 are part of Chapter V which deals with Parliament in its wider meaning, including the House of Chiefs. These sections are contained in Part III of that Chapter and they deal with the House of Chiefs. The sections read as follows:

"77.(1) There shall be a House of Chiefs for Botswana.

(2) The House of Chiefs shall consist of –

(a) eight ex-officio members;

(b) four elected members; and

(c) three specially elected members.

78. The ex-officio members of the House of Chiefs shall be such persons as are for the time being performing the functions of the office of Chief in respect of the Bakgatla, Bakwena, Bamalete, Bamangwato, Bangwaketse, Barolong, Batawana and Batlokwa Tribes, respectively.

79. (1) The Elected Members of the House of Chiefs shall be elected from among their own number by the persons for the time being performing the functions of the office of Sub-Chief in the Chobe, North East, Ghanzi and Kgalagadi districts, respectively.

(2) The Specially Elected Members of the House of Chiefs shall be elected by the ex-officio and Elected Members of the House of Chiefs in accordance with the provisions of this Constitution from among persons who are not and

> have not been within the preceding five years actively engaged in politics."

The provision for "the protection of the law" which is expressed in Section 3(a) of the Constitution to be an entitlement of every individual has received extensive consideration by the Court of Appeal in the **A.G. V DOW 1992 BLR 119** where Amissah J.P. said at p135

> "In Botswana, when the Constitution, in Section 3, provides that "every person... is entitled to the fundamental rights and freedoms of the individual", and counts among these rights and freedoms "the protection of the law", that fact must mean that, with all enjoying the rights and freedoms, the protection of the law given by the Constitution must be equal protection. Indeed, the appellant generously agreed that the provision in Section 3 should be taken as conferring equal protection of the law on individuals. "

We endorse the position that the right to the protection of the law contained in Section 3 of the Constitution leads to the principle that all laws must treat all people equally save as may legitimately be excepted by the Constitution. An enactment or even a provision of the common law that is inconsistent with the

Constitution is liable to be struck down by the High Court. The position in regard to a constitutional provision alleged to be inconsistent with another constitutional provision brings into play considerations different from those taken into account where a statute is alleged to be in contravention of the Constitution. That is the issue for determination in this case because the applicants say that the provisions of Section 77, 78 and 79 which are in the Constitution offend against Section 3 which is also in the Constitution.

The first alternative argument of the applicants is based on the contention that Sections 77 to 79 are contrary to Sections 3 and 15 of the Constitution in that they are discriminatory on the basis of tribe. We have already summarised the contentions of the applicants as to how they see Sections 77 to 79 contravening their rights to non discrimination under Section 3. With regard to Section 15 of the Constitution it is argued, cogently in our view, that Section 15(1) forbids all discrimination except as allowed under the provisions of the further subsections of that Section which derogate from the prohibition against discrimination.

Applicants contend that any provision of the further subsections which derogates from the prohibition against discrimination should be interpreted *narrowly* in accordance with certain cannons of the interpretation of statutes that were urged on us because they derogate from rights granted by the Constitution. It is indeed a cannon of interpretation often used by our courts that those provisions of the Constitution that derogate from rights given by the Constitution must be interpreted narrowly consistent with their language, whereas the provisions giving rights should be interpreted broadly.

The second alternative argument deals only with Sections 77 and 78 as they confer ex officio membership of the House of Chiefs to the eight tribes already mentioned, to the exclusion of the Wayeyi tribe and other tribes of Botswana. The applicants argue that the effect made by these sections is unduly discriminatory and this court must so pronounce. To all the above arguments the respondents have replied by stating that the sections referred to are part of the Constitution of Botswana; and as such they cannot be declared null and void by

the High Court or any other court which itself is a creature of the Constitution. The argument is complex but it can better be summarised in the following way:- That the Constitution is the foundation of the State of Botswana. It is a comprehensive law providing for all the important pillars and institutions of the State; and reposing powers in such institutions as seen fit by the founders. The Constitution, argued the respondents, is a package arrived at after negotiations and all that it contains was approved by the founders as part of the State. To declare any part of that package as unconstitutional, contended the respondents, would be to rewrite the package. The judiciary, they argue, is also part of that package and it cannot supervise post facto what was done and sealed then, and brought down as part of the new state. The respondents contend that no court of the land can declare any part of that Constitution as null and void. This argument is powerful and Mr. Motswagole for the respondents says it derives support from certain observations made by the Court of Appeal in **ATTORNEY GENERAL VS DOW (SUPRA)**.

