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"Equality and Citizenship transmission capacity of women in the Kingdom of Swaziland"

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I hereby declare that I have read and understood the regulations governing the submission of the LLM in Human Rights Law dissertation papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation paper conforms to those regulations.

Signed by candidate

Mr. Fayiya Tengbeh
14th September 2011

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CHAPTER I- Introduction

1.1 Statement of the Problem Question:

The Kingdom of Swaziland's constitution has been in force for over 6 year's.[1] The constitution is the supreme law of Swaziland and it declares that; any law inconsistent with the constitution shall be void to the extent of its inconsistency.[2]

With the advent of the constitution, came into being a bill of rights[3] which had long been absent in Swaziland since the repeal of the 1968 independence constitution in 1973. The bill of rights guarantees what it terms 'fundamental rights and freedoms of the individual.'[4] Among these fundamental rights and freedoms enshrined in the bill of rights include *inter alia;* the protection from inhumane or degrading treatment[5], equality before the law[6], the rights and protection of the family[7] and the rights and freedoms of women.[8]

Chapter IV, Part 1[9] of the very same constitution of Swaziland outlines the means for acquisition of Swazi citizenship. In the formulation of citizenship acquisition and transmission rules, the constitution regulates citizenship in a patrilineal manner, with the resulting consequence being that Swazi women can not transmit citizenship with the same equal capacity as their male counterparts were both are similarly situated. Swazi women essentially can not transmit citizenship to their children and to their foreign spouses, an ability which Swazi men are granted by the constitution. The patrilineal regulation of citizenship in

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[1] The constitution came in to effect on the 26th July 2005 and restored formal constitutional rule which was absent since the abrogation of the 1968 Independence Constitution in 1973.
[2] See S2(1) constitution of Swaziland 2005.
[3] Chapter 3, sections 14-39.
[4] S14(1) of the constitution of Swaziland 2005.
[5] S18 of the constitution of Swaziland 2005.
[6] S20 of the constitution of Swaziland 2005.
[7] S27 of the constitution of Swaziland 2005.
[8] S28 of the constitution of Swaziland 2005.
[9] S40-S48 of the constitution of Swaziland 2005.

Swaziland brings to the fore central questions which need to be dichotomised. Firstly, is such regulation an inexcusable denial to women of equal treatment with men and consequently an affront to the bill of Rights of the constitution of Swaziland? Secondly, if it is an affront to rights guaranteed in the bill of rights, is it nevertheless justifiable under limitations provided therein? Thirdly, what is the legal position when two provisos within the same document conflict, that is; does there exist a hierarchy of proviso in a constitutional document? The third enquiry is of significance because the scenario we are faced with herein is exactly that; a possible conflict of provisions in the same constitutional document. What possible remedy exists, if any? What approach would a court of law tasked with adjudication in a matter were two provisos in the same constitution are in conflict adopt? What happens ultimately if such provisions and cannot be harmonized?

It is trite that with a constitution that is supreme, any other freestanding law that is inconsistent with it is liable to be struck down and declared null and void. What is the position however, when a naked and irreconcilable inconsistency between two constitutional provisos exists? Can rights be ranked in order of preference depending on the circumstance or can one provision in the same constitutional document be declared inconsistent with another or a range of others?

It is with this brief background that one can now proceed to canvas the relevant provisions that bring forth this quandary that the Swaziland constitution seemingly canvases with regard citizenship transmission ability between men and women.

For the purpose of this paper we shall deal mainly with the means of acquisition of Swazi citizenship by birth[10] and citizenship acquisition by marriage[11]; therein is where the muddle originates.

Acquisition of citizenship by birth is outlined in Section 43(1) and 43(2). They both provide that a person born in or out of Swaziland after the commencement of this Constitution is a citizen of Swaziland by birth if at the time of birth the father of that person was a citizen of Swaziland in terms of this constitution. The only exception to this rule is children born out of wedlock, and not claimed by the father 'in accordance with Swazi law and custom.'[12] This category of children takes upon their mothers Swazi citizenship.

Acquisition of citizenship by marriage is outlined by Section 44(1) and it provides that a woman who is not a citizen of Swaziland at the date of her marriage to a person who is a citizen shall become a citizen by lodging a declaration accepting Swaziland citizenship.

The one thing inherently clear from both modes of citizenship acquisition as postulated above is that: women can not equally transmit citizenship to their children by birth as their male counterparts do and women can not equally transmit citizenship to their foreign spouses as their male counterparts do. In essence men are more privileged than women in transmission of citizenship; even where both men and women are similarly situated.

The Bill of Rights outlines and enshrines the most fundamental rights of any Swazi citizen and enjoins all arms and organs of state, natural and legal persons to respect and uphold these rights.[13] Underpinning these fundamental rights are

[10] S43 of the constitution of Swaziland 2005.
[11] S44 of the constitution of Swaziland 2005.
[12] S43(4) of the constitution of Swaziland 2005.
[13] S14(2) of the constitution of Swaziland 2005.

the principles of dignity, equality for all before and under the law[14] and non-discrimination.[15]

Section 18 of the constitution is titled 'protection from inhumane or degrading treatment' and provides as follows;

> '18(1) The dignity of every person is inviolable.
> (2) A person shall not be subjected to torture or to inhumane or degrading treatment or punishment.'

Section 20 of the constitution deals with equality before the law and reads thus:

> '20(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect shall enjoy equal protection of the law.'

In line with the above, section 28 dealing with rights and freedoms of women and provides as follows:

> '28(1) Women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.'

A preliminary analysis of Sections 43 and 44 dealing with citizenship transmission highlight deep-seated equality issues regarding the ability of women in Swaziland to act as conduits for the transmission of citizenship. Presently citizenship by birth is only transmitted to a child by a Swazi father[16] and Swazi citizenship by marriage is only transmitted by a Swazi male to his foreign spouse, thus women are not accorded equality before and under the law and equal treatment with men as guaranteed in the bill of rights of the constitution. Is this situation therefore not a contradiction in terms or is this a chivalrous and legitimate deviation from equality?

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[14] S20(1) of the constitution of Swaziland 2005.
[15] S20(2) of the constitution of Swaziland 2005.
[16] The only exception being children born out of wedlock. See note 12 above.

The aim of this research paper is therefore to ascertain whether the disparities in Swaziland between women and men, with regard the capacity to transmit citizenship, is in accord with the right to dignity, the right to equality for all under the law, the rights and freedoms guaranteed for women and the states duty to preserve and sustain the harmonious development, cohesion and respect for the family under the constitution of Swaziland; and if not whether justifiable grounds exist, for the limitation of the equal capacity to transmit citizenship for women and men in Swaziland.

Women have for a long time, before the advent of fundamental human rights protection mechanisms, had to labour under the brunt of discrimination and inferior treatment in patriarchal political, social and cultural spheres of life. For example in Swaziland, a woman married in community of property is subject to marital power and has limited capacity to contract on her own and is deemed a minor in the eyes of the law and although with a civil rights marriage, marital power can be excluded with an Ante Nuptial Contract (ANC), this can never be excluded from a Swazi Customary law marriage. This has had the effect for example that women married in community of property would have their property registered in the sole name of their husbands.

The constitution of Swaziland seeks to redress such hardships by ensuring the inviolability of every person's dignity[17] and specifically providing that women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.[18] This specific women's right is meant to buttress the main equality right in section 20(1) which provides that all persons are equal before and under the law.

This research is therefore justified on account of the hypothesis that the inability of women (as compared to their male counterparts) to equally transmit

[17] S18(1) of the Constitution of Swaziland 2005
[18] S28(1) of the Constitution of Swaziland 2005.

citizenship primarily to their children and spouses is a violation of their dignity as it is premised upon a belief that they are less worthy and inferior to males. The principles of non-discrimination and the right to equality for all before and under the law demand that such a state of affairs be remedied accordingly and brought into line with the bill of rights in the constitution.

The states duty to protect and ensure the cohesion of the family, as outlined in the constitution of Swaziland, should also demands at a minimum that the state regulates citizenship in a manner that does not have the practical effect of expatriating a Swazi women and her children despite their birth in Swaziland and in spite of a desire to reside in the country of their birth without the cumbersome residency limitations meted out to foreign immigrants. By her marriage to an alien spouse she may also be forced by circumstances into adopting the nationality of her husband and migrating because her children are considered foreigners in the land of her and their births.

The tangent on which this paper proceeds on is; firstly that s43 of the Swaziland constitution 2005 which provides for the transmission of Swazi citizenship by birth, through only the father and not the mother, violates the dignity of Swazi women and amounts to unjustifiable discrimination and is thus incompatible with; s18 of the constitution which guarantees the inviolability of dignity; s20 which provides for equality and non-discrimination and s28 which provides that women have the right to equal treatment with men; including equal opportunities in political, economic and social activities.

Similarly the paper shall argue that s44 of the Swaziland constitution 2005 which provides for the transmission of Swazi citizenship by a Swazi man to a non-Swazi through his marriage to her and does not provide same transmission capacity for a Swazi women who marries a non -Swazi man violates the dignity

of Swazi women and amounts to unjustifiable discrimination and is therefore incompatible with s18, s20 and s28 as already outlined above.

Additionally the paper shall argue that because s43 of the Swaziland constitution provides for the transmission of Swazi citizenship by birth, through only the father and s44 provides for the transmission of Swazi citizenship through marriage through a Swazi man, these provisions are incompatible with the states duty to preserve and sustain the harmonious development, cohesion and respect for the family guaranteed under s27 of the constitution.

Lastly the paper shall argue that no legally justifiable limitation exists for the curtailment of the equal capacity for transmission of citizenship for women and men in Swaziland.

The proof of this hypothesis will most certainly give impetus to calls for greater equality between men and women in all spheres of political, economic, social and cultural life as envisaged by the constitution of Swaziland.

A range of sources which include various statutory provisions and case law from Swaziland and other foreign jurisdictions pooled with international conventions which have attained the status of international customary law shall be analysed and presented in support of this hypothesis.

Additionally a wider range of views of learned authors postulated in text books and journal articles shall also be put forward to buttress the main viewpoints which this paper shall continue to elucidate on.

Chapter II of this paper shall mainly outline the historical foundations of citizenship acquisition by birth and citizenship acquisition by marriage as well as an articulation of the foundational principles underlying dignity, equality for all before and under the law and unfair-discrimination. Chapter III shall canvass

past and present provisions dealing with citizenship acquisition by birth and by marriage in Swaziland under the constitution and test their compatibility with the equality rights dedicated to women under the Swaziland constitution.

Chapter IV- shall survey and discuss citizenship acquisition and equality under International Law. Chapter V shall encompass a comparative analysis of citizenship acquisition by birth and by marriage in The Republic of South Africa, the European Union, The Republic of Botswana and Canada.

In Drawing from the initial hypothesis, and based on the intuitive discussions that precede it, Chapter VI shall then make pertinent conclusions and submit recommendations for the purposes of law reform.

CHAPTER II- Citizenship Acquisition, Dignity, Equality and Non-Discrimination

2. Introduction

This chapter will outline the historical foundations of citizenship acquisition by birth and citizenship acquisition by marriage as well as an enunciation of the foundational principles underlying dignity and equality for all before and under the law and unfair discrimination.

2.1 Citizenship as a concept

Citizenship is a notoriously polyvalent concept with many meanings and different applications. This is the view of Christian Joppke[19] who provides an array of documented 'citizenships' which range from sexual citizenship to ecological citizenship which are postulated in our modern times.[20] From a historical perspective, citizenship is traced firstly as a political concept dating back to ancient Athens. Aristotle's definition of a citizen as being; 'one who both rules and is ruled'[21], meant that because of its connection with governance, this classic citizenship was highly exclusive and based on formal inequality as only the male chiefs of a family household were citizens proper, to the exclusion of women and slaves, who were not regarded as equal members because of their incapacity to partake in the political affairs of the city.

Citizenship comparable to today's traditional outlook can be traced back to imperial Rome where citizenship was 'a legal status carrying with it rights to

[19] Joppke Christian, Citizenship and Immigration. (2010) Polity.
[20] As above at page 1.
[21] As above at page 6.

certain things.'[22] Roman citizenship was conferred on conquered peoples in exchange for obedience and loyalty to their new imperial rulers and this accord is the first that 'foreshadows a modern understanding of citizenship as legal state membership.'[23]

In a bid to augment the contemporary meaning of citizenship as given above, the International Court of Justice's view of citizenship or nationality as it were, was alluded to in the 1955 case of **Liechtenstein v. Guatemala**[24] in the following terms:

> 'According to the practice of States, to arbitral and judicial decisions and to the opinion of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interest and sentiments, together with the existence of reciprocal rights and duties.'[25]

For the purposes of our enquiry, citizenship shall be viewed from, what perhaps is its traditional understanding and contemporary meaning. Citizenship shall therefore be examined within the confines of a person's relation to a particular state or country and his or her ability to legitimately acquire and transmit this relationship as well as any implicit rights therein. In this context we approach citizenship within the realm of the law of persons and more in particular with regard to its acquisition and transmission as a status.[26] It is also prudent to highlight that in this sense the terms citizenship and nationality may be used interchangeably and that this usage will not detract from the current contemporary meaning alluded to above.

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[22] As above at page 7.
[23] As above at page 8.
[24] The Nottebohm Case (Liechtenstein v. Guatemala) International Court of Justice. April 6, 1955. 1955 I.C.J. 4.
[25] As above.
[26] Status is defined as: 'the legal position of a person, group or country'. Oxford Advanced Learners Dictionary. Oxford University Press. Sixth Edition. At page 1169.

2.2 Citizenship Acquisition by Birth

Birth right is the principal mechanism through which citizenship is acquired and attributed in all of the states of the world.[27] Indeed other than citizenship being acquired through naturalization and adoption or some other conferment of honorary citizenship status, only birth right ensures an almost instantaneous connection to a particular state or states as the case maybe.

Citizenship by birth has historically and still is today automatically acquired subject to two main conditions; either being born in a particular territory, known as *jus soli* or being born of a descendant, known as *jus sanguine. Jus soli* comes from the Latin term 'solum' for soil, which means the law of the territory and *jus sanguinis* from the Latin term 'sanguis' for blood, which means the law of descent.

