

THE TROUBLED ORPHAN: PROTECTION OF THE PROPERTY INHERITANCE RIGHTS OF ORPHANS THROUGH AFFIRMATIVE ACTION IN BOTSWANA'S 2019 LAND POLICY

REFILWE S RASEROKA*

TEBOGO JOBETA**

ABSTRACT

The proposed article examines proposals that affirmative action be the route through which inheritance rights of orphans would be effectively protected. These proposals were initially set out in Botswana's 2015 Land Policy but were carried forward to the 2019 Revised Land Policy. While these proposals were designed to protect the property and inheritance rights of widows and orphans, the focus of this article will be on the protection of orphan inheritance rights. This article builds on concerns highlighted by Ng'ong'ola in his article 'Reflections on Botswana's 2015 Land Policy' over the degree to which the 2015 Land Policy addressed problems in Botswana land tenure. While this article will examine the mooted affirmative action proposals which seek to protect the inheritance rights of orphans, it will restrict itself to the proposals contained in the 2019 Revised Land Policy. The premise of this article is that the proposed affirmative action(s) which identify the land and property rights of orphans as deserving of protection may not, on their own, actually do so. A central theme of this article is that affirmative action proposals must take into account 'the best interests of the child' laid out in the Children's Act of 2009. There is however, a tension between the 'the best interests of the child' principle and the 'ring-fencing' of customary law in personal law in section 15(3) and (4) of the Constitution. There a nuanced intersection between customary law, constitutional protection of customary inheritance rights, patriarchy on one hand and legislation protecting children's rights, human dignity as well Botho values that are inherent to Botswana on the other hand. Due however to these nuances, this article will be the first of a two-part series interrogating through a legal lens, the affirmative action proposals in the 2019 Revised Land Policy.

1. INTRODUCTION

This article builds on a review of the 2015 Land Policy conducted by Professor Clement Ng'ong'ola in 2018.¹ In examining the Land Policy proposals he highlighted some concerns

*Dr Refilwe S Raseroka, Senior Lecturer, Department of Law, University of Botswana; LLB (UB), LLM (UNSW) LLD (STELL).

** LLB (UB) LLM (London), Lecturer and Academic Advisor University of Botswana.

over the degree to which the Land Policy addressed (and would be able to address) problems in Botswana land tenure were raised.² However, save for briefly highlighting Policy recommendations that special procedures be implemented for widows and orphans, the youth, persons with disabilities and the needy,³ Ng'ong'ola went no further than to make various suggestions.⁴ These suggestions included that a quota system should be implemented in the allocation of land, and reports from social workers should be used to speed allocation to needy and disabled applicants.⁵ Ng'ong'ola's suggestion however, that a legal right be granted to surviving spouses to inherit allocated land has been superseded by events.⁶

This article is divided into several key parts including but not limited to orphanhood, land policy considerations, affirmative action and the protection of inheritance rights of orphans. The article further discusses the dissonance between the Children's Act and the Constitution in relation inheritance particularly under customary law. The article will further identify some of the problems faced by orphans especially on intestacy with a focus on judicial interventions. A key aspect of the discussion centres around the right to equal protection of the law of law, their dignity and the use of *botho* as measures to protect the inheritance rights of orphans. The article does not only introduce the admittedly innovative affirmative action proposals contained in the 2019 Revised Land Policy. It defines orphan-hood in Botswana while also contextualising some of the challenges experienced by orphans. With this backdrop the article not only proceeds to discuss affirmative action that place the orphan at the centre of the proposals but further links the discussion to the rights set out in the Children's Act of 2009 (hereinafter referred to as the Children's Act). The article will proceed to interrogate the discord between constitutional norms and the Children's Act. Of particular concern is the legislative pre-eminence of the Children's Act in case of conflict with other laws. A discussion on the effect of intestacy and the absence of estate planning on orphan's rights will be followed by interrogation of the principles underpinning affirmative action. Fundamental to the assertion of inheritance rights of orphans is the equal protection of the law. The final

¹ C Ng'ong'ola Reflections on Botswana's 2015 Land Policy (2017) 4 University of Botswana Law Journal 113-139.

² Supra, 114.

³ Supra 122-123.

⁴ Supra 123.

⁵ Supra 123.

⁶ Para 72 (c) which contained this clause was removed in the 2019 Revised Land Policy.

section will entail an introductory discussion of human dignity and *Botho* values as principles that may enhance that efficacy of the affirmative action proposals, and the conclusion.

2. BACKGROUND AND CONTEXT

The 2015 Land Policy of Botswana sets out initial affirmative action proposals to protect the inheritance rights of widows and orphans.⁷ These proposals (that affirmative action be the route through which inheritance rights of orphans would be effectively protected) were subsequently carried forward to the 2019 Revised Land Policy.⁸ This article will thus examine mooted affirmative action proposals contained in the 2019 Land Policy which seek to protect the inheritance rights of orphans. Due to various nuanced issues surrounding widow and orphan rights, which touch on customary and constitutional law, dignity and equality rights, flourishing and *Botho*, this article will focus only on the protection of orphan inheritance rights. It is this tension which Ng'ong'ola highlighted, albeit in passing, as 'decidedly vague and nondescript.'⁹

The underlying issue centres around innovative land policy mechanisms that may aid better land administration and management. The 2019 Revised Land Policy has wide range of issues that it addresses, including protection of widows' and orphans' property rights. It is trite that when a loved one has died, disputes are likely to arise over rights of inheritance, evictions,¹⁰ and violent confiscation of property or 'living law land grabbing',¹¹ to legal challenges and contestation over the estate¹² may follow. The contextual link between widows

⁷ Para 72; Republic of Botswana *Botswana Land Policy* (2015)18.

⁸ Para 71; 2019 Botswana Revised National Land Policy, 18. The review initiated by the Ministry of Land Management, Water and Sanitation Services, addressed concerns over the implications of some policy pronouncements relating to access to land. See MINISTRY OF LAND MANAGEMENT, WATER AND SANITATION SERVICES BOTSWANA LAND POLICY REVIEW 2018<<https://faolex.fao.org/docs/pdf/BOT196818.pdf>>(accessed 09/03/23).

