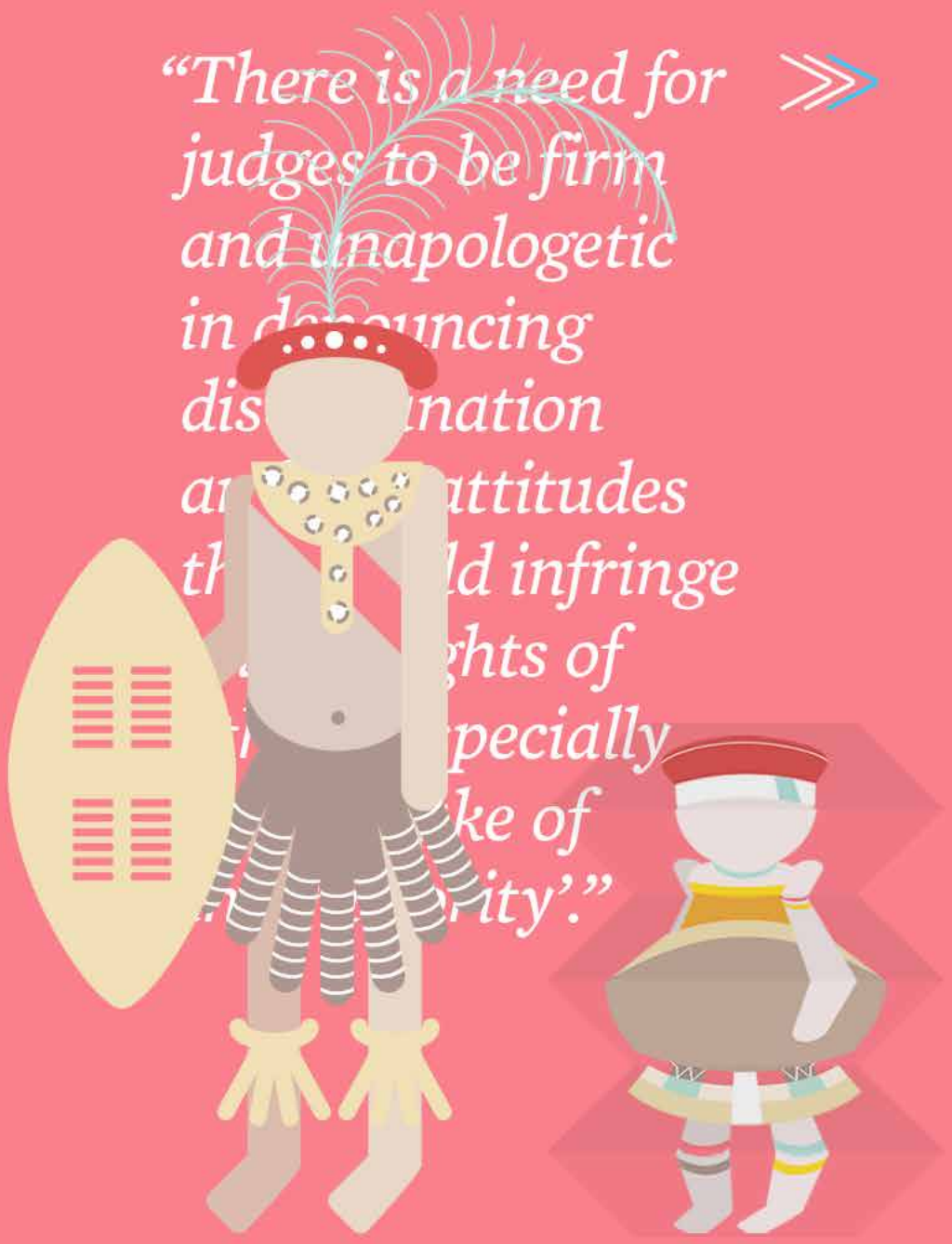
COURTING CONTROVERSY:

Is judicial activism the only way to tackle gender inequality in southern Africa?

A landmark judgement by Justice Oagile Key Dingake in the High Court of Botswana in October 2012 has been lauded as a game-changing watershed for gender rights in sub-Saharan Africa. In a remarkable decision, Dingake ruled that culture could not trump constitutional rights and made a powerful call for other judges to take a stand on gender issues.