The philosophies underpinning *jus soli* and *jus sanguine* are best canvassed by the historical French tradition and the German traditions of citizenship acquisition. The French, have historically provided for pure *jus soli* and are said to adopt a philosophical tradition of civic nation hood in which 'the state creates the nation in its political image'[28] and the German tradition, providing pure *jus sanguine,* expressing 'ethnic hood' in which a state is a reflection of its (pure) linguistic, ethnic and cultural features. This different understanding of what nation hood means, is according to Joppke, what has influenced the mode of acquisition of citizenship either through *jus soli* or *jus sanguins.*

Thus for example in a country where the state is seen as a reflection of pure linguistic, ethnic and cultural features- membership to that state can only be transmitted at birth along the blood line by descent. A country where the state

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[27] Joppke Christian, Citizenship and Immigration. At page 34.
[28] As above at page 17.

creates the nation in its political image takes the view that citizenship is a function of the political territory into which one is born[29] despite their ethnicity and this becomes a reflection of a civic nation hood philosophy.

2.3 Citizenship by Marriage

According to Joppke in all countries, a married women's citizenship used to follow that of the husband according to the principle of dependent nationality.[30] This essentially meant that when a women married a man, she automatically took upon his citizenship and in many instances lost her own nationality.[31] Its official purpose was to protect the unity of the family, but in reality its main purpose was to enshrine patriarchy.

The latter view resonates better than the 'unity' rationale, for the reason that; if family unity was the main aim why compel the women to abandon her nationality and not instead provide for the spouses to choose voluntarily which nationality would benefit the family and provide for opting for the women's nationality? The fact that in the past women could not (and still cannot in some countries[32]) in any event transmit citizenship to their spouse's only serves to augment the view that this was a deliberate re-enforcement of patriarchy. As Chao-ju Chen[33] aptly puts it;

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[29] As above at pages 17-20.
[30] As above at page 43.
[31] For example the in the USA, the Expatriation Act of 1907 provided that women assume the citizenship of their husbands, and a woman with US citizenship forfeits it if she marries a foreigner.
[32] Bronwen Manby. Citizenship Law in Africa. A Comparative Study. Published by Open Society Foundations. 2010. At pages 1 and 5. Available at: http://afrimap.org/english/images/report/OSF_Citizenship_Law_in_Africa_Summary.pdf. Accessed 5th May 2011.
[33] Chao-ju Chen. Gendered Borders The Historical Formation of Women's Nationality under Law in Taiwan. positions: East Asia cultures critique, Volume 17, Number 2, Fall 2009, pages. 289-314 (Article). Published by Duke University Press.

> 'On the premises that a family shall have the same nationality and that the husband is understood to be the master of the family, the wife and children are to follow the husband's nationality'.[34]

The principle of dependant nationality can also be contrasted, to a certain extent, with the common law doctrine of dependant domicile which provides that a married woman follows the domicile of her husband for as long as the marriage subsists[35] , the rationale being that of ensuring the existence of a uniform matrimonial regime between spouses.[36] Albeit this noble intention, patriarchy is also intrinsic in this concept as the women has to follow the man, and no provision for the man to follow the women exists.[37]

2.4 Modern Liberalization of Citizenship

According to Chen, historically, principles of nationality have conventionally worked against women. She argues that because historically non-consensual nationality is bestowed mainly through birth rights; the principle of ethnic origin or belonging, known as *jus sanguins*, privileges the patrilineal line in the tracing of one's nationality because it is the father, not the mother, who is entitled to reproduce members of the nation'.[38]

Similarly with regard *jus soli* where an individual is a national of the state where she or he is born, Chen submits further that:

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[34] As above at page 292.
[35] At Common Law, a wife acquires the domicile of her husband on marriage even if she has never set foot in the country of his domicile. See Jacks vs. Jacks 1903 20 SC 196.
[36] The proprietary rights of married persons are governed by the law of the husband's domicile at the time of marriage. See Frankels Estate vs. The Master 1950(1) SA 220 AD.
[37] See South African Domicile Act which abolishes the common law 'unity principle' which provided that the domicile of a married woman is that of her husband's.
[38] Chao-ju Chen. Gendered Borders The Historical Formation of Women's Nationality under Law in Taiwan. positions: East Asia cultures critique, Volume 17, Number 2 at page 292.

> 'To the extent that a woman often resides in her husband's or heterosexual partner's state, the principle of territoriality, known as *jus soli* ... (will once again) privilege a father's nationality'.[39]

Distinguishing between classic *jus soli* and *jus sanguins* states in most Western states at present is not as easy, because of a marked movement towards a convergence of citizenship acquisition rules. For example, countries such as England, Portugal and Australia which were classic *jus soli* states, now link granting of nationality to children born in their territory based on permanent residence of parents and not solely by birth. Classic *jus sanguins* states also offer some kind of automatic birth or post birth citizenship to second or third generation of immigrant's.[40] Joppke notes that gender discrimination in most western states nationality laws mostly disappeared by the mid 1980's.[41]

Conversely a recent report on citizenship rights in Africa[42] has found that the legal provisions of at least half a dozen African countries effectively ensure that those persons who do not have the "right" skin colour or speak the "right" languages at home can never obtain nationality from birth, and neither can their children nor can their grandchildren. It also finds that women in these countries are unable to pass on their citizenship to their foreign spouses or to their children if the father is not a citizen.

Albeit the proliferation of various human rights protection mechanisms, it's clear from the report that African countries still lag behind in ensuring the full reach of human rights freedoms and protection in all spheres of life to many despite the states undertaking to do so. Swaziland is no different in its own blatant disregard for the principles of equality and non-discrimination in its formulation of citizenship acquisition rules. Women in this regard are the

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[39] As above.
[40] Christian Joppke. Citizenship and Immigration Page 44- 45.
[41] As above at page 43.
[42] Bronwen Manby. Citizenship Law in Africa. A Comparative Study. Published by Open Society Foundations. 2010. Accessed at http://afrimap.org/english/images/report/OSF_Citizenship_Law_in_Africa_Summary.pdf. 5th May 2011.

victims and their inner worth as human beings is eroded when they are not treated equally with men, even where both are similarly situated. This in essence is a blatant attack on their dignity as persons and as citizens of Swaziland; as in the eyes of the law they are deemed less worthy and less capable of transmitting citizenship.

2.5 Dignity

The right to dignity is based on the acceptance by all civilised societies that in every person, is a self-worth which requires that person be treated with respect and due concern and not as objects or mere chattels at the disposal of mankind. It is also accepted that because of the central place dignity holds; it is therefore inviolable.[43] It is on this basis and acceptance that because men and women both have an inner worth and both deserve due concern and are endowed with reason and conscience[44], that the differentiation between man and woman and their capacity to transmit citizenship shall be analysed so as to determine whether such differentiation negates or upholds the principles under pinning human dignity as a concept and founding principle of human rights protection.

According to Rex D. Glensy[45], the term Dignity is an ethereal concept which can mean many things. He describes it as follows;

> '...The basis of dignity can be said to lie in the autonomy of self and self-worth that is reflected in every human being's right to individual self-determination. It is thus universal and uninfringeable by the state or private parties. Moreover, the dignity of the human person as a basic ideal is so generally recognized as to require no independent support...'

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[43] See the Preamble of the Universal Declaration of Human Rights 1949 which refers to "inherent dignity and of the equal and inalienable rights of all members of the human family".

[44] See Article 1 of the Universal Declaration of Human Rights 1949.

[45] Glensy, Rex D.The Right to Dignity (March 2, 2011). Drexel University Earle Mack School of Law Research Paper No. 2011-W-01. Available at: http://works.bepress.com/rex_glensy/6/. Accessed 13th May 2011.

This in his view causes the term to "suffer from an inherent vagueness at its core" and this renders it difficult at times how to determine precisely what it means in the abstract and not within the context of a factual setting. The belief that there is such a thing as human dignity that the law must account for is not novel and has its origins in ancient Roman times. This view of dignity or *"dignitas"* as it was known then had very little to do with equal self- worth as an inherent quality of humans. Indeed if it did practices such as slavery wouldn't have existed. Dignity was more of an acquired standing, of high social or political order and a manifestation of personal autonomy which symbolized majesty, greatness and moral qualities ascribed to those in high office.[46]

Immanuel Kant is regarded as 'the father of the modern concept of dignity'.[47] Kant is credited for secularizing this concept and presenting it as a normative legal ideal positing that:

> "Individuals ought never to be treated instrumentally by the state because man regarded as a person possesses ... a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world".[48]

This view is in encompassed in the Universal Declaration of Human Rights 1949 which alludes to the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family'.[49] It is exactly in this regard that the right to human dignity should be invoked to challenge discriminatory practices that treat women and man differently and make women inferior. The right to dignity is essentially aimed at guarding against

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[46] As above at page 7.
[47] As above at page 9.
[48] See Immanuel Kant, Grundenlegung Zur Metaphysick Der Sitten 434 (Akadmie Ausgabe Bd. Iv, 1911) (1785). As quoted in Glensy, Rex D.The Right to Dignity (March 2, 2011). Drexel University Earle Mack School of Law Research Paper No. 2011-W-01. Available at: http://works.bepress.com/rex_glensy/6/. Accessed 13 May 2011. At page 9.
[49] Universal Declaration of Human Rights 1949. Preamble Paragraph 1.

such conduct and should on its own act as a stand-alone right to protect women against treatment or practices that deem them less worthy and less capable than their male counterparts, especially when this right is protected in a countries constitution. Erin Daly[50], discussing the developing trends relating to the usage of dignity as a constitutional ideal refers to the "individuation principle"[51] in which dignity (as a right) is used as a mechanism for protecting individuality by ensuring that the state's objectification of individuals in an undignified manner is prohibited.[52]

Can the constitutional right to dignity therefore be of any aid where discrimination or differential treatment is meted out to women, especially where such treatment is based solely on immutable characteristics and not based on a special ability or gift? The Canadian case of **Law v Canada**[53] in attempting to amplify dignity as an ideal within a constitutional backdrop articulated its meaning and gives us guidance in the following terms:

> '..Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits...'[54]

What can be gleaned from the above avowal is that human dignity, at a minimum, is infringed where unfair treatment is meted out based on personal traits or circumstances which are immutable; and no doubt exist that such immutable characteristics do include one's gender or sex.

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[50] Erin Daly. The Constitutional Right to Dignity.15 July 2009. Accessed at: http://www.ialsnet.org/meetings/constit/papers/DalyErin(USA).pdf. Accessed on 23 April 2011.
[51] This individuation principle also has its reflection in the Universal Declaration of Human Rights which declared that "each individual human being is unique and in that uniqueness lies dignity"
[52] Erin Daly. The Constitutional Right to Dignity. At page 1.
[53] Law v Canada (Minister of Employment and Immigration) [1999] 1 SCR 497.
[54] As above at paragraph 53.

Consequently because dignity concerns itself with unfair treatment based on immutable characteristics it thus finds itself inextricable from equality which is itself, at a minimum concerned with unfair treatment of those similarly situated. Thus dignity has also become a foundational ideal for the protection of the right to equality. The Canadian Supreme Court espoused this very same view stating that the purpose of constitutionally guaranteeing equality is to

> "...prevent the violation of essential **human dignity** and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings... equally capable and equally deserving of concern, respect and consideration,"[55]

Similarly the South African constitutional court has also pronounced that;

> 'At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups'.[56]

The Swaziland constitution guarantees the protection of a person's dignity, as a standalone right and explicitly declares that the dignity of every person is inviolable[57] and that the right to dignity can not be derogated from.[58]

No Jurisprudence has been developed around this right as of yet in Swaziland, however given its seemingly universal recognition[59], the explicit stand-alone right may also be viewed as contemplating a much wider range of situations which go beyond unfair treatment of people similarly situated; it may offer

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[55] As above.
[56] As above at paragraph 41.
[57] Section 18 of the constitution 2005.
[58] Section 38(e) provides that there shall be no derogation from this right even during a public emergency.
[59] See articles 1 and 5 of the United Nations Universal Declaration of Human Rights 1949.

protection to persons in their multiple identities and capacities. This could be to individuals being disrespectfully treated, such as somebody being stopped at a roadblock. It also could be to members of groups subject to systemic disadvantage, such as migrant workers in certain areas, or prisoners in certain prisons, such groups not being identified because of closely held characteristics, but because of the situation they find themselves in. These would be cases of indignity of treatment violation of dignity.[60]

In conclusion; no reason exists to doubt that Swaziland's constitution in recognizing a right to dignity is making an acknowledgement of the intrinsic worth of human beings and aims to prohibit inferior treatment being meted out to individuals.

2.6 Equality and Unfair Discrimination

Equality is a term generally used to mean and to demand same treatment for all alike. Within a constitutional scheme; it may however take various forms and result in different consequences, to the extent that unequal treatment may very well be justifiably meted out under the umbrella of equality. Under this caption the various notions of equality shall be explored in order to clearly bring to the fore the circumstances under which equality doesn't mean same treatment for all alike and ultimately to tie in the differentiation in citizenship acquisition rules and determine whether such a distinction falls foul or is justifiable within the ambits and dictates of equality.

[60] See The National Coalition For Gay And Lesbian Equality V The Minister Of Justice Case CCT 11/98. At paragraph 124.

Case law is a helpful source in this regard as it is able to illuminate the meaning of equality within a societal context or setting. For example in the Canadian case of **Egan v Canada**[61] , equality was described as follows:

> 'Equality, as that concept is enshrined as a fundamental right . . . means nothing if it does not represent a commitment to recognizing each person's equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second-class citizens that demean them, that treat them as less capable for no good reason or that otherwise offend fundamental human dignity'.[62]

The notional aspect of equality, mainly the treatment of same alike shall be our starting point in the discussion of equality. According to Aristotle, equality is a matter of treating like cases alike and unlike cases differently in proportion to their likeness or difference.[63]

Kentridge postulates that 'Equality is not simply a matter of likeness. It is equally a matter of difference'[64] and adds that; the fact those who are different should be treated differently is as vital to equality as the requirement that those who are alike should be treated alike. He goes a step more and states that even under guarantees for equality for all; distinctions between groups and individuals may still be made to accommodate their different needs and interests.[65]

From within these two postulations emerge two forms of equality; Formal and Substantive equality. Aristotle's view resonates with formal equality, while

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[61] (1995) 29 CRR (2d) 79.
[62] Egan v Canada (1995) 29 CRR (2d) 79. At paragraph 36.
[63] Aristotle Ethica Nichomomachea Book V.3 at 1131 a-b. As quoted by Kentridge in "Chaskalson and Others Constitutional Law of South Africa", Revision Service 5 (1999) Juta. At page 14-3.
[64] Kentridge in "Chaskalson and Others Constitutional Law of South Africa", Revision Service 5 (1999). Juta. at page 14-4.
[65] As above.

Kentridge's last view that distinctions may be made to accommodate different needs and interests resonates with substantive equality.