THE CONSTITUTION

It will be clear from the short analysis of the remedies sought by the applicants that they touch on the body politic of this State. The case very much brings to the fore the question of what is truly justiciable in a court of law and what ought not to be so justiciable, and be left to the political and legislative arenas to deal with. A short survey of the meaning of making and having a constitution will be helpful in resolving the issue of the ability of the High Court to give redress in the situation presented by the applicants. The Republic of Botswana was born on 30th September 1966 by virtue of the Botswana Independence Order, an instrument of the Sovereign Monarch who had legislative powers in respect of the then Bechuanaland Protectorate. The new State was to be a living creature with a Constitution which contains all that was necessary for the new Republic to take its place amongst the nations of the world. Under the Constitution the people of the new Republic were invested with fundamental rights and freedoms, a new citizenship of the new state by the provisions of Chapter III of that Constitution (now repealed and re-enacted in a separate statute). The State was

given institutions, including the legislature to make new laws and to make whatever changes (even to the Constitution) as were deemed necessary. The State was also endowed with the Executive to govern and the Judicature to adjudge cases. Further provision was made in connection with the finances of the State and how they should be utilised for the public good. The Constitution, by Section 3 declared certain rights and freedoms as fundamental entitlements of the citizens and residents of Botswana. This court cannot overemphasise the importance of these rights as they make up the entitlement of our citizens; and the citizens are to enjoy them everyday of their lives; except to the extent that such rights may be curtailed in terms authorised by the Constitution or other valid laws deriving their authority from the Constitution.

But the Constitution did not rank any of its provisions in order of precedence or supremacy. The question that arises from the grounds advanced by Mr. Kanjabanga for the applicants, in support of the first relief sought, and from the riposte of the respondents is whether this court is entitled to rank the various provisions of the Constitution in order of precedence *and* then to hold that some

of those provisions should be subordinated to others; especially to hold that the provisions of Chapter II which deal with fundamental rights are superior to all other provisions in the same Constitution.

The first inquiry at this stage, does not deal so much with the detailed meanings and effect of those sections. The inquiry should deal with the principle of whether the High Court has the power to strike down any part of the Constitution on any ground that may be advanced by any litigant. To us it is fundamental to note that the Constitution was enacted as the groundnorm of the new State of Botswana – i.e. it is the basic and founding law of the Republic. It both ended the colonial era and founded the new State. It is not difficult to see that in the negotiations that preceded the adoption of the Constitution both the negotiators and some of the people in the country may at the time have been dissatisfied with some of the provisions contained in the Constitution; or indeed the omissions from it. Some of those dissatisfactions may represent unfinished business that arises from time to time to haunt new generations. However it should be remembered that the Constitution contains what was achieved and

was finally promulgated by the powers that be as the new order. It seems to us that the Constitution was to be received and was indeed received warts and all with all its weaknesses and strengths. The new Constitution once negotiated and promulgated became the new law. It seems to us that every institution in the land, especially those created by that Constitution had to recognise and accept the Constitution as it is. Referring to the nature of the Constitution and the existence of institutions in it and their relation to it Amissah JP in the case of

ATTORNEY GENERAL VS DOW 1992 BLR 119 AT 129 said

> "A written Constitution is the legislation or compact which establishes the State itself. It paints in broad strokes on a large canvass the institutions of that State; allocating powers, defining relationships between such institutions and between the institutions and the people themselves. A Constitution often provides for the protection of the rights and freedoms of the people, which rights and freedoms have thus to be respected in all future State action. The existence and powers of the institution of State , therefore, depend on its terms. The rights and freedoms where given by it, also depend on it. No institution can claim to be above the Constitution, no person can make any such claim."

Now we come to the question whether the High Court can strike out part of that Constitution as inconsistent with or even contrary to another part of it. The question is not only important in relation to this case, but it also raises important

considerations of what was intended in making a Constitution at all. One of the new institutions of State created under the Constitution was the High Court of Botswana. It has extensive jurisdiction and powers under Section 95 of the Constitution and also the extended jurisdiction under Section 18 which we cited earlier. Powerful as the High Court is, was it intended to second guess the founders and makers of the Constitution; with powers to reorganise the Constitution in the way it deems fit? To us to strike out one provision of the Constitution as offending another is to rewrite the Constitution, which as we said before was a package. To do so is equal to ranking the different provisions of the Constitution in order of precedence and importance – a thing which the framers of the Constitution did not do. It would result in the establishment of a new balance for the balance established by the political representatives of the people. In our view to be able to do so the High Court would need to have express powers from the body of the Constitution itself, enabling it to be the revisionary instrument for the alteration of the Constitution. Only with such powers and capability could the High Court act in a proper case to decide that

the provision alleged to be offending can be subordinated to the one it is to be tested against. That is not normally the functions of a court. That function is usually left, as has been done in the Botswana Constitution, to representatives of the electorate who can, through discussions and consultations amongst themselves and with their constituents, agree new provisions to right what is seen as wrong or lacking. The founders of the Constitution did not make that ranking, nor did they expressly confer such powers on the High Court. We do not think that such awesome powers as to rewrite the Constitution can be assumed to exist unless they are clearly and expressly granted by unambiguous language. It would require a clear provision to that effect before the High Court would assume powers of remaking the Constitution to its values. We believe that the Constitution was made with the values that the makers could conceive, find prudent and possible to include in the Constitution bearing in mind the circumstances then existing. If new values and any unfinished business require a place in the scheme of the Constitution, in our view, Parliament is the proper institution to adopt such values and legislate them into the Constitution. The