⁹ Note 3, 121-122.

¹⁰ K Izumi (ed) *The land and property rights of women and orphans: in the context of HIV/Aids, case studies from Zimbabwe* (2006) HSRC Press, Cape Town. See also D LeBeau, E Lipinge & M Conteh *Women's property and inheritance rights in Namibia* (2004) 1.

¹¹ C Himonga 'Taking the gap – 'Living law land grabbing' in the context of succession laws in Southern Africa' (2011) *Acta Juridica* 115, 114-139.

¹² D Budlender & E Alma *Women and land securing rights for better lives* (2011) 43. The discrimination of African widows occurs both directly and indirectly due to race, gender and cultural considerations, particularly where the intestate estate belongs to a deceased African. See the arguments of the *Amicus Curiae* in *Moseneke v The Master of the High Court* 2001 2 SA 18 (CC) [para 17]. See also *Bhe* [2004] ZACC 17; 2005 (1) BCLR 1 (CC).

and orphans as set out in the 2019 Revised Land Policy, rests on the notion that human rights of women also include children's rights.¹³

2.1 Land Policy links between widows and orphan inheritance rights

The 2019 Revised Land Policy,¹⁴ recognised the need to deal with key land issues and makes particular reference to widows and orphans, as the subject matter of affirmative action as they are similar circumstanced. The proposals highlight the fact that orphans experience unfair treatment and are discriminated against, especially in relation to existing and envisaged property rights.¹⁵ However, the question is whether the proposed affirmative actions, in their current form, are sufficient, effective and more importantly implementable, to achieve the stated goal.

The premise of this article is that the suggested affirmative action(s) categorising the protection of the land and property inheritance rights of orphans¹⁶ may not, on their own, actually do so. This is because the impact and magnitude of discrimination from various sources experienced by orphans affects the manner in which orphans are able to access and hold inherited land and property. This includes the intersection of customary law and the constitutional protection of customary inheritance rights and patriarchy. The tension between customary and constitutional law, legislation and children's rights as well as affirmative action to protect children's property inheritance rights will be examined, in a backdrop of what orphan-hood is and who is considered an orphan in Botswana. This is important as, while orphans include both male and female children, they have lost one or both parents. While inheritance grabbing experienced by orphans may on the face of it, stem from greed by relatives, the underlying cause may arise from discrimination based on sex or patriarchal

¹³ H Lim "Inheritance, HIV/AIDS and children's rights to land in Africa" in R Home & H Lim (eds) *Demystifying the mystery of capital: Land tenure and poverty in Africa and the Caribbean* (2004) 51-72 65. S Goonesekere & R De Silva-De Alwis "Women's and children's rights in a human rights based approach to development" (2005) 1 <<https://www.wcwonline.org/pdf/asia2007conf/Women's%20and%20Children's%20Rights%20in%20a%20Human%20Rights%20Based%20Approach.pdf>> (accessed 30/06/23) argue that while women's rights enrich the rights of children, children's rights can help promote the advancement of women's rights. The quest for gender equality among children must be the first step toward gender equality among adults. As women's inferiority to men begins in childhood, efforts to combat discrimination must begin in childhood.

¹⁴ The 2015 and 2019 Land Policies are to a large extent identical, save for amendments to Paras 58(i), 60(v) & 78 (viii), or removal of proposals contained in Para 58(ii-iii), 69(iv), 72(iii) & 77(ii).

¹⁵ H Lim "Inheritance, HIV/AIDS and children's rights to land in Africa" in R Home & H Lim (eds) *Demystifying the mystery of capital: Land tenure and poverty in Africa and the Caribbean* (2004) 51-72, 68 argues that the property rights of orphans may best be served by placing the land in trust for the children, which together with having a system of child advocates appointed for the orphans and education, may assist in realising their rights.

¹⁶ See 2 supra.

rules.¹⁷ Although there may be a need to unpack this issue in greater detail in this article, this aspect and other issues will be addressed more comprehensively in a subsequent article.

2.2 Defining orphan-hood in Botswana

The Government of Botswana has committed itself to ensure and maintain the dignity and human worth of orphaned children through affirmative action.¹⁸ The circumstances of orphans that give rise to affirmative action in the 2019 Revised Land Policy are founded on succession and/or inheritance rights relating to the estate of their deceased parent(s). One of the consequences of orphan-hood is a loss of family, to which the forfeiture of inherited property becomes an added penalty.¹⁹

While all children are in principle in need of care, both the HIV/AIDS and recent COVID-19 pandemics in Botswana, have contributed greatly to children becoming even more vulnerable and in need of even greater protection. Not only have a large number of children themselves died from the HIV/AIDS pandemic,²⁰ but many have also been left orphaned.²¹

The 2017 Botswana statistics survey indicate that in rural areas, at least 1.1% of all children aged 17 years and below had lost both parents, and were considered as double-orphans.²² Of children in a single parent household, at least 3.8% had lost their mother, while

¹⁷ R.S Raseroka, *Widows, land, property and inheritance rights: An analysis of affirmative action proposals in Botswana's 2015 Land Policy, with a legal comparative dimension* (2021) LLD Dissertation (unpublished), Stellenbosch University 166. Writing in the context of widows, Raseroka argues that while patriarchal rules including primogeniture are promoted by section 15(4) of the Constitution, critically, Constitutional provision(s) have an impact on statutes and customary laws dealing with inheritance and devolution of intestate estates, to the detriment of orphans, children and women.

¹⁸ Statement of the Government of Botswana to the 52nd United Nations Commission for Social Development <<http://papersmart.unmeetings.org/media2/1731818/botswana.pdf>>(accessed 05/08/23).

¹⁹ S Bunch et al "Women's property rights, HIV and AIDS, and domestic violence: Research findings from two districts in South Africa and Uganda" (2008) 8.