Indeed emerging new constitutions in African states, while providing for 'formal equality'.[66] and prohibiting against discrimination also provide that because of imbalances of the past and the urgent need to redress these imbalances to achieve an egalitarian society, discrimination against those previously advantaged in a bid to uplift those previously disadvantaged is permissible.[67] As Kentridge aptly puts it; '...those who were deprived of resources in the past are entitled to an "unequal" share of resources at present'.[68]

Cathi Albertyn[69] in describing the notion of formal equality observes that

> "Formal equality is best described as the abstract prescription of equal treatment for all persons, regardless of their actual circumstances. It perceives inequalities as irrational aberrations in an otherwise just social order, which aberrations can be overcome by extending the same rights and entitlements to all, in accordance with the same neutral standard of measurement."[70]

Conversely in describing substantive equality she states the following;

> "At the heart of substantive equality is the idea that individuals should be put in a position to participate fully in society, to develop to their full human potential. This entails the removal of arbitrary and systemic barriers to such participation, as well as the creation of conditions in which this human potential is realised".[71]

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[66] For a Formal Equality provision , see constitution of Swaziland 2005, S20(1) "All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect shall enjoy equal protection of the law".

[67] For a Substantive Equality provision , see constitution of Swaziland 2005, S20(5) which provides that parliament may enact laws necessary and aimed at "redressing social, economical, educational or other imbalances in society.

[68] Kentridge in "Chaskalson and Others Constitutional Law of South Africa", Revision Service 5 (1999) at page 14-5.

[69] Cathi Albertyn, Equality in "Cheadle, Davis and Haysom, SA Constitutional Law: The Bill of Rights".

[70] As above at page 4-5.

[71] As above at page 4-7.

Formal equality is naturally judged by the 'Similarly Situated Test' which takes the view that equality is only denied only where those who are similarly situated are differently treated. Under such formal equality concepts such as affirmative action could never be justified.

The utility of substantive equality is that it accepts that past patterns of discrimination have left their mark upon the present and that inequality needs to redressed and not simply removed.[72] Formal equality therein, presupposes that equality can always be achieved by treating all individuals alike in exactly the same way with the application of neutral standards for all, which may not always be true.

Substantive equality is thus one of the grounds under which 'equality for all under the law' may be justifiably departed from. This is often known as 'fair discrimination'.[73] In recognizing substantive equality as a justifiable departure from the general prohibition against discrimination the South African Constitutional Court in the case of **President of the Republic of South Africa v Hugo**[74] stated the following:

> "...we need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved".[75]

It must however be noted that even under the umbrella of substantive equality, the differential treatment between men and women in citizenship transmission capacity cannot be justified. Substantive equality generally acts to favour those

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[72] Kentridge in "Chaskalson and Others Constitutional Law of South Africa", Revision Service 5 (1999) at page 14-5.
[73] See South African Constitution 1996, S9(5) which provides that discrimination one or more of the grounds listed is unfair unless established that the 'discrimination is fair'.
[74] President of the Republic of South Africa v Hugo. Case CCT 11/96. At paragraph 41.
[75] As above at paragraph 41.

previously disadvantaged in an attempt to achieve an egalitarian society. Men are not previously disadvantaged hence the regulation of citizenship in a manner that deviates from the notions of formal equality and grants a benefit to a historically advantaged group can not be justified under substantive equality.

Beyond substantive equality as a ground upon which people may be treated differently, there is also an acknowledgment that in as much as all human beings are equal, state orchestrated differentiation is still a common feature in society.

C.R.M Dlamini[76] points out; that at times sectional and differentiation may be justified on various grounds which may include those who are similarly situated and other grounds which are not regarded as unfair. Our Society therefore does in general; accept some of these inequalities or differentiations in treatment.[77]

Indeed there are a variety of forms and modes of differentiation which govern and regulate the affairs of every modern state and its citizens. Such differentiation is described by the courts as 'mere differentiation' and while it is permissible, it is subject to a rationality caveat that such differentiation should not regulate in an arbitrary manner or manifest a naked preference that serves no legitimate or relevant purpose.

"Mere differentiation" in legislation and administration is common practice in any modern state that seeks to govern effectively and regulate the needs and

[76] CRM Dlamini Equality or Justice? Section 9 of the Constitution revisited. 2002 Journal for Juridical Science 27(1): Pages 14-40.
[77] As above at page 30.

interests of its citizen's.[78] This very same notion has been espoused in the Canadian case of Egand **v Canada**[79], where La Forest J noted that;

> "...not all distinctions resulting in disadvantage to a particular group will constitute discrimination. It would bring the legitimate work of our legislative bodies to a standstill if the courts were to question every distinction that had a disadvantageous effect on an enumerated or analogous group. This would open up an...inquiry in every case involving a protected group...'[80]

It is therefore of paramount importance to determine whether the differentiation between men and women with regard citizenship transmission capacity can be justified as "mere differentiation" that enables the state to govern effectively and regulate the needs and interests of its citizens. This determination is vital because the state is the actor in this case and has chosen to regulate citizenship acquisition in a particular manner. Every state should have the prerogative to determine in accordance with its own laws who its members are or can be, albeit in a constitutional supremacy scheme, one can expect such regulation to be justifiable under the constitution.

Examples of state differentiation may range from income classification for the purposes of taxation or social welfare grants. Albertyn asserts that the majority of these distinctions in general do not contravene the equality right; however, differentiation in this context will not always be constitutional and will fall foul of the constitutional ambit when it is arbitrary or irrational.[81]

Similarly in the South African case of **Prinsloo v Van der Linde and Another**[82], the constitutional court noted that the constitutional state is expected to act in a rational manner in cases of mere differentiation. It should not regulate in an

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[78] Cathy Albertyn, Equality in "Cheadle, Davis and Haysom, SA Constitutional Law: The Bill of Rights. Page 4-15.
[79] Egan v Canada (1995) 29 CRR (2d) 79.
[80] As above at paragraph 7.
[81] See note 76 above.
[82] 1997 (6) BCLR 759 (CC).

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.[83]

So for example while a person below the age of eighteen years is not allowed to vote, this discrimination (based on the prohibited ground of age) is permissible, not because it is of a benevolent nature; but because it is based on the rational that such a person does not possess enough knowledge to effectively exercise the right to vote- even though this generalisation is discriminatory.

A caveat worth highlighting that dovetails the rationality test as stated above is to the effect that; it matters not whether the actual legitimate purpose is achieved or not. O'Regan J put this aptly in the case of **East Zulu Motors (Pty) Ltd v Empangeni/ Ngwelezane Transitional Local Council & Others** in the following terms:

> 'The question is not whether the government may have achieved its purposes more effectively in a different manner, or whether its regulation or conduct could have been more closely connected to its purpose. The test is simply whether there is a reason for the differentiation that is rationally connected to a legitimate government purpose'.[84]

What is therefore evident, is that even where mere differentiation in legislation is enacted by the state, such differentiation must pass the yardstick that it is rationally connected to a legitimate government purpose; if not it is impermissible.

It is fitting at this stage of the analysis of the concepts of equality and discrimination to take stock of Swaziland's own law as it relates to its own constitutional guarantees of equality and non-discrimination to evaluate them

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[83] As above at paragraph 25.
[84] East Zulu Motors (Pty) Ltd v Empangeni/ Ngwelezane Transitional Local Council & Others.1998 (2) SA 61 (CC). At paragraph 24.

alongside the principles of equality espoused above and ultimately determine whether the differentiation at the heart of this paper can be justified under it.

Firstly the constitution of Swaziland[85] takes note of the notion of formal equality and under Section 20 (1) and elucidates it as follows;

> '20(1) All persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect shall enjoy equal protection of the law.

In the determination of what constitutes unfair discrimination the constitution provides in section 20(3) that;

> ' For the purposes of this section, "discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by gender, race, colour, ethnic origin, birth, tribe, creed or religion, or social or economic standing, political opinion, age or disability.'

Gleaning from S20(3) above it seems the pejorative meaning of "discrimination" relates to the unequal treatment of people based on attributes or characteristics relating to such attributes only outlined therein.

As noted these grounds have in common, the fact that they have been used (or misused) in the past to categorize, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated to demean persons in their inherent humanity and dignity. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features.

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[85] Act 01/2005

The notion of substantive equality is also provided for in the constitution in Section 20(5). It provides that parliament may enact laws necessary and aimed at redressing social, economic, educational or other imbalances in society.

It is uncertain whether other analogous grounds that 'when manipulated demean persons in their inherent humanity and dignity', such as sexual orientation can be read into S20(3) of the constitution. The tradition of so called analogous grounds is prevalent in Canadian and South African equality jurisprudence; this is however based on the open ended nature of their non-discrimination provisions.[86]

Women have also been accorded an express equality protection clause under S28 of the constitution. It provides under the header "Rights and Freedoms of Women" that;

> '28(1) Women have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.

It is therefore in this context that the differentiation between man and women with regard citizenship transmission in Swaziland must ultimately be determined, bearing in mind the states mere differentiation leeway in legislative enactments.

In the six years since the adoption of the Swaziland constitution, only one constitutional challenge based on the right of equality and non-discrimination has come before the courts of Swaziland.[87] No substantial content was however given to either of the formal equality section or the equality section specifically dedicated to women. This indeed makes it difficult to interrogate equality and

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[86] The Canadian Charter provides: "15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination **and, in particular** without discrimination based on race..." The South African constitution 1996 in S9(2) provides that "...may not discriminate directly or indirectly against anyone on one or **more grounds** including race..."

[87] The Case of Aphane v Registrar Of Deeds & Others High Court Case No: (383/09).

its constitutional development without an almost absolute reliance on similar cases from foreign jurisdiction. This may however be permissible for a novel constitutional order such as the one in Swaziland. This very inclination was highlighted by Swaziland Supreme Court Judge, Moore J.A in the following terms;

> 'With our Constitution still fairly new... we have to seek reliance on foreign jurisprudence...this includes borrowing from the South African, Canadian and other jurisdictions and this is what we will do...'[88]

'Borrowing' should not always be the order of the day and should not be a substitute for developing concrete Swazi jurisprudence with regard equality and unfair- discrimination as per the constitution of Swaziland. Wholesale borrowing may overlook infinitesimal and yet divergent issues which may need clarity.

For example; Swaziland's non-discrimination clause appears seemingly closed because it does not explicitly provide for "any other grounds" while the South African and Canadian clauses do. Furthermore the South African and Canadian bill of rights is subject to a general limitation clause[89] and Swaziland's is not.[90] These considerations may at times result in different equality jurisprudence in Swaziland.

The Case Of **Aphane V Registrar Of Deeds & Others**[91] is the only constitutional challenge based on equality and non-discrimination to have come before the courts of Swaziland in the six years since the adoption of the constitution.

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[88] Attorney General v Aphane Civil Appeal No. 12/2010. At paragraph 52.
[89] See s36 of the South African constitution 1996, which provides for limitation in terms of a law of general application.
[90] See s14(3). The bill of rights is only subject to the rights of others and for the public interest.
[91] High Court Case No: (383/09). Judgment delivered on 23rd February 2010.

The applicant therein sought to invalidate and have declared to be null and void section 16 (3) of the Deeds Registry Act 37/1968 ("Deeds Registry Act") and Regulations 7 and 9 of the Deeds Registry Regulations on the basis that these impugned laws are inconsistent with sections 20 and 28 of the constitution of Swaziland.

The applicant was married in community of property. Applicant and her husband entered into a deed of sale for the purchase of certain immovable property. The deed of sale reflected both their separate names as purchasers. Naturally they wished to have the property registered in their separate joint names. But this was not to be. They were informed that because they were married in community of property, the property would have to be registered in the sole name of the husband excluding the applicant's name by law.

The rational being that, at common law because a woman married in community of property has no capacity to contract unassisted[92], thus immovable property is registered in the name of the husband in his capacity as the administrator of the joint estate.

At the beginning of the hearing the Attorney General's office had conceded that the provision was not in line with the equality clause and only chose to argue about the proper remedy once a statute or part of it thereof is deemed unconstitutional. As a result, despite several mentions of equality and discrimination- no meaningful test for equality was postulated as being the test by which claims for unfair discrimination are to be assessed by and nor was there any meaningful engagement with the equality clause in order to unpack its scope and application.

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[92] Women subject to the marital power may only contract with the assistance of their husbands. See Kent v. Salmon 1910 TPD 642.

This being the first constitutional challenge based on the equality clause- it was essential in my view for the court to speak to the equality and non-discrimination clause, elucidate it and formulate a standard test by which future claims of discrimination can be assessed. Contrary to this the learned judge merely stated that;

> '...both Mr. Motsa and Mr. Vilakati agree that section 16 (3) is unconstitutional. I too agree that it is unconstitutional'.[93]

Additionally in light of the fact that not all differential treatment may be deemed unfair discrimination, and despite the Attorney General's concession, the court was in my view compelled to come to this conclusion of unconstitutionality by following a stipulated equality test whether borrowed or not. This did not happen and as a result this case has no equality jurisprudential value at all.

An appeal to determine the proper constitutional remedy after an incompatibility finding of legislation was made to the Supreme Court. On appeal to the Supreme Court, Moore J.A, in what initially seemed to be the start of the unpacking of Swaziland's own equality jurisprudence stated the following;

> 'This case is but the latest in a continuing series brought in many countries of the world by women in their attempts to redress what they claim to be discriminatory laws and practices which operated unfairly against women. These precepts and practices have deprived women of rights which were freely available to men, and kept women in a position of inferiority and inequality, in the various societies in which they live, work, pay their taxes, and raise their families, despite the fact that women contribute substantially to the growth and development of the communities and nations to which they belong.'[94]

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[93] Aphane V Registrar Of Deeds & Others High Court Case No: (383/09). At paragraph 13.
[94] Attorney General V Aphane Civil Appeal No.12/2010. At paragraph 4.

The crux of the initial challenge according to the court was that the complainant, having freely and with the concurrence of her husband, elected to continue to use her maiden name after her marriage, she is being forced against her wishes to assume a name which she does not care to share with her husband.

The court also highlighted a perceived affront to her dignity[95], but turned the enquiry into a discussion of 'the socio-juridical importance of a person's name"[96] and did not speak to the dignity clause in section 18 of the constitution, instead invoking that "a woman shall not be compelled to undergo or uphold any custom to which she is in conscience opposed".[97] This watered down the equality challenge and the case was merely an issue of societal practices that require women to adopt a man's surname.

It is therefore on this sole basis that in an attempt to formulate an equality test premised on the provisions of Swaziland's own constitution, the equality tests as elucidated in Canadian and South African constitutional jurisprudence shall be outlined and dismembered with the aim of formulating a suitable test in line with Swaziland's own equality and non-discrimination provisions.