representatives of the electorate, in our view, are better placed to judge what the country as a whole would require from time to time, and when it would be opportune to act. It is not for the court to do so. We therefore firmly refuse the invitation by the applicants so often repeated in Mr. Kanjabanga's submission that an activist court can and should engineer new social values into the laws of this country. Whether that can be the situation in some cases, we are convinced that this is not the sort of case or situation for the High Court to be adventurous. It is also important to note that a mere invalidation of Sections 77 to 79 of the Constitution as the applicants urge the court to do, would not produce the results that the applicants require; nor that this country can live with. Clearly it would be necessary if the Sections were deleted that something else be put in their stead. We should perhaps point out that we have noted and agree with the submission of Mr Motswagole for the Attorney General, that the effect of what the applicants urge the court to do in respect of Sections 77 to 79 of the Constitution would be to abolish the House of Chiefs which in terms of the Constitution is one of the Houses of Parliament. That, as pointed out on behalf of the respondents would

leave a gap in the legislative arrangements for the country. We are fortified in the view we take by the approach taken by the Court of Appeal in the Dow case (supra). Discussing the issue whether the High Court or any other court of the land could declare a Constitutional provision invalid, members of the Court of Appeal seemed to doubt the existence of such a power.

In Dow's case (supra) at p.150 Amissah J.P. said:

> " We cannot declare a provision in the Constitution unconstitutional. It would otherwise be a contradiction in terms. The Constitution had always had the power to place limitations in its own grants. If it did so, what it enacted was valid as any other limitation which the Constitution placed on rights and freedoms granted."

Mr. Kanjabanga also invited the court to examine the legality of Sections 77 to 79 of the Constitution on the basis of natural law. His argument is that the fundamental rights and freedoms of every person in Botswana are natural rights inherent in a human being by the very nature of his being. He contended that as such no Constitution or law can take such rights away from the human being. His point in the context of the facts of this case is that the rights of the applicants granted them by natural law are as reflected in Section 3 of the Constitution and

the Constitution and only to the extent mentioned in that Constitution. If those rights exist by virtue of the Constitution they exist to the extent they are provided for in the Constitution and no further; and logically they will exist subject to any limitations placed on them. Such rights do not exist on their own as part of the human being. Thus fundamental rights and freedoms in Botswana exist because they are contained in Section 3 of the Constitution. More relevant to the present argument these rights exist together with the exceptions and limitations that are stipulated in that Chapter. For instance in Section 3, it is made clear that these rights are subject to two exceptions i.e.

> "Subject to respect for the rights and freedoms of others and for the public interest."

These rights are therefore subject to the limitations placed on them in the Constitution. Furthermore, in our view these rights also exist alongside any other provision in the Constitution, even if the terms of that provision places a limit to the application of those rights. Both such provisions being in the Constitution

that such rights cannot be whittled down by any other provision of the Constitution, including the provisions of Sections 77 to 79 which discriminate against the applicants. But if that were so then one would expect the Constitutions of the many states where fundamental rights and freedoms are contained to state them in the same measure if not in the same language. But that is not the case. For instance, the much newer Constitutions in the states of Southern Africa contain much more extensive constitutional rights than the older Constitutions of the remaining Southern African States. For example, the new Constitutions of South Africa, Namibia and Lesotho contain much more rights than those contained in the Constitutions of Botswana, Zambia and Zimbabwe. Even in the newer constitutions the extent and formulations of those rights differ markedly. The conclusion therefore must be that there is no one natural law to which state constitutions must conform in the formulation of fundamental rights and freedoms for their citizens. Nor, in our view, is there in fact a natural law which demands that such rights must or do exist as part of human nature. We are of the view that fundamental rights and freedoms exist only as contained in

must be constitutional and must be taken by our courts as valid. This argument is also rejected.

THE ALTERNATIVE ARGUMENTS AND RELIEFS – RE SECTIONS 77 TO 79

The alternative arguments advanced by applicants against *Sections* 77 *to* 79 of the Constitution amount to saying:

(a) That the sections are inconsistent with the fundamental rights provisions of Section 3.

(b) That the sections breach the prohibitions against discrimination contained in Section 15.

As the two alternative prayers sought are based on similar grounds we deal with them together. We have already recited the provisions of *Sections* 77 to 79 and here it suffices to note that under Section 77 a House of Chiefs is created as part of the legislative system of the State of Botswana. It is composed of three categories of members that is:

(a) The eight chiefs of the Bakgatla, Bakwena, Bamalete, Bamangwato, Bangwaketse, Barolong, Batawana and Batlokwa tribes are made ex officio members of the House of Chiefs.