²⁰ H Lim "Inheritance, HIV/AIDS and children's rights to land in Africa" in R Home & H Lim (eds) *Demystifying the mystery of capital: Land tenure and poverty in Africa and the Caribbean* (2004) 51-7255. According to Lim, 64% of the deaths of children under the age of 5 in 2000 in Botswana were due to HIV/AIDS. WHO statistics indicate that between 3rd January 2020 and 2nd August 2023 there have been 330 176 confirmed COVID-19 infections with 2799 COVID-19 related deaths in Botswana. See <<https://covid19.who.int/region/afro/country/bw>>(accessed 08/08/23). Statistics Botswana, *Botswana Causes of Mortality 2018 Stats Brief of 2020*, 3. The Brief indicates that pre-Covid statistics in 2018 indicate that male (53.4%) deaths was higher than females (46.6%) deaths. That between that e 20-24 -30-34 age group more females died than their male counterparts, while between 50-54- 75-79 years, more males died than women. <<https://www.statsbots.org/bw/sites/default/files/publications/Botswana%20Causes%20of%20Mortality%202018.pdf>> (accessed 08/08/23).

²¹ Feranil, I. B. Herstad, W. Jallow, and R. Mbuya-Brown. 2010. *Assessing Implementation of Botswana's Program for Orphans and Vulnerable Children*. Washington, DC: Futures Group, Health Policy Initiative, Task Order <http://www.healthpolicyplus.com/archive/ns/pubs/hpi/Documents/1265_1_PIBA_Botswana_FINAL_acc.pdf> (accessed 06/08/23).

²² No. 2, 20. The 2017 Report distinguishes between urban towns and villages. In towns and cities double orphans constituted 0.1%, children without mothers 0.5%, while those who had lost their father 1.2%. In urban villages,

8.7% had lost their father. It is reported that Botswana has approximately 44.327 orphans, while another 36 183 children are considered vulnerable.²³ It must be noted that the age of majority in Botswana is 18.²⁴ In Botswana, an orphan is defined as a child below the age of 18 years who may fall in one of three categories. Firstly, the child has lost either (a) parent(s), or where the child was raised in a single parent home, they have lost the primary care-parent. Thirdly, If raised by biological or adoptive parents, the child has lost both.²⁵ Commonly classified as ‘needy’²⁶ and disadvantaged members of society,²⁷ at risk of poverty,²⁸ orphaned children,²⁹ especially those in orphan-headed households,³⁰ are considered most at risk³¹ and considered in need of care.³² This is more-so, it is contended when inheritance rights are involved.

Where inheritance is involved the vulnerability of orphaned children is exacerbated as this often results in the unauthorised taking of their (the orphan’s) parents’ property by care-

double orphans constituted 0.5% of the population, those without mothers amounted to 1.6%, while those without fathers 3.8%. In rural areas double orphans constituted 0.5% without mothers 1.6% and fathers 3.7%.

²³ World without Orphans reports that there are 920000 children in Botswana, who are under the age of 18. Of this number 35% are either orphaned or vulnerable, while 3% are considered as both orphaned and vulnerable. https://worldwithoutorphans.org/about/regional-teams/africa/country/people_organization/141202>accessed (07/03/23) Statistics Botswana *Botswana Aids Impact Survey IV (Bais IV) Summary Report 2013*<www.cso.gov.bw>(accessed 22/5/2023) 15 indicate that in 2012, 14.4% of orphans had lost both parents to HIV/AIDS and were considered as double orphans. CM Miller, S Groskin, SV Subramanian, D Rajamaraman & SJ Heymann “Orphan care in Botswana’s working households growing responsibilities in the absence of adequate support”(2006) 96 *American Journal of Public Health* 1429-1435 1429 <<http://doi.org/10.2105/AJPH.2005.072280>>(accessed 06/05/2023)estimated that orphaned children would be 20% by the highest rate in sub-Saharan Africa.

²⁴ Section 2 of the Children’s Act of 2008 (Cap 28:04) of the Laws of Botswana, Section 49 Interpretations Act. The age of majority in Botswana depended on the subject matter of the discussion and was previously 21 years. It was however lowered to 18 so as to harmonise internal laws as well as to be consistent with key international and human rights instruments to which Botswana has ratified or acceded to.

²⁵Statistics Botswana (2018) BOTSWANA DEMOGRAPHIC SURVEY REPORT 2017, 20.

²⁶ PT Moepeng & DS Dewah “Empowering the poor and other disadvantaged groups” (1999)<<http://www.aricaportal.org/dspace/articles/empowering-poor-and-other-disadvantaged-groups>>(accessed 09/07/23) . Remote area communities, women and the youth form the core of the needy population of Botswana.

²⁷ PT Moepeng & DS Dewah “Empowering the poor and other disadvantaged groups” <<http://www.aricaportal.org/dspace/articles/empowering-poor-and-other-disadvantaged-groups>>(accessed 09/07/23)

²⁸ N Kakwani et al “Poverty status report for Botswana: Incidence, trends and dynamics” prepared by International Poverty Centre (UNDP) and Botswana Institute for Development and Policy Analysis (BIDPA) (2005) <www.ipc-undp.org/publications/reports/Botswana.pdf> (accessed 12/08/23..

²⁹ Supra 72. Orphans are defined as children under the age of 18 who have lost one or both parents. 2002 statistics revealed there were 107760 orphans or 14.62% of the total number of children. The United Nations estimated that in 2015 Botswana had between 51 000-66 000 HIV and Aids orphans between the age of 0-17 years <<http://www.unaids.org/en/regionscountries/countries/botswana>> (accessed 12/08/23).

³⁰ Republic of Botswana *Botswana Land Policy* (2015) Government Paper No 4 of 2015 18.

³¹ See note 28. Kakwani et al contend that orphans are most likely to suffer acute deprivation and require extra care.

³² Section 42(b) of the Children’s Act of 2008 (Cap 28:04) of the Laws of Botswana defines a child in need of care as “any child who has no parent”, whilst under section 42(e) it is a child who either heads a household or lives in a household headed by a child.

givers and/or relatives.³³ Furthermore, these children may face discrimination levelled against them where their parent(s)' death was linked to pandemics such as HIV/AIDS.³⁴ The numerous and sudden deaths that occurred during the COVID-19 pandemic have also led to many children being orphaned.