The Canadian Charter of Rights and Freedoms[98] provides under its equality clause in Section 15 as follows;

> '15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

In terms of Article 1 of the charter rights granted may be limited. It provides as follows;

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[95] As above at paragraph 14.
[96] As above at paragraph 15.
[97] See section 28(3) of the Swaziland constitution 2005.
[98] The Canadian Charter of Rights and Freedoms 1982. Assented to March 29th, 1982

> '1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

The Canadian equality test was outlined in the case of **Egan v Canada (1995) 29 CRR (2d) 79,** per LA Forest J is as follows;

> "The first step looks to whether the law has drawn a distinction between the claimant and others. The second step then questions whether the distinction results in disadvantage, and examines whether the impugned law imposes a burden, obligation or disadvantage on a group of persons to which the claimant belongs which is not imposed on others, or does not provide them with a benefit which it grants others. The third step assesses whether the distinction is based on an irrelevant personal characteristic which is either enumerated ...or one analogous thereto.'[99]

The third step which is geared at assessing Parliament possible "relevancy defence" looks at "the nature of the personal characteristic and its relevancy to the functional values underlying the law."[100] This third step is similar to the rationality or legitimate purpose enquiry in the first part of the South African equality test.

If the distinction made is found to be relevant and yet discriminatory, the fourth and final test[101] is to subject it to the general limitation clause in the article 1 of the charter.

The 'Relevance' test used under Canadian Charter has however been criticised in the following terms[102];

Firstly, that using relevancy of legislation to determine the absence or presence of discrimination is not useful. It is no good, for instance, for a distinction to be

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[99] Egan v Canada (1995) 29 CRR (2d) 79. At paragraph 9, quoting Gonthier J. in Miron v.Trudel, [1995] 2 S.C.R. 418. At page 435.
[100] Egan v Canada (1995) 29 CRR (2d) 79. At paragraph 13.
[101] As above at paragraph 29.
[102] The criticism of the test is he view of Justice L'Heureux-Dubé (dissenting) in Egan v Canada (1995) 29 CRR (2d) 79. At Paragraphs 31-45.

relevant to a legislative purpose if that purpose is itself, discriminatory. This in itself defeats the purpose of the discrimination prohibition in itself.

Secondly, a "relevance" test within a s. 15 determination would place the onus on the rights claimant to characterize properly the purpose of the legislation which it claims is irrelevant to the impugned distinction. This according to Canadian judge, Justice L'Heureux-Dubé is undesirable, since between the rights claimant and the government, the government is clearly in the superior position to characterize properly the purpose of its own legislation.

Lastly, the relevancy test appears to impose an internal limitation on s. 15 that does not arise naturally from its plain language.

Bearing in mind the criticism above and agreeing with challenges and difficulties intertwined with it, I now turn to the South African 'Equality Test'.

The test as articulated in South African Constitutional Court case of **Harksen v Lane NO and Others**[103] is as follows:[104]

> '...(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation... Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
>
> (b)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination

[103] 1997 (11) BCLR 1489 (CC).

[104] This test was formulated in line with the equality section (S8) of the South African Interim Constitution. Section 8(1) provided that "every person shall have the right to equality before the law and equal protection of the law", while the current equality section 9(1) provides that "everyone is equal before the law and has the right to equal protection and benefit of the law. The Constitutional Court has accorded no legal significance to this textual change. See National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1998 (12) BCLR 1517 (CC). At paragraphs 58–59.

will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation....

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution).'[105]

The South African equality test appears to be aimed at remedying the Canadian 'relevancy test' and its main pitfalls as espoused by Justice L'Heureux-Dubé above. This observation is gleaned from the fact that the South African test provides that: Even if a distinction bears a rational connection, it might nevertheless amount to discrimination- and yet the Canadian test focuses solely on whether the distinction made by Parliament is relevant and closes its eyes to the fact that even though a distinction maybe relevant to a legislative purpose it may be unjustifiably discriminatory. In essence relevancy of legislation may not always justify discrimination.

On this basis the South African test as outlined in the Harksen case supra, shall be adopted and applied *mutatis mutandis* for the purpose of the overall enquiry into the differential treatment in capacity of both men and women to transmit citizenship in Swaziland.

In an endeavour to formulate an equality test for Swaziland based upon its own equality provisions, the proper test in my view would be formulated as follows:

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[105] Harksen v Lane No And Others 1997 (11) BCLR 1489 (CC).At Paragraph 52.

Part 1- Mere Differentiation

A. Does the provision differentiate between people or categories of people listed?

B. If so, does the differentiation bear a rational connection to a legitimate government purpose?

C. If it does not bear a rational connection then there is a violation of section 20(1).

D. If it bears a rational connection, it might nevertheless amount to discrimination- hence the enquiry must continue.

In order to determine whether the discriminatory provision has impacted on complainants unfairly, various factors must be considered. These would include:[106]

> (i) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;
>
> (ii) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants dignity but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question.

E. If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause in section 14(3) Constitution which provides that the entitlement of the rights in

[106] These factors were articulated in the Harksen case above at paragraph 50.

the Bill of Rights is subject to 'respect for the rights and freedoms of others and for the public interest.

Part 2- Unfair Discrimination

(A) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

> (A)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground listed in S20(2) then discrimination will have be primafacie established.
>
> (A)(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it falls within the ambit of S20(5) which provides for substantive equality, then it is fair discrimination- if it does not then it is unfair discrimination.

(B) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under; the limitations clause in section 14(3) Constitution which provides that the entitlement of the rights in the Bill of Rights is subject to 'respect for the rights and freedoms of others and for the public interest'.

The following should be noted about the test as envisioned above. Firstly it assumes that no analogous grounds for discrimination to those listed in the constitution may be invoked. This is based solely on the read of the non-discrimination provision which is seemingly closed, unlike the South African and Canadian provisions which were clearly drafted as open ended. It is however submitted that on a broad and purposive interpretive constitutional approach, analogous grounds could be deemed to be inherent in equality and non-discrimination whether grounds are listed or not, so long the differentiation

'has the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner'.[107]

Secondly, as per S14(3) of the Swaziland constitution, the only general limitation to enjoyment of Swaziland bill of rights is the subjection to the respect for the rights and freedoms of others and for the limitations based on the public interest. What constitutes public interest is unclear, but one submits that at a minimum issues of national security or declarations of a state of emergency may constitute derogations under the public interest banner.

In conclusion it is submitted that the equality test as carved and fashioned out from the Canadian and South African jurisdictions and adapted to Swaziland's own constitutional provisions shall be used in the discussions to follow in determining in the compatibility of the differentiation made with regard citizenship transmission capabilities with regard man and women in Swaziland.

[107] This is the criteria used in South Africa to determine whether a new ground raised can be said to be analogous to those listed. See the Equality Test in Harksen v Lane No And Others 1997 (11) BCLR 1489 (CC). At Paragraph 52.

CHAPTER III- Citizenship and Equality Rights in Swaziland

This chapter shall outline the provisions dealing with Citizenship Law- mainly its acquisition by birth and by marriage in Swaziland from independence times up to its current codification under the constitution of 2005 and shall ultimately scrutinize them alongside the application of the equality test.

3.1 History of Citizenship Acquisition in Swaziland

Swaziland's Independence constitution of 1968[108], just as its 2005 predecessor did codify citizenship acquisition rules. Among other categories, the constitution provided for citizenship acquisition by persons born in Swaziland, persons born outside Swaziland and a category titled: "persons entitled to be registered as citizens".

Section 21 dealing with persons born in Swaziland reads as follow;

> '21.Every person on or after 6th September 1968 shall, if his father is a citizen become a citizen of Swaziland at the time of his birth.'

Section 22 dealing with persons born outside Swaziland provided that;

> '22. Every person born outside Swaziland on or after 6th September 1968 shall if his father is a citizen of Swaziland and is domiciled in Swaziland become a citizen of Swaziland at the time of his birth.'

Section 23(1) dealt with persons entitled to be registered as citizens and provided that special categories of people were entitled upon application to be registered as citizens of Swaziland. These categories *inter alia* included the following:

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[108]This Constitution was abrogated in 1973 by The Kings Proclamation to the Nation.

'(a) any woman who is married to a person who is a citizen of Swaziland...

(c) any person one of whose parents is a citizen of Swaziland or whom at the date of the death of such parent, a citizen of Swaziland or a citizen of the former protected state of Swaziland.'

The Swaziland 1968 independence constitution while following a trend of granting automatic citizenship at birth through patrilineal descent did however provide that any person one of whose parents is a citizen of Swaziland was entitled upon application to be registered as citizens of Swaziland. This very grant shows that a women's ability to transmit citizenship to their children regardless of even their birth place was not an enigma historically in Swaziland.

This position it is submitted was aimed at ensuring that children of Swazi women born to a foreign spouse could acquire citizenship if they so desired. It would also have the practical effect of ensuring that dual citizenship is limited- as upon being granted citizenship through registration, the individual would be required to denounce their father's citizenship which most likely accrued to them automatically at birth.

The constitution of Swaziland 1968 was later abrogated on the12th April 1973 by a legislative instrument called the King's Proclamation to the Nation, 1973 by which supreme power in the Kingdom of Swaziland and all Legislative, Executive and Judicial power was vested in the King.

Section 3A of the Kings Proclamation to the Nation reads:

"The Constitution of the Kingdom of Swaziland which commenced on the 6th September, 1968 is hereby repealed."

Although other chapters were subsequently saved, inclusive in this repeal was Chapter II which contained the Bill of Rights and Chapter III of the constitution which provided for Citizenship acquisition.

Subsequently the **Citizenship and Immigration: Act 14/1992** seeking to "enlarge the different modes of citizenship acquisition" came into being in 1992. This enactment did not change the previous position with regard women and their ability to equally transmit citizenship as their male counterparts did. Instead it went a step further and deprived person's, one of whose parents is a citizen of Swaziland of being granted citizenship upon ordinary application and rescinded from a much more favourable approach under the independence constitution of 1968.

Section 7 of the Act, providing for citizenship of persons born after the commencement of Act, states that;

> "(1) A person born in Swaziland after the commencement of this Act is a citizen of Swaziland by birth if at the time of his birth his father was a citizen of Swaziland, under this Act.
>
> (2) A person born outside of Swaziland after the commencement of this Act is a citizen of Swaziland by descent if at the time of his birth his father was a citizen of Swaziland..."

Section 8 dealing with acquisition of citizenship on marriage provided that;

> "(1) A woman who is not a citizen of Swaziland at the date of her marriage to a person who is a citizen (otherwise than by registration) shall not become a citizen merely by virtue of her marriage but may do so by lodging a declaration in the prescribed manner with the Minister or with any Diplomatic Mission or Consular Office of Swaziland or at any other prescribed office, either before or at any time during the marriage, accepting Swazi citizenship as her post-nuptial citizenship.
>
> (2) A woman who lodges such a declaration shall be a citizen of Swaziland from the date of the marriage, if the declaration is lodged before the marriage or, if lodged thereafter, then from date of lodgement".

It is clear therefore that historically discrimination on the basis of gender in citizenship law has long been entrenched in Swaziland and that following the abrogation of the independence constitution and the subsequent Citizenship Act which followed, not much has changed as it is the very same provisions which in effect have been fashioned into the 2005 constitution of Swaziland.

There may be two reasons for this phenomenon. Firstly, the abrogation of the independence constitution in 1973, and therein the Bill of Rights (which provided for equality for all) meant that for a period of almost 28 years no bill of rights with which discriminatory laws could be tested against existed and hence such laws went on abated and even though citizenship law was being reformulated, the discriminatory element was being constantly entrenched.

Additionally, Swaziland has only in recent years acceded to international human rights instruments which prohibit discrimination and promote equality between men and women[109] and hence continued discrimination in citizenship and acquisition and transmission between the sexes has continued. Furthermore International Conventions only carry enforceable rights in Swazi courts once domesticated by Parliament[110] and although it is trite that such conventions can be used as an interpretive aid by the courts were ambiguity exists with regard other domestic pieces of legislation[111], domestication is still essential to ensure more meaningful impact in national law.

Swaziland, by its patrilineal regulation of citizenship seems keen on upholding a practice that enshrine and institutionalize patriarchy and dominance of the

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[109] For example : The African Charter On Human And People's Rights 1981 was only acceded to on the-15th September 1995 and The United Nations Convention on the Elimination of All Forms of Discrimination against Women 1979 was only acceded to on 26 March 2004.

[110] See the case of : Gwebu Ray & Ano v Rex. Supreme Court Case No: 19/2002, 20/2002. In this case an attack was leveled at Decree No. 3 of 2001 ,i.e. that it is null and void and of no force or effect in as much it is inconsistent with Articles 1, 7(b) and (d) of the African Charter on Human and Peoples' Rights as ratified by the Government of Swaziland on 15 September 1995. The court held that unincorporated international agreements may be used as aids to interpretation but not treated as part of domestic law for purposes of adjudication in a domestic court.

[111] As above.

male figure as the only person capable of 'bringing forth a nation'. As Louis Olivier[112] states with regard discrimination in citizenship acquisition;

> 'This is rooted in a patriarchal paradigm where women are perceived as "ours" and should thus lose the right to pass on their citizenship to their children if they marry "another" or a person who is not from the country; no such loss accrues to a man who marries a foreign woman'...[113]

Olivier goes on further to state that

> 'Swazi law and custom is comprised of the traditions and customs that have been practiced by the Swazi people over time and the understanding of the concept and the rights and duties that flow from citizenship are based on the belonging to a common ethnicity, cultural and linguistic heritage'...[114]

This is indeed in line with the principle of ethnic origin or belonging, known as *jus sanguins,* which privileges the patrilineal line in the tracing of one's nationality through descent. It is the father, not the mother, who is entitled to reproduce members of the nation. Olivier concludes with regard the traditional view of women in Swaziland that;

> 'women are ultimately "in transit" from their birth homes, the destination being that of a potential future marriage which has the consequence of transferring women's tenuous "belonging" from her birth home (or community) to that of her groom's family's home (or community). This means, in terms of customary practice, that woman who are married to non-Swazis cannot pass on their citizenship to a foreign husband, because it is understood that she has through her marriage adopted the citizenship of her husband. With respect to children, the customary position is that they receive their identity and belonging from their fathers'.[115]

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[112] Olivier, Louise. 2006. "Citizenship Legislation in Southern Africa.". In Open Society Initiative for Southern Africa. Available at http://www.test.osisa.org/.../2_2_pp03843_louise_olivier_citizenship_legislation.pdf . Accessed 13 May 2011.

[113] As above at page 39.

[114] As above.

[115] As above.

This is however an out dated view, as today may Swazi women marry foreign spouses and still choose to reside and found a family in Swaziland. Should her children then be treated as foreigners in the land of their birth because of the baseless view that women are ultimately "in transit" from their birth homes?