(c) The next category of membership is that of sub-chiefs. That category consists of four members of the House of Chiefs who are elected each by the sub-chiefs in the Chobe, North East, Ghanzi and Kgalagadi Districts respectively.

(d) The third category consists of three specially elected members. These three members are elected by both the ex officio members and the four elected members of the House from amongst persons eligible to vote who have not been engaged in active politics in the last five years.

It will be seen that apart from the possibility of having a Moyeyi become a member of the House by special election, a Moyeyi traditional authority or tribesman cannot become a member of the House of Chiefs as an ex officio member or as an elected member chosen by the sub-chiefs. This is simply because the Wayeyi as a tribe are not mentioned amongst the eight tribes that have ex officio membership of the House, nor do they fit anywhere amongst the subchiefs that elect the four elected members. A Wayeyi Chief or tribesman can only hope to become a member of the House of Chiefs if he was specially

elected. But only three people from all the registered voters of Botswana can become members of the House by that method. The possibility of a Moyeyi being elected is rather remote. At any rate that possibility does not give the same treatment as is afforded to the eight tribes whose chiefs are automatically Members of the House by law. Nor does it give a Wayeyi the same chance as the sub-chiefs who are members of a small class, four of whom will be elected to the House. The sub-chiefs enjoy only a qualified right to membership of the House and many of them will not be elected to it. This is in sharp contrast to the status of the chiefs of the eight tribes specified in Section 77 of the Constitution. The complaint of the applicants is that this distinction in affording membership of the House of Chiefs and giving better rights to eight mentioned tribes is discriminatory and contrary to Sections 3 and Section 15 of the Constitution. We have already stated that Section 3 of the Constitution, contemplates that every person and for that matter every tribe, should have equal protection of the law. The applicants having demonstrated the preferential treatment given to the eight tribes as opposed to their tribe in regard to the eligibility to the House of Chiefs

ask this court to declare that Sections 77, 78 and 79 are inconsistent with their right to equal treatment before and by any law. But we must remember that these sections are part of the Constitution.

We next deal with the argument that these sections are inconsistent with Section 15 of the Constitution as they are discriminatory of the applicants and their tribe. In order to examine that argument, it is necessary first to look at the provisions of Section 15. They read as follows:

> "15(1) subject to the provisions of subsections 4, 5 and 7 of this section no law shall make any provision that is discriminatory either of itself or in its effect.
>
> (2) subject to the provision of subsections 6, 7 and 8 of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the function of any public office or any public authority.
>
> (3) In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective description by race, tribe, place of origin, political

> opinions, colour or creed whereby persons of one such description are subjected to disability or restriction 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."

There are derogations from this absolute prohibition against discrimination which are contained in sub-section 4 and we shall refer to them later. There is no doubt that under the wide definition of the expression "discriminatory", the treatment given to the Wayeyi and other tribes by omitting their tribe from having an ex officio member in the House *of Chiefs* under the provisions of Section 77(2)(a) amounts to unfairness and discrimination, which if not justified, is intolerable. They are subjected to a disability which the named eight tribes do not suffer; or put in another way these eight tribes have a privilege or advantage which is not accorded to the Wayeyi. Having said that however, we must enquire whether these distinctions enacted and written into the Constitution at the time of its adoption can be said to amount to prohibited discrimination under

any part of the Constitution especially under either Section 3 or sub-sections 1 and 2 of Section 15. Notwithstanding the difference in the reliefs sought in the main case and in the alternatives the difficulty facing the applicants is the same i.e. that in each case the reliefs sought involve the competence of the High Court to determine whether one part of the Constitution is valid or not. We have already held with regard to the main relief sought that the High Court cannot in any way impugn the validity of a provision of the Constitution. We make the same decision with respect to the alternatives. We are further of the view that the founding fathers of the Constitution realised the disparity in specifying only eight tribes whose Chiefs would have an automatic right to membership of the House whilst other tribes were not so entitled. The founders nevertheless enacted that disparity into the Constitution. Much as the Wayeyi and other tribes do not receive equal protection of the law under the provisions of Section 77 to 79 yet it should be recognised that these distinctions were authorised by the Constitution itself. As shown earlier, anything that is authorised by the Constitution cannot subsequently be declared to be illegal even though it may

appear inconsistent with another valid provision of the Constitution. This conclusion covers both alternatives (b) and (c) of the relief sought in Paragraph 1 of the applicants notice of motion .

We should however state that we have noted the submission of Mr Motswagole that the composition of the House of Chiefs is undemocratic because its members are not elected by the electorate. The point Mr. Motswagole was making was that the applicants are seeking equality and fairness by inclusion into an institution the membership of which is hardly justifiable in a modern democratic state. It is common cause that eligibility to chieftainship is based not on merit but on parentage. Whilst we note Mr. Motswagole's point, that particular issue is not squarely before this court.