3. LAND POLICY VS CHILDREN'S RIGHTS GENERALLY

3.1 Affirmative action proposals

The 2019 Land Policy identifies and categorises orphans as a 'special category of society' whose rights and access to land should not only be considered but more importantly, secured.³⁵ The rationale behind this is specifically outlined as follows;

'...Protection of Existing Land Rights

*72. Widows and **Orphans**: There are instances where some widows and **orphans** who are compelled to head households find themselves in urgent need of land, especially for residential purposes. However, many find that access to their deceased husbands'/parents' rights are denied or restricted by their in-laws/ guardians or others. While our land policies or land laws do not undermine the land rights of these two categories of the society, the reality on the ground is different. Not many widows/**orphans** find access to the administrative and legal fora to assert and defend these rights.'*³⁶ (emphasis mine)

It is argued that the mechanisms proposed to deal with this problem fall short, largely, because the scope of the action may be too limited. These proposed mechanisms include suggestions that;

'i. Government institutions such as Land Authorities, Local Authorities and Non-Governmental Organizations will be encouraged to step up their

³³ G Anangà, C Otieno & A Oluoch "Legal challenges of land held in trust for orphans and vulnerable children (OVC) in Kenya" in R Home (ed) *Essays in African land law* (2011) 155; K Izumi (ed) *The land and property rights of women and orphans, in the context of HIV and AIDS: Case studies from Zimbabwe* (2006) 4.

³⁴ G Anangà, C Otieno & A Oluoch "Legal challenges of land held in trust for orphans and vulnerable children (OVC) in Kenya" in R Home (ed) *Essays in African land law* (2011) 157.

³⁵ Para 71 supra, states 'There are special categories of society whose rights and access to land should be acknowledged, realized and protected. Disadvantaged members of the society should be provided with the opportunities that will ensure their inclusion in the economic development mainstream through affirmative action in land allocation. Such categories include remote area communities, widows, orphans, youth and the vulnerable groups (people with disabilities and the needy)'.

³⁶ Supra, Para 72.

campaign to educate women and orphans about their legally protected rights and offer them legal support to successfully claim their legitimate land rights.

ii. Customary practices -and Common Law dealing with Deceased Estate which do not disadvantage widows and orphans will continue to be implemented to ensure protection of the land rights of the widows and orphans and practices that are unfavourable will be identified and addressed...'

3.2 Empty words make the loudest noise?

One may ask what the policy seeks to achieve. Will legal education and support alone be sufficient to protect the inheritance rights of orphans? Will identification of unfavourable customary practices alone without other tangible actions be sufficient to protect orphan rights. Furthermore, it may be necessary to determine the root cause for each instance of inheritance grabbing that orphans` experience, as while it may, on the face of it, seem to be based on greed, there may be clear cases of gender discrimination at play for female orphans. Male orphans on the other-hand may be discriminated upon due to patriarchal norms that favour senior males over young men and boys.³⁷ Succession in this case occurs through the male bloodline where the oldest son succeeds in preference to younger sons and daughters.³⁸ Primogeniture is relevant in customary law as estates are administered privately within the family.³⁹ It is argued these Land Policy proposals are tacit acknowledgement that orphans do experience unfair treatment and discrimination, especially in relation to asserting existing and envisaged property inheritance rights.⁴⁰ Furthermore, that current solutions (if any) cannot address the problem and that innovative solutions such as affirmative action are necessary to deal with inheritance issues. However, without an examination of the underlying cause of property grabbing through a gender lens, the affirmative action proposals may not go far enough to resolve the problem.

³⁷ Raseroka (2021) Argues that not only customary law but also statutory and common law in Botswana have entrenched patriarchy. Within the customary law context, primogeniture rather than ultimogeniture greatly affects men and women in matters of marriage and inheritance.

³⁸ Bennett *Customary law in South Africa* 332. See also *Bhe v Magistrate Khayaletsha (Commission for Gender Equality as Amicus Curiae)*; *Shibi v Sithole*; *South African Human Rights Commission v President of the Republic of South Africa* ('Bhe') [2004] ZACC 17; 2005 (1) BCLR 1 (CC) [para 76].

³⁹ Bennett *Customary law in South Africa* 334. See also M Ndulo 'African customary law, customs and women's rights' (2011) 18 *Indiana Journal of Global Legal Studies* 104 (87-120).

⁴⁰ H Lim "Inheritance, HIV/AIDS and children's rights to land in Africa" in R Home & H Lim (eds) *Demystifying the mystery of capital: Land tenure and poverty in Africa and the Caribbean* (2004) 51-72 68 argues that the property rights of orphans may best be served by placing the land in trust for the children, which together with having a system of child advocates appointed for the orphans and education, may assist in realising their rights.

Clearly the combined impact and the magnitude of various sources of discrimination experienced by orphans have warranted proposals to change the manner in which orphans are able to access and hold inherited land and property.⁴¹ The question emerges however, whether the proposed affirmative actions are sufficient, effective and more importantly implementable as a means to protect orphan rights, or this is an example of a ‘decidedly vague and nondescript’,⁴² solution.

3.3 Orphans and the Children’s Act

The fundamental premise of this paper is that the effectiveness of these specific affirmative action proposals on their own, without taking into account legislatively protected children’s rights, are limited. That the implications and effect of the Children’s Act⁴³ as well as constitutional provisions relating to customary inheritance⁴⁴ must also be taken into account.

When dealing with any issue that affects a child, the provisions of the Children’s Act are instructive as they deal with the law governing children. One cannot discuss children’s rights without reference to the Children’s Acts. The bedrock of children’s rights and attendant issues is the ‘best interests of the child’ principle.⁴⁵ This principle is so fundamental that it traverses all areas of child law including child protection among others. The manner in which the principle has been articulated and applied leaves room for expansion of the doctrine to envisage instances which were not in the contemplation of the legislation at the time of promulgation of the Act.⁴⁶ This overarching principle applies in all spheres affecting children be they legislative, administrative or judicial.⁴⁷ Both the short term and long-term interests of the child should be taken into account. It has been said that the best interests of the child principle reflects two important human rights principles of inherent rights and the universality principle.⁴⁸ It has been shown that the application of this principle becomes problematic in inheritance matters as it is completely ignored.⁴⁹

⁴¹Para 71; 2019 Botswana Revised National Land Policy, 18.