It is this view of women and their "inability" to solely reproduce members of a nation that has led to such discrimination and its continuous entrenchment. Patriarchy has seemingly become an acceptable way of life under the guise of culture and tradition- even where such practices clearly derogate from constitutional guarantees of equality and non-discrimination and in particular those that expressly and specifically guarantee equality between men and women in Swaziland.

3.2 Application of Equality Test to the Citizenship acquisition rules under the Constitution of Swaziland 2005

Equality, as noted can never be absolute for all people. Grounds do exist for the differential treatment of people based on many attributes which may indeed involve differentiation on the basis of gender or sex by the state. This form of differentiation would be permissible if found to be on the basis of substantive or restitutionary equality, or where it is deemed to amount to "mere differentiation" necessary for a state to govern effectively or regulate the needs and interests of its citizens; for so long it is not irrational and serves a legitimate government purpose.

It thus follows that differentiation with regard rules relating the ability to acquire and transmit citizenship must be scrutinized within this ambit to avoid overzealous and *prima facie* pronouncements being made without due introspection. An enlightened and cautionary approach is additionally a must bearing in mind that the provisions seemingly in conflict, are both constitutional

provisions- one a general set, attempting to regulate a specific aspect of citizens life's and the other, specially entrenched fundamental rights which are non-derogable.

The bill of rights guarantees fundamental rights and freedoms of the individual which include protection from inhumane or degrading treatment and equality for all before the law. On the other hand the constitution of Swaziland in outlining the means for acquisition of Swazi citizenship by birth and citizenship by marriage provides only for patrilineal transmission in both instances, essentially enabling a male citizen to transmit citizenship and depriving a female citizen of the same capacity to a female citizen.

The mere differentiation equality test as previously formulated requires the following enquiry:

Firstly; does the provision differentiate between people or categories of people listed?

Among the grounds listed, gender is an attribute on which differential treatment is prohibited.

Secondly; if so, does the differentiation bear a rational connection to a legitimate government purpose?

As noted in the Canadian case of **Egand v Canada**[116] **by** La Forest J, not all distinctions resulting in disadvantage to a particular group will constitute discrimination. It would bring the legitimate work of our legislative bodies to a standstill if the courts were to question every distinction that had a disadvantageous effect on an enumerated or analogous group.[117] However as stated in the South African case of **Prinsloo v Van der Linde and Another**[118]; the constitutional state is expected to act in a rational manner. It should not regulate

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[116] Egan v Canada (1995) 29 CRR (2d) 79.
[117] As above at paragraph 7.
[118] 1997 (6) BCLR 759 (CC).

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.[119]

The central question before us, thus becomes is there any rational purpose served by according males and females different capacity to transmit citizenship or is this merely a patriarchal regulation of citizenship in an arbitrary , manner manifesting naked preferences in a manner inconsistent with the spirit of Swaziland's constitution?

One reason advanced for the regulation of citizenship in a patriarchal fashion is based on the assumption that a married women is more likely to settle in her marital home and so do the children. As argued on behalf of the state in the Botswana High Court case of Unity Dow Case[120], the Attorney General stated that;

> "The acquisition of citizenship through the father would appear to be a reflection of the fact that the wife and children of a man, as head of the family, are more likely to settle in the country of which he is a citizen and thereby acquire a genuine link with that country than in the country of which she is a citizen (if different)"...[121]

This assumption is however not always true and seems to be an attempt to lump citizenship and domicile into one bungle. Augustine-Adams, Kif[122] notes a similar view in the late nineteenth- and early-twentieth-Century taken by Argentine courts which held that;

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[119] As above at paragraph 25.

[120] See the unreported Unity Dow v Attorney-General(High Court case) as published in 'The Citizenship Case' by Lentswe La Lesedi (Pty) Ltd. Accessed at: http://www.law-lib.utoronto.ca/Diana/fulltext/dow1.htm. On 15th July 2011.

[121] See Heads of Argument for the Attorney General. Paragraph F4. Accessed at: http://www.law-lib.utoronto.ca/Diana/fulltext/dow1.htm. On 15th July 2011.

[122] "She Consents Implicitly": Women's Citizenship, Marriage, and Liberal Political Theory in Late-Nineteenth- and Early-Twentieth-Century. Argentina Journal of Women's History, Volume 13, Number 4, Winter 2002, page. 8-30.

> '...with respect to legal jurisdiction, the exercise of her rights, and fulfilment of obligations imposed by law, the married woman has no other domicile or nationality than that of her husband while the marriage exists...'[123]

Thus because at common law, a married woman follows the domicile of her husband wherever he may be, so must she and her children follow the husbands citizenship. In Swaziland like most common law countries the proprietary rights of married persons are governed by the law of the husband's domicile at the time of marriage.[124]

However although with regard a common domicile based on the "Unity Principle"- the main reason being advanced for a common domicile is for purposes of determining one legal jurisdiction to deal with matters relating to marriage property regime[125], no marriage jurisdictional issues are attached to common citizenship or lack of it thereof.

In the Botswana case of **Attorney-General v Moagi**[126], Kentridge JA made the point that constitutional rights conferred without express limitation should not be cut down by reading implicit restrictions into them so as to bring them into line with the common law.

In Swaziland citizenship is patrilineal by descent from male citizens and matrilineal by descent in the case of illegitimate children of female citizens. This seems to be an attempt to align it with common law of domicile and the unity principle.

This however seems to be an unnecessary conflation of the need for a single domicile and its jurisdictional purpose together with nationality and citizenship,

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[123] As above at page 12.
[124] See Frankels Estate vs. The Master 1950(1) SA 220 AD.
[125] As above.
[126] 1982 BLR (II) 124 at 184. As quoted at paragraph 18 in Attorney-General v Dow (2001) AHRLR 99 (BwCA 1992).

albeit the latter not conferring the same benefit of a common legal jurisdiction to determining proprietary rights of married persons.

Citizenship merely carries with it the advantages of travel and residence which, in line with the states duty to "preserve and sustain the harmonious development, cohesion and respect for the family and family values"[127], should not be fashioned in a discriminatory manner which unnecessarily and ultimately expatriates a Swazi women who wishes, together with her foreign husband and children, to reside in Swaziland without residency restrictions, especially where those children were born in Swaziland; albeit to a foreign spouse.

Another rational advanced is based on the prohibition of foreign nationals holding dual citizenship.[128] This prohibition aims at seeking sole allegiance to one particular country and may be a legitimate state objective. Sole allegiance of a citizen to a particular state may be a cornerstone in shaping citizenship law as it aimed at ensuring exclusive and unrestrained loyalty to a particular country, which in the case of a declared war or national conflict of interest, a person's allegiance to a single country should preclude any other interest in any another country.

The limitation on dual citizenship has in the past been advanced in a few jurisdictions as a legitimate reason for fashioning out citizenship transmission capacity only along the patrilineal line. This reason and the underlying issues of national security which may underpin it have however been held not to trump guarantees of equality and freedom from discrimination in national constitutions and as per the state obligations under various international human rights protection instruments.

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[127] See Section 27(5) of the constitution of Swaziland 2005.

[128] See Heads of argument for the Attorney General in Attorney General v Unity Dow. Paragraph B.12.4. Accessed at: http://www.law-lib.utoronto.ca/Diana/fulltext/dow1.htm. On 15th July 2011.

For example in Pakistan, the citizenship Act had established that citizenship would be conferred upon a foreign woman married to a Pakistani man, but not a foreign man married to a Pakistani woman. Security concerns, along with a roster of social and political issues such as concerns about increased unemployment, were offered to justify the law. The Shariat Court summarily rejected these arguments, concluding that the classification violated the equality provisions of the Pakistan constitution and was also repugnant to the fundamental principles of Islam.[129]

Likewise in 1974, the Federal Constitutional Court of Germany struck down sex-based nationality laws that precluded German mothers, but not fathers, from transmitting citizenship to their children. Similarly the German government argued that abolition of gender or sex-based classifications would lead to more instances of dual citizenship, a status that was deemed legally problematic at the time. The court rejected this justification, concluding that it was not sufficiently compelling to warrant overriding constitutional equality principles. [130]

In 1983, the Italian Constitutional Court also invoked constitutional equality principles to strike down a 1912 law providing that the child of a male Italian citizen was an Italian citizen by birth but making no such provision for the child of a female Italian citizen. The court entertained government arguments that sex based citizenship classifications were necessary to avoid dual nationality. The court concluded, however, that the desire to avoid dual nationality was not a valid reason to ignore the equality guarantees of the Italian constitution. Instead,

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[129] See In re Gender Equality, (2008) 40 PLD (FSC) 1, 4-5 (Pak.)

[130] See the 'Brief Of Amici Curiae Equality Now, Human Rights Watch And Other Human Rights Organizations and Institutions'. In the case of Ruben Flores-Villar v United States of America (Docket No. 09-5801). Pages 10-11. Accessed at: http://www.scotusblog.com/case-files/cases/flores-villar-v-united-states/. 1 June 2011.

according to the court, the constitutional principle of equality took precedence, despite the serious inconveniences which may be caused by dual nationality.[131]

Ultimately because no uniformity exists in citizenship conferment rules between states, this very idea of limiting dual citizenship may never the less be an elusive one. Amissah JP pointed out in the Unity Dow Appeal case that;

> "...states follow different criteria in conferring citizenship... citizenship laws may not achieve the objective of eliminating dual citizenship... because where some states confer citizenship by birth to parents, whether through the male or the female line, and others confer citizenship by birth within a territorial area, cases will occur where a child born to citizens of state A, which follows the descent principle, within the territorial jurisdiction of state B, which follows the territorial area principle, will initially acquire the citizenship of both states A and B."[132]

So for example, if a Swazi male citizen and his wife resided in Canada and had a child there, because Canada automatically grants citizenship to anyone born its territory and Swaziland grants citizenship by patrilineal descent, such a child would have dual citizenship at birth. What this serves to illustrate is that; preventing dual citizenship can be very illusionary and that at a minimum, discrimination against women is definitely not were the key to solving such a dilemma lays.

Whatever course domestic law adopts in limiting dual citizenship it must do so; not only in a rational manner but it should not regulate citizenship in an arbitrary manner or manifest naked preferences as the present patrilineal regulation exists. Additionally, such regulation must comply with two prerequisites- it must, in the first place, conform to the constitution of the state in question, and secondly it must conform to international law.[133]

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[131] As above.
[132] Attorney-General v Dow (2001) AHRLR 99 (BwCA 1992) Appeal Case. At paragraph 61.
[133] As above at paragraph 59.

The enquiry at this stage is; however not whether the government may have achieved its purposes more effectively in a different manner, or whether its regulation or conduct could have been more closely connected to its purpose. The test is simply whether there is a reason for the differentiation that is rationally connected to a legitimate government purpose'.[134]

As per the third step in the enquiry, we shall assume that the differentiation bears a rational connection- that of limiting dual citizenship of foreigners in Swaziland and that this is a legitimate state interest.[135]

As per the fourth step in line with the assumption above, the differentiation may nevertheless amount to unfair discrimination- hence the enquiry must continue.

The differentiation in this case amounts to unfair discrimination because in terms of the constitution- no discrimination is permitted based on gender as an attribute- hence this makes such discrimination unfair. The citizenship transmission and acquisition rules in the constitution clearly subjects women to disabilities and restrictions which men are not subjected and it accords privileges and advantages to men which are not accorded to women.

As per the fifth and final stage; the question thus becomes whether this limitation of equal capacity can be can be justified under the limitations clause in section 14(3) Constitution which provides that; the entitlement of the rights in the Bill of Rights are subject to 'respect for the rights and freedoms of others and for the public interest.

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[134] East Zulu Motors (Pty) Ltd v Empangeni/ Ngwelezane Transitional Local Council & Others.1998 (2) SA 61 (CC). At paragraph 24.

[135] See the Canadian case of Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358. The court noted that establishing a commitment to Canada and safeguarding the security of its citizens maybe a pressing and substantial governmental objective. At paragraph 94.

Clearly no rights and freedoms of other people are adversely affected or even encroached upon by providing for equal capacity to transmit citizenship between men and women. It's simply the state exercising its prerogative to regulate how it accredits those it believes should be its nationals. The state must however- being bound by the constitution and the overall dictates therein regulate citizenship in a manner that not arbitrary and does not manifest naked discriminatory preferences and ultimately if it does do so- this must be justifiable in the "public interest".

In the absence of any encroachment on the rights of others, is it justifiable under the "public interest" banner to clearly subject women to disabilities and restrictions to which men are not subjected and accords privileges or advantages to men which are not accorded to women solely on gender or sex in terms of citizenship transmission capacity?

As noted above by way of the Pakistan[136], German and Italian[137] examples above; in as much as the state has a legitimate interest in ensuring national security or seeking sole allegiance by prohibiting dual citizenship, such an interest has been deemed not sufficient enough to limit guarantees of equality and non-discrimination in a constitutional state.

Furthermore, assuming that Swazi law and custom is indeed comprised of the traditions and customs that have been practiced by the Swazi people over time and that the understanding of the concept and the rights and duties that flow from citizenship are based on the belonging to a common ethnicity, cultural and linguistic heritage; could this be a public interest that requires that citizenship be regulated in a patrilineal manner? Is granting men the ability to transmit citizenship less of a threat to preserving Swazi's common ethnic, cultural and linguistic heritage, than if the same grant was made for women?

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[136] See note 129 above.
[137] See note 130 above.

The main problem with the formulation of citizenship transmission along a patrilineal line only, is that it re enforces the stereotype that only men father the nation and yet this is clearly discrimination reinforcing patriarchy under the guise of culture and tradition- especially where such practices clearly seem to derogate form constitutional guarantees of equality and non-discrimination and in particular those that expressly guarantee equality between men and women in Swaziland.

As pointed out by Kriegler J in the South African case of **The President of the Republic of South Africa V Hugo:**

> "...the fact that discrimination is unintended or in good faith does not render it fair. Once the subject action or legislation is found to create adverse effects on a discriminatory basis, there is no further requirement, e.g. of bad faith or malice. My second observation is that the "rebutting" factors can seldom, if ever, in themselves be discriminatory or otherwise objectionable. True as it may be that our society currently exhibits deeply entrenched patterns of inequality, these cannot justify a perpetuation of inequality. A statute or conduct that presupposes these patterns is unlikely to be vindicated by relying on them. One that not only presupposes them but is likely to promote their continuation is even less likely to pass muster..." [138]

In the same vein it is submitted that this same observation as postulated above should apply to the discriminatory nature of citizenship transmission between men and women. The fact that government in regulating citizenship- acts in good faith and with the legitimate purposed of limiting dual citizenship or preserving Swazi's common ethnic, cultural and linguistic heritage can certainly not vindicate the on-going discrimination of women in this regard.