THE CHIEFTAINSHIP ACT

The next complaint covers Section 2 of the Chieftainship Act. It is contended by the applicants that this section is discriminatory on the basis of tribe because it defines "tribe" only as referring to the eight tribes mentioned in the section. Applicants contend that such disparity is discriminatory and therefore ultra vires

Sections 3 and 15 of the Constitution. The Chieftainship Act is contained in Cap 41:01 of the Laws of Botswana. It is an Act to regulate the appointment of chiefs, subchiefs and other persons acting as tribal leaders in lesser capacities. A chief is defined in Section 2 of that Act as "a chief of one of the tribes and includes any regent thereof". A "tribe" is defined in the same Act as meaning the Bakgatla, Bakwena, Bamalete, Bamangwato, Bangwaketse, Batawana, Barolong and the Batlokwa tribes. According to these *definitions* therefore no other communities are recognised as tribes in Botswana. And since those other communities are not "tribes" they cannot have "chiefs" as understood under the Chieftainship Act. The applicants' point is that the Wayeyi tribe is not mentioned as a tribe when it exists as such in the State of Botswana. The Court notes that without being designated a tribe under the Chieftainship Act the Wayeyi and any other tribe cannot have a chief under the Act. The applicants therefore complain of this obvious disparity. The disparity between the eight designated tribes and other tribal communities arises from designating the former as tribes and also in the rights and privileges they obtain as a result of such designation. We agree that

the Chieftainship Act does not afford applicants equal treatment and that therefore they do not enjoy equal protection under that law as required by Section 3(a) of the Constitution.

It is also contended that the omission of the Wayeyi tribe from being mentioned in the Chieftainship Act is discriminatory and ultra vires the Constitution because it contravenes the provisions of Section 15 of the Constitution. We have already detailed the provisions of sub-sections (1) to (3) of Section 15 of the Constitution. We noted that they prohibit discrimination absolutely except as may be authorised under the derogation clauses of sub-section (4) or elsewhere under the remaining clauses of Section 15. To these contentions the respondents have argued that the Chieftainship Act is saved from being regarded as inconsistent with the provisions of Sections 3 and 15 of the Constitution by the provisions of sub-section 9 of Section 15.

Before we deal with subsection 9 of this section, we ought to mention that some discriminatory practices may also be saved by the derogations contained in subsections 4 – 8 of Section 15 made to the right to non-discrimination granted in Section 15(1) and (2). All of them will not assist the respondents except perhaps subsections 4. Of the numerous derogations from the right to non discrimination appearing in subsection 4, the only one that deserves any consideration is that contained in subsection 4(e). In that subsection it is provided that:

> "(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision –
>
> (e) Whereby persons of any such description as is mentioned in subsection (3) of this section may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to is nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society."

In other words any provision in a law that does what is described in subsection (4)(e) shall not be regarded as offending the prohibition against discriminatory

laws contained in Section 15(1). That is clear and causes no doubt. The only dispute might arise as to what is the meaning of the provisions in paragraph (e) of subsection 4. To answer that question we must first have regard to subsection 3 of the section which defines the expression "discriminatory" as meaning in essence giving different treatment to different people mainly or wholly because of factors like race, tribe, place of origin, political opinion and the like factors, with the result that persons of one such description receive privileges and advantages or are subjected to disabilities and disadvantages which persons of another such description do not receive or suffer. Doing so is discriminatory. What subsection 4(e) now says is that a law made will not offend Section 15(1) (non discrimination) if it makes provision subjecting persons of the description referred to above, to disabilities or disadvantages; or on the other hand granting them privileges which persons of the same description do not suffer or enjoy; only if bearing in mind the nature of the disability or the privilege and to special circumstances pertaining to those people or to the people left out; the treatment is reasonably justifiable in a democratic society. But it is for those who justify

such a law to prove that it is exempted by subsection 4(e), once the applicant can first put forth facts that prima facie show discrimination. In the present case, the respondents did not attempt to justify the disadvantages suffered by the Wayeyi nor the advantages enjoyed by the eight tribes on the basis that the provisions embodying them can be justified in terms of the provisions of subsection (4)(e) of Section 15 of the Act. There are no special circumstances that were placed before this court that could justify the differentiation between tribe and tribe in Botswana. It follows that this subsection 4(e) is not available to justify any discrimination that may exist in the Chieftainship Act.

We now revert to subsection 9 of Section 15 of the Constitution. It reads as follows:-

"(9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with the provisions of this section:

(a) If that law was in force immediately before the coming into operation of this Constitution and has continued in force at all times since the coming into operation of this Constitution; or

(b) To the extent that the law repeals and re-enacts any provision which has been contained in any written law at all times since immediately before the coming into operation of this Constitution."

The Chieftainship Act is headed as follows:

"An Act to re-enact with amendments the provisions relating to Chiefs, Deputy Chiefs, Sub-Chiefs and Headmen and matters incidental thereto or connected therewith."