⁴²Note 3, 121-122.

⁴³Children’s Act of 2009.

⁴⁴Section 15 (4)(d) of the Constitution of Botswana.

⁴⁵Section 5 of the Children’s Act.

⁴⁶Section 6 of the Children’s Act leaves room for expansion of the best interest principle under para (i)

⁴⁷Jobeta, T The Law of Inheritance and the Best Interest of the Child in Botswana 2008 *Jurisdika Foreningen I Finland* at 337.

⁴⁸Supra.

⁴⁹Jobeta, T The Law of Inheritance and the Best Interest of the Child in Botswana 2008 *Jurisdika Foreningen I Finland* at 337, Jobeta and Dinokopila The Best Interest of the Child Principle in Botswana 2018 *UBLJ* at page 40.

As intimated above, orphaned property rights under inheritance have become topical due to the increasing cases of property grabbing of inheritance. Instances of denying orphaned children what rightly belonged to them usually comes to the fore when the now adult orphan demands what is theirs, only to realise that there is nothing left for them to take over or enjoy. The grabbing of inheritance is not in the best interests of the orphan and thus protective measures need to be accorded to orphans who find themselves in such situations.

3.3.1 How illegitimate children are affected

This situation also extends to children born out of wedlock. There are a plethora of decided cases that have posited the common law position that a child born out of wedlock is treated differently from those born within marriage when it comes to inheritance unless adopted.⁵⁰ This may be a double-edged sword where the child is also orphaned. Case law reveals that the best interest of the child principle has often been disregarded when arriving at the decision to exclude either an orphaned or illegitimate child from inheriting from a deceased parent's estate.

This reveals the failure of the court to act as the upper guardian of all minor children, irrespective of their status in protecting their inheritance rights. Since it is evident that the common law stance is not conducive to the welfare of the child (particularly when it relates to orphaned or illegitimate children), it should not be allowed to stand as it flies in the face of what the Children's Act seeks to achieve.

3.4 Dissonance between the Children's Act and the Constitution

There is a strain between the provisions of the Children's act on the one hand and constitutional provisions on the other. A child including an orphaned one needs protection and should not be discriminated against based on their status.⁵¹ This is in consonance with the equal protection clause in the Constitution of Botswana.⁵² Section 15⁵³ of the Constitution likewise, outlaws differential treatment but it has a saving clause where matters of personal law fall beyond the remit of non-discrimination. It entrenches culture, customs and values,

⁵⁰ Hendrick v Tsawe [2008]3BLR 447(HC);,Tape v Matoso [2007]3 BLR 447 (HC);Ikitseng v The Attorney General and Others [2019]2BLR 99(CA),

⁵¹Section 7(a) Children's Act

⁵² Section 3 of the Constitution of Botswana

⁵³ Section 15(4)(c) Constitution of Botswana.

that is, by the constitutional exemption of personal law and customary law from complaints of discrimination,⁵⁴ this effectively fails to safeguard the inheritance rights of orphans.

The ring-fencing of inheritance from complaints of discrimination particularly under customary law, may effectively contribute to inheritance grabbing of inheritance rights of orphans particularly where the parents' estate is to devolve under customary law.⁵⁵ On the other hand, the 'best interests of the child' principles contained in the Children's Act, strongly suggest that adherence to protecting the rights of the child may trump constitutional clauses that allow or result in a contrary outcome or effect to the 'best interests of the child'. This is a fundamental problem that has to be addressed. One cannot have a situation of constitutional superiority that clashes with the provisions of section 3 of the Children's Act, which gives it (the Act) precedence) in the event of a conflict or inconsistency.⁵⁶ It is submitted that the latter provision should be viewed from two perspectives *being* the equal protection clause vis a vis and the best interest of the child principle, as to do otherwise, would mean a child whose parents have died is left to their own devices and their best interests jettisoned.

3.4.1 Who will speak for the orphan?

The dire situation an orphaned child finds itself in is exacerbated by the fact that there is often no one to advocate for them. Those close to the child may not care as they are often the culprits in dissipating the inheritance of the orphaned child or they pretend to protect the child while their intentions are self-serving.

There is a dearth of authority on culprits who have dispossessed orphaned children of their inheritance despite there being enactments speaking against such.⁵⁷ Although there is a semblance of protection, it is submitted that it is not sufficient as there are a lot of loopholes

⁵⁴Constitution of Botswana. Section 15(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision—

(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law. The administration of customary estates may be in accordance with the Customary Law Act (Cap 16:01). See also Refilwe Raseroka, Widows, land, property and inheritance rights: An analysis of affirmative action proposals in Botswana's 2015 Land Policy, with a legal comparative dimension (2021) LLD Dissertation (unpublished), Stellenbosch University 166. Writing in the context of widows, Raseroka argues that while patriarchal rules including primogeniture are promoted by section 15(4) of the Constitution, critically, Constitutional provision(s) have an impact on statutes and customary laws dealing with inheritance and devolution of intestate estates, to the detriment of orphans, children and women.

⁵⁵ Supra Section 15(4)(c). Where the deceased died leaving a valid will, the estate is administered in terms of the Administration of Estates Act (Cap 31:01).

⁵⁶ Section 3 Children's Act.

⁵⁷Section 27(7) Children's Act Any person who dispossess a child of his or her inheritance or who without the authority of a court takes possession of any portion of a deceased's estate under which a child is or maybe a beneficiary shall be guilty of an offence and shall be sentenced to a fine of not less that P20 000 but not more than P30 000 or to imprisonment to a term of not less than six months but not more than two years or both.

that culprits may exploit. The Masiela Trust Fund, a non-governmental organisation, has assisted orphans who had been dispossessed of their inheritance by either relatives or guardians and continue to do so though funding is a problem. Strides made by the Trust are commendable as they strive to fulfil an aspect of their mandate being the protection of orphans primarily.