As the Hugo case illustrates[139], there are at least two factors relevant to the determination of unfairness, firstly it is necessary to look at the group which has suffered discrimination in the particular case and the effect of the discrimination

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[138] The President Of The Republic Of South Africa v Hugo Case CCT 11/96. At paragraph 77.
[139] As above at paragraph 112.

on the interests of those concerned. It also follows that the more vulnerable the group adversely affected by the discrimination, the more likely the discrimination will be held to be unfair and similarly, the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair.

The group that has suffered discrimination in this regard is Swazi women- and no doubt exists about their vulnerability due to a traditional Swazi society which is founded on patriarchy and continues to entrench this under the guise of culture and tradition. The nature of the interests herein is personal and private interests which have a bearing on a woman's constitutional right to found a family. The discriminatory nature in which citizenship has been regulated also derogates from the states duty to preserve and sustain the harmonious development and cohesion of the family unit as it may have the effect of expatriating a Swazi woman's children and spouse from the land of her birth because her children and spouse are denied similar residency conditions which would apply to a Swazi male who married a foreign spouse.

If this conclusion be true, we are then faced with a problem resulting in the conflict of constitutional provisions; rights in the bill of rights versus rights of general application. In the Unity Dow Appeal case, the Attorney General had submitted that the then repealed section 22 of the Botswana Independence constitution had like the Citizenship Act under dispute in the case differentiated between men and women with regard children born abroad in terms of citizenship acquisition. The court stated as follows regarding such a provision;

> "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 as valid as any other limitation which the Constitution placed on rights and freedoms granted."[140]

The court further stated that the fact that the Constitution differentiated between men and women in its citizenship has to be accepted as a legitimate exception which the framers thought right. But that does not provide a general license for discrimination on the basis of sex.[141]

In the Botswana case of **Kamanakao v The Attorney General**[142] a similar constitutional conflict came before a full bench of the High Court. The applicants in the case, representatives of the Wayeyi Tribe, had sought an order in the following terms:

> A) That 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 only eight tribes, making only their Chiefs ex officio members of the House of Chiefs to the exclusion of chiefs of the Wayeyi and other tribes in Botswana. They averred that the said sections of the Constitution of Botswana were inconsistent with the fundamental rights provisions of sections 3 and 15 of the Constitution which prohibit discrimination and hence were null and void.
>
> B) That section 2 of the Chieftainship Act is 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 under inclusive, in that it expressly interprets tribe' to mean only the eight tribes mentioned therein to the exclusion of other tribes in Botswana.

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[140] Attorney-General v Dow (2001) AHRLR 99 (BwCA 1992). At paragraph 96.
[141] As above at paragraph 97.
[142] Kamanakao and Others v Attorney-General and Another (2002) AHRLR 35 (BwHC 2001).

The court per Nnganunu CJ in granting judgement had no hesitation in ordering that section 2 of the Chieftainship Act be amended to afford equal treatment and equal protection by that law to the applicants.[143]

With regard an order declaring sections 77 and 78 of the constitution null and void and inconsistent with the fundamental rights provisions of sections 3 and 15 of the constitution which prohibited discrimination, the court shilly-shallied and in disposing of this particular relief stated as follows:

> "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... 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...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 to legislate them into the Constitution...It is not for the court to do so. We therefore firmly refuse the invitation by the applicants...that an activist court can and should engineer new social values into the laws of this country."[144]

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[143] As above at paragraph 64.
[144] As above at paragraph 28.

One can at this stage note two problems which may hinder adjudication of an inconsistency of provisions in the same constitution: firstly the lack of express conferment of revisionary powers of the said constitutional document on the court and secondly the absence of express ranking of constitutional provisions within the same document. It is because of this realization that in the South African case of Midi **Television (Pty) Ltd V Director of Public Prosecutions (Western Cape)**[145], Nugten J.A observed as follows:

> "Where constitutional rights themselves have the potential to be mutually limiting - in that the full enjoyment of one necessarily curtails the full enjoyment of another and vice versa - a court must necessarily reconcile them. They cannot be reconciled by purporting to weigh the value of one right against the value of the other and then preferring the right that is considered to be more valued, and jettisoning the other, because all protected rights have equal value. They are rather to be reconciled by recognising a limitation upon the exercise of one right to the extent that it is necessary to do so in order to accommodate the exercise of the other (or in some cases, by recognising an appropriate limitation upon the exercise of both rights) according to what is required by the particular circumstances..."[146]

This 'reconciliation' process alluded to above, as prudent as it may appear does not however address situations such as the one referred to in the **Komanako case** supra, which is similar in terms of the enquiry relating to citizenship acquisition and equality in the Swaziland constitution where it is not possible to reconcile or harmonize contending sections.

The proper approach one would put forward regarding this particular scenario was espoused by Masuku J.A in the Swaziland case of **Jan Sithole and Others v The Government of the kingdom Swaziland.**[147] In this case the appellants had contended that their rights to form political parties rooted in their right to freedom of association and assembly was being limited by another section of the

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[145] Midi Television (Pty) Ltd V Director Of Public Prosecutions (Western Cape) (100/06) [2007] SCA 56.
[146] As above at paragraph 9.
[147] Jan Sithole and Others v The Government of the kingdom Swaziland. Appeal Case No: 50/08. Dissenting Judgment Masuku J.A,

constitution which provided only for individual merit as a basis for political office. The judge referred to and quoted the Tanzanian case of Christopher **Mtikila v Attorney General Dodoma Civil Case No. 5 of 1993** where an approach was postulated in the following terms:

> "...What happens when a provision of the Constitution enacting a fundamental right appears to be in conflict with another provision of the constitution? In that case, the principle of harmonization has to be called in aid. The principle holds that the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other...If the balancing act should succeed, the court is enjoined to give effect to all the contending provisions. Otherwise, the court is enjoined to the realization of the fundamental rights and may for that purpose disregard even clear words of a provision if their application would result in gross injustice..."[148]

Where human rights provisions conflict with other provisions of the constitution, human rights provisions take precedence and interpretation should favour enjoyment of human rights freedom.

The rights to equality and dignity are not only guaranteed in the bill of rights but are also specially entrenched in the entire constitutional scheme of Swaziland. This is an indication of the foundational importance which they hold in the entire constitutional scheme. The provisions regulating citizenship are neither entrenched nor specially entrenched. The rights to equality and protection of dignity fall into the extra special category of non- derogable rights.[149] The constitution in its own words states that notwithstanding anything in this Constitution, there shall be no derogation from the following rights and freedoms, these include equality and dignity. Is this not an implied ranking of certain rights before other rights that was sort and not to be found by Nnganunu C.J in the Kamanakao[150] case above?

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[148] As above. At paragraph 34.
[149] See Section 38 of the Swaziland Constitution, titled "Prohibition of Certain Derogations".
[150] Kamanakao and Others v Attorney-General and Another (2002) AHRLR 35 (BwHC 2001).

It must also be noted that even though in as much as possible and in the ordinary sense the whole constitution must be read as a whole- in case of conflict , certain rights may need to be considered ahead of others.

In **Smith vs. Attorney General of Bophuthatswana 1984 1 SA 196** at Page 199 Hiemstra CJ noted that;

> "The bill of Rights is a declaration of values and a statement of the nation's concept of the society it hopes to achieve. It is the duty of the Court to make it identifiable as such."

In conclusion, this very same view must ultimately be the premise on which discrimination in citizenship acquisition and transmission should be uprooted and done away with in Swaziland and equality and dignity be given their due recognition as not only fundamental rights, but as non-derogable rights as well. This however may ultimately have to be the role of Parliament and not the courts of law.

Chapter IV- Equality and Citizenship under International Law

This chapter shall survey and discuss international legal instruments as well as case law that has a bearing on equality and citizenship acquisition under International Law.

4.1 The Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women, also known as CEDAW, was adopted by the United Nations General Assembly on 18 December 1979 and it entered into force as an international treaty on 3 September 1981.[151]

As per Article 2 of the convention States Parties, which includes the Kingdom of Swaziland, condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake;

> "(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle..."

Similarly article 3 provides that;

> "States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to en sure the full development and advancement of women , for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."

[151] Swaziland acceded to the Convention on the Elimination of All Forms of Discrimination Against Women on the 26th March 2004.

Additionally Article 5 enjoins state parties to take all appropriate measures:

> "(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary 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 men and women;.."

With regard nationality, Article 9(1)-(2) of the convention provides thus;

> "1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of the husband.
>
> 2. States Parties shall grant women equal rights with men with respect to the nationality of their children."

Article 15 also provides that states parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

4.2 The African Charter on Human and Peoples Rights 1981

The Charter was adopted by the eighteenth Assembly of Heads of State and Governments in June 1981, in Nairobi, Kenya and entered into force on the 21st October 1986. The kingdom of Swaziland signed the charter on the 20th December 1991 and subsequently acceded to the charter on the 15th September 1995.[152]

Among many other affirmations made in the preamble of the charter, the following is included:

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[152] See. http://www.au.int/en/treaties/status.

> "Recognizing on the one hand, that fundamental human rights stem from the attributes of human beings which justifies their national and international protection and on the other hand that the reality and respect of people's rights should necessarily guarantee human rights;"[153]

Article 3 provides that every individual shall be equal before the law and that every individual shall be entitled to equal protection of the law and Article 5 provides that every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.

Discrimination against women is addressed by Article 18(3) which provides in its own words that;

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

4.3 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The protocol was adopted by the 2nd Ordinary Session of the African Union Assembly in Maputo, Mozambique on the 11th July 2003 and entered into force on 25th November 2005. Swaziland signed the protocol on the 7th December 2004, but is yet to ratify or accede to it.

The protocol in its preamble notes a concern in the following terms;

> "CONCERNED that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices;"[154]

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[153] Paragraph 6. Preamble of the African Charter on Human and Peoples Rights 1981.

[154] Preamble Paragraph 12. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

Article 2 provides that state parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures and that 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; ...
>
> d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist..."

Similarly, as does The Convention on the Elimination of All Forms of Discrimination Against Women, the Protocol on the Rights of Women in Africa also enjoins state parties to take steps towards the eradication of patriarchal practices and tendencies premised on culture and tradition. It provides in Article 2(2) that;

> "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."

Article 3 also provides that every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.

With regard nationality, the African Protocol on the Rights of Women, although *prima facie* granting equal rights with respect nationality of children for both woman and man, it vitiates this same grant. It provides in Article 6(h) that;

> "h) a woman and a man shall have equal rights, with respect to the nationality of their children **except where this is contrary to a provision in national legislation or is contrary to national security interests;**"

4.4 The SADC Protocol on Gender and Development 2008

The protocol was signed by Swaziland on the 17th August 2008. The preamble of the protocol highlights the need for gender equality in the following terms;

> "NOTING further that all SADC Member States are convinced that gender equality and equity is a fundamental human right and are committed to gender equality and equity and have signed and ratified or acceded to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women;"[155]

And additionally that:

> "RECOGNISING further that social, cultural and religious practices, attitudes and mind sets continue to militate against the attainment of gender equality and equity which are central to democracy and development;" [156]

States are enjoined as part of the general principles of the protocol to eradicate discrimination and foster equality of women with men. Article 2(1) provides that;

> "(a) States Parties shall harmonise national legislation, policies, strategies and programmes with relevant regional and international instruments related to the empowerment of women and girls for the purpose of ensuring gender equality and equity; ."

With regard constitutional rights of women the protocol also sets a fixed target for achieving equality. It provides in Article 4(1) that:

> "1. States Parties shall endeavour, by 2015, to enshrine gender equality and equity in their Constitutions and ensure that these rights are not compromised by any provisions, laws or practices."

It is clear from a survey of the regional and international legal instruments above that indeed discrimination of whatever kind of form is outlawed and prohibited. The instruments also acknowledge that there still exist social,

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[155] The SADC Protocol on Gender and Development 1998. Preamble Paragraph 3.
[156] As above at ppreamble paragraph 7.

cultural and even religious practices, attitudes and mind sets which continue to militate against the attainment of gender equality and equity and that these are premised on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

With regard nationality and citizenship and equal capacity to transmit such, a clear divergence in approach exists. The African Protocol on Women Rights in Africa does grant women and men equal rights, with respect to the nationality of their children it however expressly limits this grants by providing that "except where this is contrary to a provision in national legislation or is contrary to national security interests".

The UN Convention on the Elimination of All Forms of Discrimination against Women on the other hand provides that women be granted equal rights with men to acquire, change or retain their nationality and that state parties shall grant women equal rights with men with respect to the nationality of their children with no exceptions.

The African Protocol takes a less favourable approach and subjects its grant to what is provided for in a countries domestic law. This position is folly bearing in mind the concern highlighted in the same charter, that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices. This vitiates the very benefit granted and makes one wonder about the full commitment of African states to acceptable standards of human rights protection.

4.5 Decisions of International Tribunals and Courts

International human rights instruments as canvassed do not exist in isolation to domestic law and hence it is important to provide examples of how international courts and tribunals apply the provisions therein when faced with citizenship laws that create conflicts between the rights of equality and non-discrimination. This will illustrate the point that gender equality is an inviolable principle of international law and must accordingly not be impinged by citizenship law.

For example the United Nations Human Rights Commission held in case of **Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius**[157], that gender-based citizenship classification which automatically conferred legal rights and protections to foreign wives of Mauritian citizens, but not to foreign husbands, violates the International Covenant on Civil and Political Rights.[158] Mainly; articles 2(1) which is the state's duty to give effect to the covenant, article 3 which guarantees equality between men and women and article 26 which guarantees non- discrimination. Additionally articles 17(1) which prohibit interference with the family, home and attacks on honour and reputation together with articles 23(1) which binds the state to protect the family as the fundamental group unit of the family were also deemed to have been transgressed.

Similarly the Inter-American Court of Human Rights came to a similar conclusion when it responded to Costa Rica's request for an advisory opinion on its citizenship laws.[159] The proposed Costa Rican law allowed foreign women who married Costa Rican nationals to apply for citizenship, but did not extend the same opportunity to foreign men who married Costa Rican women. In

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[157] Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius, CCPR/C/12/D/35/1978, UN Human Rights Committee (HRC), 9 April 1981, available at: http://www.unhcr.org/refworld/docid/3f520c562.html. Accessed 6 July 2011.

[158] Swaziland acceded to the ICCPR on 26th March 2004.

[159] Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984). Available at: http://www1.umn.edu/humanrts/iachr/b_11_4d.htm. Accessed 6 July 2011.

vindicating the right to nationality under article 20(1), the right to equality of spouses in marriage under article 17(4) and the right to equal protection of the law under article 24 in the American Charter on Human Rights, the court directed Costa Rica to remove the specific reference to foreign women so that the law would apply equally to all foreigners who married Costa Rican nationals, whether women or men.