In short, the Chieftainship Act though commencing on the 9th of October 1987 was re-enacting with amendments the provisions of an old law previously existing under the same title as the re-enacted Act. The respondents have therefore argued that sub-section 9 (b) applies to exempt the present Chieftainship Act from falling foul of Sections 3(a) and 15(1) and (2) because it is an Act that repeals and re-enacts provisions which had existed since immediately before the coming into operation of the Constitution and has since continued. There can be no doubt that the old Chieftainship Act existed before the becoming into operation of the Botswana Constitution on 30th September 1966. Cap 41:01 largely re-enacts the provisions of the old law and repeals some of it. Even if the

present Chieftainship Act contains substantially the same provisions of the old Chieftainship Act it would be necessary to show that the terms of subsection 9 are met, before it could apply to exempt that law from the proscription against discrimination. It is provided by subsection 9 of Section 15 of the Constitution that nothing contained in any law which falls either under (a) or (b) of the subsection shall be held to be inconsistent with the provisions of Section 15. In other words, if there is a law that is covered by paragraph (a) or (b) of subsection 9, the provisions of such law must not be held to be inconsistent with the provisions of Section 15 even if they are in fact discriminatory. To the extent therefore that the provisions of the Chieftainship Act, especially Section 2 could be held as discriminatory and therefore contrary to Section 15(1) and (2), that discrimination is deemed not to be inconsistent with those subsections and any other provision of Section 15. The discrimination is rendered immaterial for the purposes of Section 15 only. That was the argument put forcefully by Mr. Motswagole for the respondents. We agree with that argument because it must be the intended effect of subsection 9 that any existing Act whose provisions are

contrary to the anti-discriminatory provisions of Section 15 would be saved and rendered not offensive to the provisions as long as the law in which they are contained was in force immediately before the coming into operation of the Constitution and has continued at all times thereafter up to the time of the complaint; or alternatively the offending provisions are contained in a law which re-enacts a law that existed before the coming into operation of the Constitution. We are therefore of the view that the omission and the apparent discrimination in the Chieftainship Act cannot be regarded as inconsistent with Section 15 only because the Constitution itself has legitimised such discriminatory laws for the purposes only of Section 15 of the Constitution. That subsection specifically states that "nothing contained in or done under the authority of any law, shall be held to be inconsistent with the provisions of this section." "The provision of this section" referred to in subsection 9 is a reference to the whole of Section 15 but to no other provision of the Constitution, so that if Section 2 of the Chieftainship Act offends against another section of the Constitution, it is in our view not immune from examination by the Court to see if it breaches anybody's rights.

With regard to the Chieftainship Act the Court is only dealing with a statute and not a provision of the Constitution and therefore such Act can be examined for consistency with the provisions of the Constitution. It is well known that except as otherwise provided by the Constitution to the contrary, all laws enacted in Botswana and all rules of the common law can be tested against the provisions of the Constitution to see if they comply therewith. In our view the Chieftainship Act is no exception – except only in regard to the immunity regarding a conflict with Section 15.

But the Act was also attacked for being discriminatory contrary to Section 3(a) of the Constitution in that it did not afford equal treatment and equal protection to the applicants when compared with the treatment it affords to the eight tribes. The question then should be whether any provision of the Chieftainship Act is inconsistent with the rights of the Wayeyi and the applicants to equal protection of the law as required by Section 3(a) of the Constitution. We have already stated earlier that the right to the protection of the law means more than simple

assistance by law enforcement agencies. It connotes equality before the law as well as equal treatment under the provisions of the law. Any inequality which is entrenched by law is not equal protection under the law for those disadvantaged by that law. Discriminatory treatment can only be tolerated under the Botswana Constitution if it is permitted under laws authorised by the Constitution under the derogation clauses of the Constitution. If that discriminatory treatment is not so permitted then it ought to be struck down by the High Court. We are therefore of the view that in defining "chief" and "tribe" under Section 2 of the Chieftainship Act to refer only to eight tribes of the Bamangwato, the Batawana, the Bakgatla, the Bakwena, the Bangwaketse, the Bamalete, Barolong and Batlokwa, the Act to that extent does not afford equal treatment to the Wayeyi and the applicants. To that extent the Act is contrary to Section 3(a) of the Constitution and contravenes the rights of the applicants and their tribe to equal protection of the law. The discriminatory effect of the definitions we have referred to in Section 2 of the Chieftainship Act leads to serious consequences when it is remembered that this Act is one of three laws that define which tribal community can be

regarded as a tribe, with the result that such a community can have a chief; who can get to the House of Chiefs and that only a tribe can have land referred to as a "Tribal Territory."