3.5 Effect of lack of estate planning

The Land Policy highlights as one of the solution, the need for legal education for orphans, that is, there should be '*a campaign to educate women and orphans about their legally protected rights.*'⁵⁸ as one of the solutions. The question is whether it should be the orphan alone who should be educated? As a solution on its own, it is not a very good one as it is reactive rather than proactive. Reacting after the fact is not solving the problem. Rather, the target of the proposals should be sustained and comprehensive legal education of the general population of the need for estate planning and will making. There is a need to educate people to be proactive in making plans for the distribution of their estates and care of their minor children after their demise.

Anecdotal evidence indicates that most Batswana die intestate and their property rights are dealt with in terms of customary law. More often than not, during the HIV/AIDS and COVID pandemics there was no time or opportunity for estate planning or preparation of wills.⁵⁹ This resulted in many an intestate estate subjected to informal or customary law administration by family and relatives, often to the detriment of surviving child heirs. This tends to take away or tamper with the rights of the child to inherit due to certain cultural beliefs and norms and the most common one being that "a child should be seen and not heard". The powerlessness of children, more especially orphans, is exacerbated by patriarchal norms embedded in culture that grants the family the right to claim the orphaned child as part of the family.⁶⁰

It may also be objectionable within a customary law context to allow an orphan to obtain ownership or control of their parents' property, to the exclusion of adult relatives.⁶¹

⁵⁸ Para 72 2 Land Policy, 18.

⁵⁹Wills Act (Cap 31:04). Administration of Estates Act (Cap 31:01). See for example, the legal formalities set out in sec 3 of the Wills Act, for the making of wills and codicils. See also D Horton & R Kress Weisbord, COVID-19 and Formal Wills, 73 *Stan. L. REV. ONLINE* 18-27 (2020-2021), 19-20. See also Richard F. Storrow, Legacies of a Pandemic: Remote Attestation and Electronic Wills, 48 *MITCHELL HAMLINE L. REV.* 826-862 (2022).

⁶⁰ TW Bennett *Human rights and African customary law under the South African constitution* (1995) 5.

⁶¹P Kishindo Customary land tenure and the new land policy in Malawi, (2004) *Journal of Contemporary African Studies*, 22 Vol 2, 213-225, at 221-222 <http://doi: 10.1080/ cja0258900042000230023> (accessed 02/08/2023) While Kishindo argues in the context of customary land tenure that Malawi's Land Policy objectives that confer

That being the case older people are often entrusted with the properties of the child, as they are deemed to know what is best for the child but the reality on the ground is that they end up dealing with the property to the detriment of the child. Where adult relatives assumed guardianship over the orphans and concomitantly also control of property, the orphans do not have legal capacity to deal with their deceased parents' estate⁶² and thus constrained to assert their rights.⁶³

The legal position states categorically that “where the biological parent of a child dies intestate or fails to make adequate provision for his or her surviving child in a will or other bequest, the child shall be awarded such portion of such parent's estate as is required by the Administration of Estates Act or any other relevant law to be awarded to the child.⁶⁴ The import of this legal provision is to somewhat shift the common law position that a child born out of wedlock has no automatic right to inherit from its parent particularly the father. This provision was meant to protect the child in the event of the passing on of its parents.

3.6 Selected cases on inheritance rights of orphans

Although these cases do not deal directly with orphans *per se*, inferences may be drawn as to the general approach regarding issues affecting this group. They show how a similar circumstanced orphan would be dealt a double blow.

3.6.1 Kealeboga vs Kehumile⁶⁵

The *Kehumile* case is one of the few cases whose outcome should be followed when dealing with orphans generally. The case dealt with the right of children born out of wedlock to inherit from the estate of their father and the court held in the affirmative. It should however be noted that the case dealt with the Bangwaketse customary law and is by no means applies to all areas

inheritance rights to children in the event of the death of their parent(s) may not only be culturally unacceptable, but more importantly, may result in uneconomical use of land through division of inherited land, it is argued that it would be culturally unacceptable in Botswana particularly with regard to customary law and patriarchal norms.

⁶² H Lim “Inheritance, HIV/AIDS and children's rights to land in Africa” in R Home & H Lim(eds) *Demystifying the mystery of capital: Land tenure and poverty in Africa and the Caribbean*(2004) 51-72 53. See also Kishindo 221-222.

⁶³ G Anangà, C Otieno & A Oluoch “Legal challenges of land held in trust for orphans and vulnerable children (OVC) in Kenya” in R Home (ed) *Essays in African land law*(2011)157. See also

⁶⁴ Section 27(6) Children's Act

⁶⁵ *Kealeboga and Another v Kehumile and Another* [2014] 2 BLR 259 (CA), Jonas and Gunda Children born out of wedlock and their right to inherit from their fathers under customary law in Botswana – Baone Kealeboga & Anor v Tidimalo Mercy Kehumile & Anor *The Comparative and International Law Journal of Southern Africa* , Vol. 48, No. 1 (MARCH 2015), pp. 89-9.

in Botswana. This is due to the fact that customary law is not uniform as it varies from tribe to tribe and from time to time. The approach is laudable and others should emulate it.

3.6.2 Thununu Iketseng vs Attorney General⁶⁶

The *Iketseng* case on the other hand held a contrary view that a child born out of wedlock does not inherit from the estate of its father. It is submitted that the Court of Appeal failed to take heed of the Children's Act and in particular the best interest of the child principle so that the said children inherit.

The plethora of cases that have come before the courts stating that an orphaned child born out of wedlock has no automatic right to inherit on intestacy is wrong. The Children's Act seeks to promote and protect the rights of children among others as evident from the long title of the Act and to deny orphaned children their rights would mean that there is an elephant in the room. This allows a child to be discriminated against on account of the circumstances of its birth which is a wrong approach which has no rational basis. Although the courts are of the view that the common law position regarding the inheritance of orphaned children born out of wedlock can only be remedied through adoption or execution of a will leaving a portion to the said children is wrong as it seems to rubberstamp discrimination of the children.