The European Court of Human Rights has also ruled that dissimilar treatment of men and women in the United Kingdom with respect to the ability of non-citizen spouses to enter and remain in the country violated the equal protection clause of the European Convention on Human Rights.[160] The court noted that the advancement of the equality of the sexes is today a major goal and that; there must be very weighty reasons to justify a difference of treatment on the ground of gender or sex.

These various decisions alluded to above make it succinctly clear that gender based discrimination in the formulation of citizenship acquisition and transmission rules is incompatible with guarantees of equality and are incomprehensible were no rational and substantial reasons exist to deviate from human rights guarantees which have attained the status of international customary law.

[160] See the case of Abdulaziz, Cabales and Balkandali v. United Kingdom, 94 Eur. Ct. H.R. (Ser. A) at 83 (1985).

CHAPTER V- A comparative analysis on the acquisition of citizenship rights through birth and by marriage.

A comparative analysis as to acquisition of citizenship rights mainly through birth and by marriage in South Africa, the European Union, Botswana and Canada shall be engaged in.

5.1 The Republic of South Africa

5.1.1 Brief Background

South Africa's is a constitutional republic and had its first post- apartheid democratic elections in April 1994. The constitution of South Africa was adopted in 1996[161] and its operation commenced on 4th February 1997.

South Africa is a signatory and has ratified the follow human rights instruments; the African Charter on Human and People's Rights 1981[162], the Convention on the Elimination of All of Forms Discrimination against Women[163] and the Protocol to The African Charter on Human and Peoples' Rights on The Rights of Women in Africa.[164]

Citizenship acquisition in South Africa is governed by the South African Citizenship Act, 1995.[165] The act is aimed at providing for the acquisition, loss and resumption of South African citizenship; and for matters incidental thereto.

5.1.2 Citizenship by Birth

[161] Act No. 108 of 1996.
[162] Acceded/ Ratified on the 9th July 1996.
[163] Acceded/ Ratified on the 15th December 1995.
[164] Acceded/ Ratified on the 17th December 2004.
[165] Act No. 88 of 1995.

With regard citizenship by birth, the South African Act grants both female and male South African citizen's equal capacity to transmit citizenship to their children.

Section 2 titled citizenship by birth, provides that any person who is born in the Republic on or after the date of commencement of the Act shall, be a South African citizen by birth if, at the time of his or her birth, one of his or her parents had been lawfully admitted to the Republic for permanent residence therein, and his or her other parent is a South African citizen.

5.1.3 Citizenship by descent

Section 3 of the South African citizenship Act provides that any person who is born outside the Republic on or after the date of commencement of the Act, and one of whose parents was, at the time of his or her birth, a South African citizen and whose birth is registered in terms of the provisions of section 13 of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992) shall be a citizen by descent.

5.1.4 Citizenship by Marriage

As per the citizenship Act, no automatic acquisition of citizenship exists for either foreign spouse upon marriage to a South African citizen. The act provides for the issuance of a certificate of naturalisation for either male or female foreign spouse married to a South African citizen after the fulfilment of certain residency requirements. It provides in section 5(5) relating to Certificate of naturalisation, as follows:

"(5) The Minister may... upon application in the prescribed form, grant a certificate of naturalisation as a South African citizen to a person who is an alien and who satisfies the Minister that-

(a) in the case of a man, he is the husband or widower, or in the case of a woman, she is the wife or widow, of a South African citizen and he or she has been lawfully admitted to the Republic for permanent residence therein and has resided in the Republic for a period of not less than two years immediately preceding the date of his or her application and after the date of his or her marriage to such citizen or

(b) he or she is the spouse of a South African citizen, and he or she has in terms of any law relating to the control of the admission of aliens obtained permission to enter the Republic for permanent residence therein and he or she has resided with his or her spouse in the Republic or, while he or she was employed in the service of the Government of the Republic, outside the Republic for a period of not less than two years."

What is evident with regard citizenship law in South Africa is that it is non-discriminatory and provides equal capacity to both male and female citizens as regard their ability to transmit citizenship. This is not only in line with South Africa's own constitution, but it is also in line with the various human rights instruments which South Africa is a signatory to.

5.2 The European Union

5.2.1 Brief Background

The European Union is a geo-political entity covering a large portion of the European continent. It is founded upon numerous treaties and has undergone

expansions that has taken it from an initial 6 member states to 27,which is today the majority of states in Europe. The European Union was set up with the aim of ending the frequent and bloody wars between neighbours, which culminated in the Second World War. As of 1950, the European Coal and Steel Community began to unite European countries economically and politically in order to secure lasting peace. In 1957, the Treaty of Rome created the European Economic Community (EEC) which today is known as the European Union.

5.2.2 EU Nationality Law

Nationality acquisition and transmission is governed by the European Convention on Nationality 1978. The preamble lists among its many motivating factors the; "Desire to avoid discrimination in matters relating to nationality".[166]

As guiding principles for European Union states, the convention provides that each State shall determine under its own law who are its nationals and that the convention shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality.

Article 5 of the Nationality convention specifically and unambiguously addresses the issue of discrimination in nationality acquisition and transmission and provides as follows with regard non-discrimination;

> "1. The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin.
>
> 2. Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently."

[166] Preamble paragraph 6 of the European Convention on Nationality 1978.

Acquisition of nationality is addressed by Article 6(1) which states that each state party shall provide in its internal law for its nationality to be acquired *ex lege* by the following persons:

> "a.) children one of whose parents possesses, at the time of the birth of these children, the nationality of that State Party..."

It is evident that even under European Union law, discrimination in citizenship transmission capacity is prohibited and that both men and women have equal capacity to transmit and acquire it.

5.3 The Republic of Botswana

5.3.1 Brief Background

The Republic of Botswana is a former British protectorate. It gained its independence on the 30th September 1966. Botswana is currently a party to the African Charter on Human and Peoples Rights 1981[167] and has also acceded to the Convention on the Elimination of All Discrimination Against Women[168]. It is a constitutional republic with its first constitution in 1965.

5.3.2 The Citizenship Act of 1984

The Citizenship Act provided as follows in section 4 with regard citizenship by birth and section 5 dealing with citizenship by descent;

> "4(1) A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth if
>
> (a) his father was a citizen of Botswana; or

[167] Acceded/ Ratified it on the 17 July 1986.

(b) in the case of a person born out of wedlock, his mother was a citizen of Botswana

5(1) A person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth if

(a) his father was a citizen of Botswana;

(b) in the case of a person born out of wedlock, his mother was a citizen of Botswana.

Section 13 of the Act also conveyed upon a foreign woman marrying a Motswana husband the right to apply for citizenship after two and a half years residence. This right was not conferred upon a foreign man who marries a Motswana wife. He would have to get ten years residence before a right to apply was possible.

These provisions, which in all fundamental respects and effect are similar to the current citizenship acquisition rules in Swaziland, also discriminated against women, in that they favoured males in terms of citizenship transmission either by birth or marriage.

5.3.3 The Unity Dow Case[169]

5.3.3.1 Facts of the Case

The Applicant in this case was Unity Dow a female citizen of Botswana having been born in Botswana. She was married to Peter Nathan Dow who although he has been in residence in Botswana for nearly 14 years was not a citizen of Botswana but a citizen of the United States of America. The couple had three children. In terms of the Laws in force prior to the Citizenship Act of 1984 the daughter born before the marriage was a Botswana citizen and therefore a Motswana, whereas in terms of the Citizenship Act of 1984 the children born

[169] Unity Dow v Attorney General, High Court unreported case. Published by Lentswe La Lesedi (Pty) Ltd. Accessed at: http://www.law-lib.utoronto.ca/Diana/fulltext/dow1.htm. and the case of Attorney-General v Dow (2001) AHRLR 99 (BwCA 1992) Appeal Case.

during the marriage are not citizens of Botswana (although children of the same parents), and are therefore aliens in the land of their birth.

The applicant thus contended that Sections 4 and 5 of the Citizenship Act of 1984 offends against the Constitution in that it is discriminatory and an inroad or limitation on her basic rights and freedoms which include the right to liberty, protection of the law, immunity from expulsion from Botswana, protection from being subjected to degrading treatment, and not to be discriminated against on the basis of her sex. The Applicant claimed she suffered these from adverse consequences solely because she was a woman.

The State however argued that Section 15 (3) of the constitution that defines discrimination, defines discrimination only as: different treatment of different persons, and attributable mainly or wholly to their race, tribe, place of origin, political opinions, colour or creed. Sex or gender is not mentioned and therefore it was argued that discrimination on the basis of sex or gender is not a breach of the Botswana Constitution.

5.3.3.2 Legal Question

Section 3 of the Botswana Constitution guaranteed every person in Botswana fundamental rights and freedoms without distinction as to their race, place of origin, political opinions, colour, creed or sex.

On the other hand within the same constitution Section 15 (3) of the constitution that defines discrimination, defined discrimination only as: different treatment of different persons, and attributable mainly or wholly to their race, tribe, place of origin, political opinions, colour or creed. Sex or gender is not mentioned

The essential question before court was thus whether the provisions in the Citizenship Act which provide that the children born in Botswana of a female citizen married to a non-citizen are not citizens of Botswana and yet children

born in Botswana of a Male citizen married to a non-citizen are citizens of Botswana, offended against the Constitution.

5.3.3.4 *Ratio Decidendi*

In ruling in favour of the applicant Unity Dow, Horwitz AJ sitting in the High Court reasoned as follows:

> "...the effect of Section 15 (3) is not restrictive to the definition but it extends the meaning of or is explanatory of the word "discriminatory", in that it gives examples of different kinds of discrimination which it is sought to prohibit. Applying the canons of construction applicable to a Constitution...this conclusion is inescapable. Interpreting the subsection as limiting section (1) to the definition would nullify the spirit of the Constitution because not to be discriminated against because of one's sex, is in accordance with the guarantee of the fundamental liberties mentioned in the Constitution. I do not think that I would be losing sight of my functions or exceeding them sitting as a Judge in the High Court, if I say that the time that women were treated as chattels or were there to obey the whims and wishes of males is long past and it would be offensive to modern thinking and the spirit of the Constitution to find that the Constitution was framed deliberately to permit discrimination on the grounds of sex."[170]

The High Court also noted that although the legislature has the power to pass laws reasonably justifiable in a democratic society. It is difficult if not impossible to accept that Botswana is a discriminatory society and that the word sex was left out of the section because Botswana believes that there should be discrimination based on sex and furthermore that because Botswana is a Signatory to the O.A.U. Convention on Non-Discrimination, adherence by Botswana to the Convention must show that a construction of the section which does not do violence to the language but is consistent with and in harmony with the convention must be preferable, although it had no force of law, adding that it is also difficult if not impossible to accept that Botswana would deliberately

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[170] Unity Dow v Attorney General, High Court unreported case. As published by Lentswe La Lesedi (Pty) Ltd. At page 39. Accessed at: http://www.law-lib.utoronto.ca/Diana/fulltext/dow1.htm.

discriminate against women in its Legislation whilst at the same time internationally support non-discrimination against females or a section of them.[171]

The High court also noted that the Citizenship Act and the discriminatory provisions therein interfere with the dignity of the person and that their effect is to lower a person in the plaintiff's position and reputation, and that can be regarded as degrading treatment. [172]

On Appeal, in dismissing the appeal by the Attorney General, Amissah JP, also stated the following:

> "It seems to me that the argument of the appellant was to some extent influenced by a premise that citizenship must necessarily follow the customary or traditional systems of the people. I do not think that view is supported by the development of the law relating to citizenship." [173]

And ultimately concluded that

> "Although it is possible that citizenship should by municipal law be based on descent or guardianship, there is no historical reason for compelling any state to so base its citizenship laws, especially where there is some serious obstacle like a constitutional guarantee in the way... I find, therefore, no necessary nexus mandating that citizenship should be based on traditional or customary ideas of descent or guardianship."[174]

The Botswana Citizenship Act 8 of 1998 was subsequently enacted and commenced on the 24th April, 1998. The new Act, largely influenced by the judgement in the Unity Dow case is completely gender neutral.

Section 4(1) addressing citizenship acquisition by birth, reads as follows;

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[171] As above at page 40.
[172] As above at page 41.
[173] Attorney-General v Dow (2001) AHRLR 99 (BwCA 1992).At paragraph 53
[174] As above at paragraph 57.

> "(1) A person born in Botswana shall be a citizen of Botswana by birth if, at the time of his birth, his father or mother was a citizen of Botswana."

Similarly Section 5(1) addressing citizenship by descent reads provides that; a person born outside Botswana shall be a citizen of Botswana by descent if, at the time of his birth, his father or mother was a citizen of Botswana.

Acquisition of citizenship by Marriage has also been reformulated and the new Act provides for the "Naturalization of foreign spouse" under section 14 and provides as follows

> "(1) The Minister may at any time grant a certificate of naturalization to a foreign spouse who is married to a citizen of Botswana and, has not since remarried and who satisfied the Minister that he or she is otherwise qualified... for naturalization in terms of this section, and that spouse shall, on taking the oath of allegiance, be a citizen of Botswana by naturalization from the date on which the certificate is granted."

The granting of the naturalization certificate is subject to residency requirements, mainly that the spouse is resident in Botswana on the date of such application for a certificate of naturalization and has been resident in Botswana for a continuous period of or for periods amounting in the aggregate to not less than five years.

Disappointingly though, the Act does not only apply retrospectively to confer a benefit on Botswana female citizen's children who were not citizens before the Act commenced. Sections 4(2) and 5(2) both provide as follows;

> "(2) A person born before the commencement of this Act shall not be a citizen by virtue of this section unless such person was a citizen at the time of such commencement."

The inclusion of this additional caveat seems aimed merely at depriving the Applicant in the Unity Dow Case the benefit of the other order which she had

originally sought which included that the Applicant's children be declared citizens of Botswana notwithstanding any other citizenship they may have.[175] The Act deprived children born before the 1998 Citizenship Act, despite the fact that the final appeal case declaring the discriminatory nature of Citizenship acquisition to be unconstitutional was delivered on the 3rd July 1992.This ultimately meant that despite the courts pronouncement, discrimination continued for a six year period in Botswana.

Notwithstanding the fact that law making is the function of Parliament, it may have been more prudent for the Botswana court to have ordered Parliament; that as they reformulate citizenship acquisition rules to be in line with the constitution, they should;

> A) Ensure a general retrospective application of the rules to attenuate the discriminatory effects of the acquisition rules which women have suffered or
>
> B) Alternatively that all reformulation have a retrospective effect as from the date of the judgement of the court.