THE TRIBAL TERRITORIES ACT

We next consider the argument that the Tribal Territories Act (Cap 32:03) and also the Chieftainship Act are discriminatory either expressly or in their effect as far as they discriminate on the basis of tribe. We have already discussed the provisions of the Chieftainship Act and it is not necessary to repeat what we said, concerning it. The Tribal Territories Act was first enacted as Proclamation No. 1899 and was continually amended and re-enacted; the last replacement law being Proclamation No. 45 of 1933. This last Proclamation has also been amended from time to time but essentially it is the 1933 Act which presently exists in our statutes. The Act sets out Tribal Territories in Botswana and delineates and specifies the boundaries thereof. These areas are those of the Bamangwato, Bakgatla, Bakwena, Bangwaketse, Bamalete, Barolong, Batawana and Batlokwa tribes. The law omits in this or subsequent amendments any

mention of any area for the Wayeyi tribe. Furthermore other pieces of land in Botswana are not designated tribal territories even though tribal communities reside therein. The same defence as that relating to Section 2 of the Chieftainship Act was offered by the respondents in answer to the complaint by the applicants against the Tribal Territories Act. That defence is that the Act is saved from being inconsistent with the anti-discrimination provisions of Section 15 by sub-section 9(a), as the Tribal Territories Act is a law which was in existence before the coming in operation of the Constitution and has since continued to exist thereafter. It is contended therefore that under sub-section 9(a) what is done by virtue of that law or what is contained in that law cannot be held to be inconsistent with the provisions of Section 15. We agree and for the reasons previously mentioned. It was not contended by the applicants that the Tribal Territories Act was in conflict with Section 3 of the Constitution, nor was any ground laid in the papers for that contention to be properly sustained. The attempt to strike down this law as unconstitutional is therefore rejected. No sufficient grounds were advanced in that respect.

We have now come to the point where we can deal with the requirements of the applicants for orders designed to compel the Government of Botswana to take positive steps to appoint and recognise Wayeyi Chiefs, their Headmen and other traditional leaders under relief 5(b); and in accordance with relief No. 7, to compel the government to introduce Sheyeyi language as a national medium of instruction in schools in the country; as well as to have the Wayeyi culture to be declared part of the school curriculum. As a matter of judicial policy the courts are reluctant to issue orders for the carrying out of works and other activities which require their supervision. It is obvious that for a court to issue orders requiring positive action on the part of the government on a continuing basis is a mammoth task. The performance by government of required activities to fulfill the orders sought by the applicants must involve inter alia, careful planning, budgeting and funding, manpower and other inputs on the part of the State. This court was not availed any information by the applicants showing that all such inputs are or could be made available, nor was any time scale indicated nor the feasibility of some of the matters sought by the applicants. Consequently this

court is not put in a realistic position to determine whether such activities can and should be carried out. The court, in our view, would be incapable of supervising the required activities and would thus be unable to judge whether any performance is adequate, or to know whether the person ordered has wilfully disobeyed the order, in the event of a complaint of lack of execution. Now it is a well known rule of our law that courts should not issue orders for doing things which they would not be capable of supervising. The applicants ask that the government be ordered as follows:-

i.(a) That the 1948 Wayeyi Courts be re-established with the main kgotla at Gumare.

Alternatively

(b) That 2nd Respondent [1st Respondent] to initiate or put in place a constitutional structure for the appointment and recognition of Chiefs, headman and other Wayeyi traditional authorities that is not discriminatory on the basis of tribe.

(ii) That the 2nd Respondent [1st Respondent] in conjunction with the Ministry of Education to introduce Shiyeyi language as a

National medium of instruction in preprimary, primary and secondary schools and the culture of Wayeyi be part of school curriculum.

With regard to prayer 1(a) above it suffices to state that this court was not provided with any or adequate information concerning what the applicants refer to as "the 1948 Wayeyi Courts" with the result that the court is not remotely able to appreciate what is involved. In that event this court is not in a position to judge the desirability of making such an order. For that reason alone the prayer sought cannot be granted. The prayer for government "to initiate and put in place a constitutional structure for the appointment and recognition of chiefs, headman and other Wayeyi traditional authorities" which is not discriminatory according to tribe is an alternative to prayer (a) which this court has rejected. The applicants have again not given any or adequate information with regard to their requirement. Questions such as those relating to the distribution of other ethnic groups, precisely over which areas and over whom such authorities would hold sway, the feasibility of the establishment of such courts and the implications for

the existing local and governmental authorities, would arise and need to be taken into account by this court. No discussion of the impact of such measures was made in applicants papers. Without a minimum of the relevant information this court cannot know the implication of such an order for the government and the district. Apart from the issue of ability of the court to supervise such an order the court cannot decide the wisdom and desirability of the grant of such an order without knowing who, if any, would be prejudiced thereby. For the same reasons advanced by this court for refusing prayers (a) and the alternative (b) the prayer to order the government to introduce Shiyeyi language as a national language in schools; as well as the Shiyeyi culture in the education curriculum must be rejected. There is hardly any information on the subject to show this court what it would be leading the government and the country into. There is no discussion at all about the resources such an exercise might possibly require nor is the scale of the undertaking revealed. These remedies cannot be granted for the reasons stated above.