Tabeth Masengu *is currently a Research officer at Democratic Governance & Rights Unit at the University of Cape Town and the Secretary of the African Network of Constitutional Lawyers' Working group on Women, Equality and the Constitution. She is an admitted attorney of the High Court of South Africa and holds an LLB from Rhodes University (Cum Laude) and an LLM in Human Rights (Cum Laude) from the London School of Economics and Political Science. Current Research interests include Refugee Law, Women's Rights and the impact of the Protocol to the African Charter on the Rights of Women in Africa on Democracy and Governance.*

But can other judges adopt such an 'activist' approach? And should they? Is our current situation akin to America during the civil rights era when an 'activist' Supreme Court made a series of rulings that changed the nation? Is judicial activism the only way to tackle gender inequality in southern Africa, given the lack of movement by executives and legislatures?

Dingake – who earlier in 2012 had spent several weeks on sabbatical at the University of Cape Town, hosted by the Democratic Governance and Rights Unit – held that the Ngwaketse Customary law rule, which provides that only the last born son is qualified as intestate heir to the exclusion of his female siblings, offends Section 3 of the Constitution of Botswana in that it violates the applicants' rights to equal protection of the law.

The judgement makes it clear that there is no place for sexual discrimination and patriarchy in any aspect of life, including culture. This reasoning is not entirely unprecedented in African countries when one thinks of the South African case of Bhe v Magistrate, Khayelistha and Other and the Tanzanian case of Ephraim v Pastory. In these two jurisdictions, judges have taken a stand to ensure that the Constitutions speak to the needs of all people, including those perceived as inferior to others.

In the Mmusi case, the legal representatives for the Respondents argued that Botswana is 'culturally inclined' against gender equality and that the court should be slow to upset entrenched customs. What they were actually saying was that discriminatory practices – like those in question – should be left untouched simply because they had been practised for a long time. This cultural

culture has long been used as an excuse for undermining women and reinforcing patriarchal attitudes.

argument is not new and it will not be the last time courts are faced with this appeal in favour of maintaining the status quo. However, what must be remembered is that culture is evolving: it is not static and even culture has to bow to the supreme law of any land, which is the Constitution.

Judges need to make a stand and pronounce on what is constitutionally permissible and to ensure that the minority and those who cannot adequately protect their rights are secure in the understanding that a constitution speaks for all and not just the traditionally powerful. But while judicial activism is an important tool for tackling gender inequality, it cannot be relied upon to change society on its own – however heartening recent displays of judicial courage and progressiveness have been. The simple fact is that while there are judges who believe that they should breathe life into the Constitution and make the law progressive for the purposes of rendering justice, there are others who do not.

So gender inequality needs to be tackled by all arms of government. Judicial activism should be seen as a catalyst for such a process and not as a single 'silver bullet' solution to the problem.

Southern African countries are already signatories of various conventions that seek to ensure gender equality, including the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The region's judicial ministries took the first step of declaring an intention to promote gender equality by signing and ratifying these treaties. In Monist states, these treaties automatically become part of domestic law, while in Dualist states, the legislatures still have to domesticate them.

This process is a reminder that different branches of government have significant roles to play. Indeed, genuine efforts by governments to promote gender equality should make the role of the courts easier because they would then be enforcing an already established intention to rid our societies of gender inequality.

The Protocol for Women states in Article 17 that women have the right to live in a positive cultural context and to participate in all levels of determining cultural policies. This is a fundamental and innovative article as it takes into consideration the fact that culture has long been used as an excuse for undermining women and reinforcing patriarchal attitudes. Interestingly, Botswana is the only country in the Southern African Development Community (SADC) that has not signed and ratified the African Women's protocol. Yet the High Court was bold enough to take a stand and to remind us of the tragedy of taking away the rights of women solely on the grounds of their sex.

This should galvanise courts in other countries in the region that have ratified the Protocol to ensure that the right to a positive culture does not result in mere rhetoric. Judges should be willing to go the extra mile to question policies or traditions that entrench gender inequality. They should be willing to engage with the executive and legislature in ensuring that our constitutions and treaties are not filled with empty promises but offer the genuine prospect of social transformation.

To compare the current situation in southern Africa to US Civil rights era is an interesting comparison even allowing for the substantial differences in history and context. The US civil rights movement recognised that constitutional rights to equality and equal treatment provided a potentially vital platform for advocacy through the courts, but also that this approach would complement – rather than become a substitute for – 'street level' activism and a strong social demand for change. In southern Africa, too, the campaign for gender justice cannot focus solely on the courts. It needs to be a broad-based campaign in order to tackle the numerous, deeply-entrenched forms of gender inequality in our region.

But judges clearly have a critical role to play. Our constitutions are not just about the present and they are not just for those who are here today. Our constitutions also contain promises for future generations. They inspire a future that will be built on the foundation stone of respect for human rights – on the promotion and protection of our basic rights – and they should be interpreted by every judge in a manner that helps to fulfil their promises and inspire a more just and equal future for all. ( )