It is argued that the common law position cannot trump provisions of a statute more so that the provisions of the Children's Act take precedence in the event of conflict with either other legislation or other law.⁶⁷ In the premises to deny orphaned children their inheritance is not only discriminatory but is a position that is so backward and should not be allowed to stand in this day and age. Children should be treated equally and not be stigmatised on account of the circumstances of their birth of which they had nothing to do with. The failure to secure the inheritance of orphans quite often results being a burden as they become children in need of protection. An orphaned child is a child in need of protection⁶⁸ due to the fact that once their parent(s) die(s) they have no other form of protection and end up being charity cases which would not be the case if their inheritance was protected. The long-term benefits of allowing such a child to inherit should be factored in as failure to do so denies the child fundamental rights and is not conducive to their welfare.

⁶⁶ [2019] 2 BLR 99 (CA).

⁶⁷Section 3 Children's Act. This notwithstanding the constitution still reigns supreme.

⁶⁸Section 42(b) Children's Act

3.7 Beyond affirmative action- the right to equal protection of the law

As alluded to above, any discussion on the protection of orphan rights through affirmative action cannot be made in isolation. Firstly, it is necessary to interrogate whether what is meant by affirmative action in the proposals is actually affirmative action. Affirmative action has been defined as the taking of special measures to ensure that people who were previously disadvantaged or discriminated against are treated differently to redress the inequality.⁶⁹ Thus 'context sensitive'⁷⁰ affirmative action, would require the taking of special measures to ensure that people (in this case, orphans) who were previously disadvantaged or discriminated against are treated differently, in order to redress inequality.⁷¹ Secondly, affirmative actions are and directed by the purpose, specific goals or timetables⁷² for which they are employed.⁷³ Thirdly, affirmative action is intended to be a temporary measure, which comes to an end when the specific goal underpinning the affirmative action is realised or achieved.⁷⁴

It is argued that the proposals in their current form are problematic. Just because something is termed affirmative action does not make it so. Furthermore, educating people on their legal rights is not affirmative action. Without addressing issues of substantial and formal equality⁷⁵ which are part and parcel of any affirmative action, these affirmative action proposals cannot be considered as temporary measures. Reliance on formal equality alone leads to irrationality and arbitrariness. One of the weaknesses of formal equality is that it does not consider societal and socio-economic differences and needs within the targeted group.⁷⁶ As already discussed there are different categories of orphans with different needs, who may experience inequality differently.⁷⁷

⁶⁹ A Sachs *Affirmative action and the new constitution* (1991) 2 and L Human *Affirmative action and the development of people: A practical guide* (1993) 1. See also J Faundez *Affirmative action: International perspectives* (1994) 3.

⁷⁰ Sachs *Affirmative action and the new constitution* 3.

⁷¹ A Sachs *Affirmative action and the new constitution* (1993) 2; L Human *Affirmative action and the development of people: A practical guide* (1993) 1; J Faundez *Affirmative action: International perspectives* (1994) 3.

⁷² T Sewell *Affirmative action around the world: An empirical study* (2004) 5.

⁷³ Human *Affirmative action and the development of people* 1.

⁷⁴ Sewell *Affirmative action around the world* 5. See also DD Ntanda Nsereko *Constitutional law in Botswana* (2010) 245.

⁷⁵ Currie & De Waal *the Bill of Rights Handbook 6ed* (2013) 213. They point out that formal equality means sameness of treatment while substantive equality arises where the law is used to ensure equality, consequently, while there may be a disparity in treatment this may be tolerated in order to achieve equality. For a discussion of the history of affirmative action, see also Raseroka (2021) unpublished LLD Dissertation 117-123.

⁷⁷ C Albertyn 'Equality' in E Bonthuys & C Albertyn (eds) *Gender, law and justice* (2007) 87-88. Writing in the context of widows, Albertyn argues that it is important to recognise that it is not only women who have different needs that ought to be recognised and taken into account, widows also are different and have different needs, which may include disability, rural/ urban location, age, race, ethnicity, culture, education and class.

Any permanent solution(s) would necessitate the putting into place of other measures such as the enactment of specific legislation that protect their rights, need to be found, rather than just affirmative action alone. It is argued that for the affirmative action proposals to be more robust, they ought to be linked with other fundamental rights, such as for example, the right to equal protection of the law⁷⁸ and dignity.

It is argued that irrespective of the tension between the Childrens' Act and section 15 of the Constitution, the key issue is that orphans' right to inherit their parent property must be protected and maintained as an effect of section 3 of the Constitution. Although constitutional provisions have equal rank and status,⁷⁹ all other constitutional rights are subject to the fundamental rights and freedoms in section 3.⁸⁰

3.7.1 Dignity, Botho and the orphan

When one speaks of human dignity it encompasses all human beings including orphans. Consequently, issues relating to the dignity and right to equality of orphans, it is argued, should be underpinned by principles of *Botho*.⁸¹ *Vision 2036*⁸² highlights the fact that values inherent in *Botho* are intrinsic to and within Botswana society.

Unlike South Africa,⁸³ Botswana does not have a constitutional matrix or framework that expressly enshrines the protection of children's rights or human dignity. What is striking about the Constitution of South Africa is the fact that children, (including orphans) are considered to be rights carriers and holders. That is to say, there are specific constitutional rights that are assigned to children that may not be abrogated. Chief among these rights, and

⁷⁸ Section 3 of the Constitution of Botswana.

⁷⁹ *Kamanakao v Attorney General* 2001 2 BLR 654 (HC). According to the court none of the constitutional provisions can be ranked by precedence or importance ahead of any other.

⁸⁰ *Attorney General v Dow* 1992 BLR 119 (CA) at 135. The enjoyment of rights is conditional upon non-infringement and prejudice against the rights or freedoms of others or in the public interest

⁸¹ *Supra*, 3.

⁸² Presidential Task Team, *Vision 2036- Achieving Prosperity for All* (2016).