As regards Prayer 4, we note that although it was not abandoned, it was not argued. This prayer, in which the applicants seek the recognition of the 1st applicant as chief of the Wayeyi, must fail for three main reasons. The first reason is that there is a dispute of fact, which dispute cannot be resolved on affidavits, as to whether or not the 1st applicant can legitimately claim the chieftainship of the Wayeyi. The respondents have filed an affidavit by one Moeti Moeti who claims that some other lineage, and not that of the 1st applicant, has legitimate claim to the Wayeyi chieftainship. The second reason is that the applicants have failed to put forward sufficient factual averments to satisfy the requirements of the Chieftainship Act. Particularly, the applicants have failed to allege that the 1st applicant has been designated as chief in terms of the Wayeyi customary law. In fact the applicants' papers are silent on the customary law of the Wayeyi on this point. The third reason is that to grant to the applicants the order they seek, that is to direct the recognition of the 1st applicant as chief, would be tantamount to second guessing the legislature as regards its response to this Courts decision. This is because, the applicants having succeeded on

having Section 2 of the Chieftainship Act declared ultra vires the Constitution does not necessarily mean that the Wayeyi will be included therein to be the ninth tribe. It may well be that the legislature, in its wisdom, will create equality between the tribes by removing the special status of the eight tribes in the definition section of the Chieftainship and under take such consequential amendments as shall be necessary.

We mention however that the refusal by this court to order as applied for is not an expression that the issues involved in this case must be ignored. On the contrary we wish to emphasise the urgent requirement on the part of the Government of Botswana to attend to them lest they bedevil the spirit of goodwill existing between the different tribes and communities of this country.

POWERS OF THE COURT

Having reached the conclusions set out above we should now consider what this court should do. The fundamental rights and freedoms granted under Sections 3 *to* 15 of the Constitution are afforded protection by the High Court under the

provisions of Section 18. Where a person has successfully shown in an application to the High Court that any of his rights so granted have been, are being or are likely to be contravened, the High Court

> "may make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Sections 3 to 16 (inclusive) of this Constitution."

It can readily be seen that the remedies available to the Court are wide and varied. Such remedies are not spelt out in any precise language, but they are couched in broad terms indicating by what processes the court may require the provisions contravened to be enforced i.e. the breach to be corrected. Thus the Court is empowered to consider issuing orders or writs or making directions, all for the purpose of enforcing or securing the enforcement of the relevant provisions of the Constitution. We consider that by the use of the phrase "for the purpose of enforcing or securing the enforcement of any of the provisions ..." the Constitution intended to give the High Court power to order the immediate enforcement of the provisions contravened, or where appropriate to give such directions as recognise that other things will have to be done leading ultimately to

the enforcement of the provision breached. The diversity of the methods of enforcement given to the court indicates the flexibility which the Constitution has granted to the court in order to deal with the circumstances of each case. Where for instance, (as in this case) the complaint is about a law being inconsistent with the provisions of the Constitution the appropriate direction or order as the case may be, of the court must take into account the legislative process that may be required in order to remedy the breach.

In regard to the present case the breach which the applicants have successfully demonstrated is that brought about by the provisions of Section 2 of the Chieftainship Act in defining "tribe" and "chief" in terms that exclude the Wayeyi and other tribes and ethnic groups. They have proved in our opinion that these definitions omit them and as such they are not treated equally under this law and therefore there is a contravention of their right to equal treatment and protection of the law as ordained by Section 3(a) of the Constitution. It is however clear that to secure the observance of their right under Section 3(a) of the Constitution,

legislative changes are necessary. We therefore order that Section 2 of the Chieftainship Act (Cap 41:01) be amended in such a way as will remove the discrimination complained of and to give equal protection and treatment to all tribes under that Act. If other laws have also to be amended to accord the applicants this right then necessary action must follow.

On the question of costs the applicants have succeeded in the main in challenging the unconstitutionality of Section 2 of the Chieftainship Act while the respondents have successfully resisted in the main the attempt to declare Sections 77 to 79 of the Constitution unconstitutional. The general rule is that costs follow the event but in this case we take the view that the extent to which either of the opposing parties has succeeded is not insignificant. In all cases the court always has a discretion when it comes to the awarding of costs, and in doing so it takes the circumstances of each particular case into account. In this case we take the view that the circumstances are such that the court cannot weigh with mathematical precision the extent of the success and or loss of the respective parties. Our Order on costs reflects that.

The Order we issue is this:

(1) We direct that Section 2 of the Chieftainship Act (Cap 41:01) be amended to afford equal treatment and equal protection by that law to the applicants.

(2) Save as mentioned in Paragraph 1 hereof the application of the applicants fails in all other respects and it is dismissed.

(3) Each Party to pay its own costs.

DELIVERED IN OPEN COURT AT LOBATSE THIS 23rd DAY OF NOVEMBER 2001.

.....
J.M. NGANUNU
(CHIEF JUSTICE

.....
M. DIBOTELO
(JUDGE)

.....
U. DOW
(JUDGE)