Such an additional order would have had the effect of expanding the reach and benefits of the right of equality for all previously deprived of women's citizens who were burdened under the shawl of oppression due to patriarchal societies which aim to limit and attenuate the reach and benefit of fundamental rights.

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[175] The Court in handing down Judgment merely declared the challenged provisions ultra vires the Constitution of Botswana, and did not make any order that the Applicants children be deemed citizens.

5.4 Canada

5.1 Citizenship by birth and descent

Citizenship is regulated by the Citizenship Act 1985[176]. The Act in section 3(a) provides for *jus soli* citizenship as it accords to persons born in Canada after February 14, 1977 citizenship by birth. Citizenship by descent is accorded by section 3(b) and it provides that if a person was born outside Canada after February 14, 1977, citizenship is conferred upon them if at the time of birth one of their parents, was a Canadian citizen.

5.2 Citizenship by Marriage

Under Canadian citizenship law, marriage to a Canadian citizen does not entitle a person to Canadian citizenship.

5.3 The case of Benner v Canada[177]

The appellant, who was born in 1962 in the United States of a Canadian mother and an American father, applied for Canadian citizenship and perfected his application on October 27, 1988. The Citizenship Act provided that persons born abroad before February 15, 1977, would be granted citizenship on application if born of a Canadian father or mother but would additionally be required to undergo a security check and to swear an oath only if born of a Canadian mother.[178] The court reviewed the classification under the Canadian Charter of Human Rights which guarantee equal protection and equal benefit of the law without any discrimination based on sex or gender.

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[176] The Act was last amended April 17 2009.

[177] Benner v. Canada (Secretary of State), [1997] 1 S.C.R. 358.

The court noted that even if the government's legislative goals were important, i.e. that of establishing a commitment to Canada and safeguarding the security of its citizens, these being the reasons advanced by the state; the crisp question was ultimately whether it is reasonable to make these demands only of children of Canadian mothers, as opposed to those of Canadian fathers. The court concluded that there is clearly no inherent connection between this distinction and the desired legislative objectives and that children of Canadian mothers are not in and of themselves less committed to Canada or more dangerous than children of Canadian fathers, hence such discrimination could not be sustained in light of guarantees of equality for all under the law.[179]

This case is just another example of Canada's commitment to ensuring that even where the state has a legitimate objective it pursues by regulating citizenship acquisition in a particular manner, such regulation does not trump guarantees of equality and non-discrimination.

[179] As above at paragraphs 94- 95.

CHAPTER VI- Conclusions and Recommendations

6.1 Summary of Hypothesis

This paper and the discussions herein have from its commencement sought to canvass the discriminatory treatment which Swazi women labour under with regard their inability to transmit Swazi citizenship to their children and foreign spouses. The paper argued that this limitation on the capacity of women, which their male counterparts do not labour under; is an affront to their dignity, is a breach of the equality guarantees in the Swaziland constitution and negates the states duty to ensure the cohesion of the family unit as envisioned by the Swaziland constitution.

These assertions were then tested against the theoretical and foundational principles underlying the ideals of equality and human dignity as postulated by the courts of law and scholars of law. It is from these discussions that the following conclusions can be drawn regarding the treatment of women and their inability to transmit citizenship.

6.2 Conclusions

The right to dignity and freedom from undignified treatment requires that an individual or group as the case maybe, be treated with equal self-worth and concern. Human dignity is thus essentially violated by unfair treatment or legislative distinction premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is therefore submitted that the inability of women (as compared to their male counterparts) to equally transmit citizenship to their children and spouses, were both are similarly situated is a violation of their dignity and has the effect of making them less

worthy and inferior to males, more so because the distinction is based solely on the immutable personal characteristic of sex or gendėr.

The right to equality as canvassed also brings to the fore the crisp fact that despite its foundational dictates that all who are similarly situated be treated alike, deviation from this principle is permissible on substantive equality grounds which primarily aim at redressing imbalances in society, by treating those who have suffered in the past from discrimination or some other form of unacceptable deprivation more favourably than those who have not laboured under such past patterns of discrimination. Similarly as a deviation from equal treatment of all, the notion of "mere differentiation" in legislation that enables the state to govern effectively and regulate the needs and interests of its citizens has also emerged. This differentiation leeway granted to the state is however subject to the caveat that the state must be pursuing a legitimate aim and that even in doing so, it should not regulate in an arbitrary and irrational manner nor should it 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 which is the bill of rights.

It is clear in the context of Swaziland that the regulation of citizenship in a manner that differentiates solely on grounds of sex, to the disadvantage of women can not be justified under substantive equality grounds, because males have always been a privileged group and have not suffered from past discrimination or inferior treatment. Under the umbrella of mere differentiation, it is submitted that differentiation in citizenship transmission capacity solely on an immutable characteristic such as sex to the disadvantage and detriment of a group that has long been victims of discrimination does is irrational and manifests naked discriminatory preferences merely aimed at legitimising abhorrent patriarchal tendencies. This not acceptable in a constitutional state as it negates the guarantees of equality in the bill of rights and is on the proscribed

ground of discrimination therein. It is thus submitted that the regulation of citizenship in a manner that discriminates against women solely because of their sex can not be justified under the guarantees of equality for all as envisioned by the bill of rights simply because of the immutable nature of the classification. An inflexible application of the equality principles must be applied when access to citizenship is restricted based solely on immutable factors beyond the control of any person such as gender.

The states duty to protect the cohesion of the family unit also places a duty on the state to ensure that Swazi women who marry foreign man have the benefit of cohesion of the family unit similarly granted to Swazi men who marry foreign spouses. Where children despite their birth in Swaziland to a Swazi women do not have the entitlement to the same residence status as their mother, this would naturally expatriate the children to a country they may have no solid ties with. The states duty to protect and ensure the cohesion of the family must entail that it regulates citizenship in a manner that does not have the effect of expatriating a Swazi women's children despite their birth in Swaziland and in spite of a desire to reside in the country of their birth without the cumbersome residency limitations meted out to foreign immigrants.

In this very same regard the Supreme Court of Zimbabwe has found that differential treatment of the spouses of male and female Zimbabwean citizens with regard residency privileges, involved a violation of the wives' right to freedom of movement under the Constitution and additionally that the freedom of movement should be adjudged in the light of the institution of marriage, which embodied the obligations to found a home, to cohabit, to have children and to live together as a family unit.[180] It is submitted that this approach is also

[180] See the cases of Rattigan and Others v. Chief Immigration Officer, 1995(2) SA 182 (ZS) (Zim) and Salem v Chief Immigration Officer and Another (Appl. No. 559/94) 1995 (4) SA 280 (ZC).

in tune with guarantees in the Swaziland constitution which place a positive duty on the state to protect the cohesion of the family unit.

As an ancillary matter, it is worth noting the constitution of Swaziland guarantees that all children shall enjoy the same protection and rights.[181] In this regard it is submitted that the granting of citizenship to a child whose Swazi father is married to a foreign spouse and not granting same to a child whose Swazi mother marries a foreign spouse vitiates this very guarantee as it deprives the latter of the same protection and rights it grants the former.

6.3 Recommendations

In light of the fact that citizenship is regulated in the constitution in a manner clearly in in breach of the bill of rights in the same constitution, and coupled with the uncertainty a court of law would be faced with if asked to adjudicate as to the precedence or ranking of rights in a constitutional document, it seems the only way to remedy such discrimination would be for Parliament to amend the constitution itself to bring the citizenship provisions in line with the bill of rights guarantees of equality and non-discrimination.

If the courts had the power to declare a provisions in the same constitution inconsistent with the bill of rights, then one would could safely assume that the courts of law would give impetus to such amendment by declaring such an inconsistency if the chance availed itself in a citizenship challenge. In the absence of such power, law reform with regard equal capacity to transmit citizenship may take a very long time to be realised despite its current regulation being an affront to fundamental rights in the constitution. A clear example in this regard is the parliament of Botswana which took approximately

[181] See section 29(4).

six years after a court judgment, for it to finally amend its citizenship Act and bring it in line with the countries constitutional guarantees of equality and non-discrimination.

Parliament itself has an important role to play and has at its disposal legislative mechanisms to speedily enforce equality norms. It is hoped that more vigorous advocacy in this regard will give impetus to the remedying of the provisions which not only are out of step with the Swaziland's constitution, but are also out of step with Swaziland's obligations and commitments under international law to ensure equality between men and women.

BIBLIOGRAPHY

1. PRIMARY SOURCES

Botswana Cases

- Attorney-General v Dow (2001) AHRLR 99 (BwCA 1992).
- Attorney-General v Moagi 1982 BLR (II) 124.
- Kamanakao and Others v Attorney-General and Another (2002) AHRLR 35 (BwHC 2001).
- Unity Dow v Attorney-General (Unreported High Court case) as published in 'The Citizenship Case' by Lentswe La Lesedi (Pty) Ltd. Available at: http://www.law-lib.utoronto.ca/Diana/fulltext/dow1.htm. Accessed On 15th May 2011.

Canadian Cases

- Benner v Canada (Secretary of State), [1997] 1 S.C.R. 358.
- Egan v Canada (1995) 29 CRR (2d) 79.
- Law v Canada (Minister of Employment and Immigration) [1999] 1 SCR 497.

International Law Cases

- Abdulaziz, Cabales and Balkandali v. United Kingdom, 94 Eur. Ct. H.R. (Ser. A) (1985).
- Liechtenstein v. Guatemala (The Nottebohm Case). International Court of Justice. April 6, 1955. 1955 I.C.J. 4.
- Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius, CCPR/C/12/D/35/1978, UN Human Rights Committee (HRC), 9 April 1981, available at: http://www.unhcr.org/refworld/docid/3f520c562.html. Accessed on the 6th July 2011.

South African Cases

- East Zulu Motors (Pty) Ltd v. Empangeni/ Ngwelezane Transitional Local Council & Others.1998 (2) SA 61 (CC).

- Frankels Estate v. The Master 1950(1) SA 220 AD.
- Harksen v. Lane NO and Others 1997 (11) BCLR 1489 (CC).
- Jacks v. Jacks 1903 20 SC 196.
- Kent v. Salmon 1910 TPD 642.
- Midi Television (Pty) Ltd v. Director of Public Prosecutions (Western Cape) (100/06) [2007] SCA 56.
- President of the Republic of South Africa v Hugo. Case CCT 11/96.
- Prinsloo v. Van der Linde and Another1997 (6) BCLR 759 (CC).
- Smith v. Attorney General of Bophuthatswana 1984 (1) SA 196.
- The National Coalition For Gay And Lesbian Equality v. The Minister of Justice Case CCT 11/98.

Swaziland Cases

- Aphane v. Registrar of Deeds & Others. High Court Case No: (383/09).
- Attorney General v. Aphane Civil Appeal No. 12/2010.
- Gwebu Ray & Ano v. Rex. Supreme Court Case No: 19/2002, 20/2002.
- Jan Sithole and Others v. The Government of the kingdom Swaziland. Appeal Case No: 50/08.

Zimbabwe Cases

- Rattigan and Others v. Chief Immigration Officer, 1995(2) SA 182 (ZS) (Zim).
- Salem v. Chief Immigration Officer and Another (Appl. No. 559/94) 1995 (4) SA 280 (ZC).

Statutes

Canadian Statutes

- The Canadian Charter of Rights and Freedoms 1982.
- The Canadian Citizenship Act 1985.

Botswana Statutes

- The Botswana Citizenship Act 8 of 1984.

- The Botswana Citizenship Act of 1998.

South African Statutes

- The South African Citizenship Act, 1995.
- The South African Constitution 1996.

Swaziland Statutes

- The Independence Constitution of Swaziland 1968.
- The Kings Proclamation to the Nation 12th April 1973.
- The Citizenship and Immigration: Act 14/1992.
- The Constitution of Swaziland Act 01/ 2005.

2. SECONDARY SOURCES

International Law Declarations, Conventions and Protocols

- The Universal Declaration of Human Rights 1949.
- The International Covenant on Civil and Political Rights 1968.
- The European Convention on Nationality 1978.
- The Inter- American Charter on Human Rights
- The United Nations Convention on the Elimination of All Forms of Discrimination against Women 1979.
- The African Charter on Human and People's Rights 1981.
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003.
- The SADC Protocol on Gender and Development 2008.

Text Books

- Chaskalson and Others, Constitutional Law of South Africa, Revision Service 5 (1999) Juta.
- Cheadle, Davis and Haysom, SA Constitutional Law: The Bill of Rights. (2005) Lexis Nexis/Butterwoths.

- Currie Ian, De Waal Johan, The Bill of Rights Hand Book. (2005) Fifth Edition. Juta.
- Joppke, Christian, Citizenship and Immigration.(2010) Polity Press.

Journal Articles and Reports

- Brief Of Amici Curiae Equality Now, Human Rights Watch and Other Human Rights Organizations and Institutions'. In the case of Ruben Flores-Villar v. United States of America (Docket No. 09-5801). Available at: http://www.scotusblog.com/case-files/cases/flores-villar-v-united-states/. Accessed on: 1 June 2011.
- Chen, Chao-ju "Gendered Borders. The Historical Formation of Women's Nationality under Law in Taiwan". Positions: East Asia cultures critique, Volume 17, Number 2, Fall 2009, pages. 289-314 (Article). Published by Duke University Press.
- Daly, Erin "The Constitutional Right to Dignity".15 July 2009. Accessed at: http://www.ialsnet.org/meetings/constit/papers/DalyErin(USA).pdf. Accessed on 23 April 2011.
- Dlamini, CRM "Equality or Justice? Section 9 of the constitution revisited". 2002 Journal for Juridical Science 27(1).
- Glensy, Rex D "The Right to Dignity" (March 2, 2011). Drexel University Earle Mack School of Law Research Paper No. 2011-W-01. Available at: http://works.bepress.com/rex_glensy/6/. Accessed 13 May 2011.
- Kif, Augustine-Adams, "She Consents Implicitly": Women's Citizenship, Marriage, and Liberal Political Theory in Late-Nineteenth- and Early-Twentieth-Century. Argentina Journal of Women's History, Volume 13, Number 4, Winter 2002.
- Manby, Bronwen. "Citizenship Law in Africa. A Comparative Study". Published by Open Society Foundations. 2010. Available at: http://afrimap.org/english/images/report/OSF_Citizenship_Law_in_Africa_Summary.pdf. Accessed 5th May 2011.

- Olivier, Louise. 2006. "Citizenship Legislation in Southern Africa.". In Open Society Initiative for Southern Africa. Available at: http://www.test.osisa.org/.../2_2_pp03843_louise_olivier_citizenship_legislation.pdf . Accessed 13 May 2011.
- Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984). Available at: http://www1.umn.edu/humanrts/iachr/b_11_4d.htm. Accessed 6 July 2011.