⁸³ Section 28 Constitution of South Africa, 1996. It provides *inter alia* as follows; 1. Every child has the right

- a. to a name and a nationality from birth;
- b. to family care or parental care, or to appropriate alternative care when removed from the family environment;
- c. to basic nutrition, shelter, basic health care services and social services;
- d. to be protected from maltreatment, neglect, abuse or degradation;
- e. to be protected from exploitative labour practices;
- f. not to be required or permitted to perform work or provide services that
 - i. are inappropriate for a person of that child's age; or
 - ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development...

2. A child's best interests are of paramount importance in every matter concerning the child.

3. In this section "child" means a person under the age of 18 years.

in the context of this article it is argued, is the right to family care,⁸⁴ shelter⁸⁵ as well as to be protected from maltreatment, neglect and/or abuse.⁸⁶

Closely connected with these rights are the right to equality⁸⁷ and human dignity⁸⁸ which also includes the concept of human flourishing.⁸⁹ While for example, the Constitution of South Africa highlights the protection of the well-being, physical or mental health of children,⁹⁰ it is argued, that the concept of ‘the best interests of the child’ captures the idea of human flourishing as it relates to children and by extension orphans.⁹¹

According to Narvaez,⁹² aspects of human flourishing such as equality, recognition of one’s worth and compassion are the same cornerstones that are found within *Botho*.⁹³ As a value therefore, *Botho* rejects anti-social, disgraceful and inhuman behaviour while encouraging individual and community respect, dignity and social justice for all.⁹⁴ *Botho* brings together customary values of communality, interdependence and self-worth with

⁸⁴ Section 28 1 (b).

⁸⁵ Section 28 1(c).

⁸⁶ Section 281(d).

⁸⁷ Section 9. It provides *inter alia*...(1) That everyone is equal before the law and has the right to equal protection and benefit of the law.(2). Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.....

⁸⁸ Section 10. Everyone has inherent dignity and the right to have their dignity respected and protected.

⁸⁹In the context of orphans, human flourishing relates to their right to dignity and equality. Alexander & Penalver point out that human flourishing as a concept was first introduced by Aristotle as a property, politics and morality theory, in his book *Nichmachean Ethics*. While the many facets of this concept inhibited proper definition, Aristotle viewed as a state which personal needs and the enjoyment of a good or flourishing life of human beings could only be satisfied or obtained within social organisations and relationships. Some of the factors that aid human flourishing include human virtue, justice as well as property. GS Alexander & EM Peñalver *An introduction to property theory* (2012) 80-83. See also Pogge *World poverty and human rights* (2008) 42. See also Darcia Narvaez *Understanding flourishing: Evolutionary baselines and morality*, Journal of Moral Education, (2015) vol 44:3, 253-262 where the characteristics of human flourishing are defined and discussed at 255-257. Human flourishing features in Article 25 of the Universal Declaration of Human Rights which promotes the universal right to a standard of living adequate to health and wellbeing which includes food and housing.

⁹⁰Section 28 (1)(ii).

⁹¹Narvaez argues at 254 that when one speaks of flourishing it should not be confined to the adult experience of a ‘good enough’ life as has often been argued, but should in fact start from and shaped by childhood events and encounters. The grabbing of orphaned children’s inheritance is an example of childhood event that would mark and or scar the orphan experience, due in part to their helplessness and inability to protect as it were, their inheritance rights.

⁹² Narvaez 256.

⁹³Narvaez 256.

⁹⁴ The adage ‘*motho ke motho ka batho*’ forms the nub of what *Botho* amounts to. See Raseroka (2021) Unpublished LLD Dissertation, 146-153. See also *S v Makwanyane* 1995 (3) SA 391 (CC). See *Azanian Peoples’ Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 672 (CC). See further Mokgoro ‘Ubuntu and the Law in South Africa’ in *Ubuntu and the Law* 317. See also T. Gareegope, Aspect of *Botho/Ubuntu* in Botswana, 2020 (28) University of Botswana Law Journal 41-57.

western human rights standards of dignity and equality.⁹⁵ It is argued that the right to shelter, to dignity, to be protected from abuse including from property grabbing and denial of the orphans right to inherit from their deceased's parents estate is inimical with values of *Botho*. This is what ought to be simply because it is right and is in the best interests of the orphaned child.

It has been argued that there is an indelible synergy between *Botho* and affirmative action which is founded upon the inclusion of *Botho* in Vision 2036.⁹⁶ Thus, Vision 2036 may facilitate a relevant, innovative 'outside the box' solution that may strengthen the affirmative action proposals.⁹⁷ However, as has already been stated, space constraints in this article require that a further detailed and more nuanced argument be made in a subsequent article.

4. CONCLUSION

This discussion has attempted to highlight some of the challenges and concerns about the affirmative action proposals contained in the 2019 Revised Land Policy. One may be tempted to argue that the affirmative action proposals are both 'vague and nondescript' and of no effect to achieving the stated goals of protecting the inheritance rights of orphans.

However, as the discussion has revealed, the proposed use of affirmative action is innovative and may if expounded upon, provide some protective mechanisms for orphans' inheritance rights. Admittedly, several tensions have been revealed which require to be addressed in a further article. Chief among the tensions is that found between the constitutional ring fencing of customary inheritance rights vis a vis 'the best interests of the child' principle contained in the Children's Act.⁹⁸ This is one of the factors that require further interrogation.

Although the article introduced the concept of *Botho* as one that underpins the protection of orphan rights, there is need to delve further into the argument that *Botho* is a relevant and appropriate value system. The use of *Botho* in conjunction with human dignity and the right to equal protection of the law may facilitate the more effective use of affirmative action. A further study of these issues will naturally form the backbone of a further article.

⁹⁵ D Cornell 'A call for a nuanced constitutional jurisprudence: South Africa, ubuntu, dignity and reconciliation' in D Cornell & N Muvangua (eds) *Ubuntu and the law: African ideals and post-apartheid jurisprudence* (2012) 332 (324-332). *S v Makwanyane* 1995 (3) SA 391 (CC) para 223. See also Mokgoro 'Ubuntu and the law in South Africa' in *Ubuntu and the law* 318.

⁹⁶ Raseroka (2021) 147.

⁹⁷ Raseroka, *supra*.

⁹⁸ Section 3 of the Childrens Act, 2009.