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Judicial Application of Human Rights of Women in Southern Africa
with particular Reference to Non-Discrimination
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1. Introduction
For a very long period of time women across the world and Africa in particular have generally suffered prejudices and discrimination. The discrimination or unequal treatment of women was institutionalised by cultural practices and given effect to by traditional institutions including traditional or customary courts. Many African systems and institutions did not recognize that women have the same rights as their male counterparts. The systems were based purely on patriarchy. Attempts, both of international and national levels, did not fully recognize the rights of women. These efforts culminated into the Beijing Conference, which adopted the Beijing Declaration recognizing various rights of women. The Declaration enjoins states to take measures at national level to protect women's rights including judicial measures. This means that the judiciary has a major role to play in promoting and protecting the rights of women in the African continent. This presentation explores extent to which the judiciary in Southern African countries has discharged its responsibility of protected the rights of women in the region. First, it discusses the legal and constitutional framework for the judicial protection and application of women's rights. Second, it examines the approach of the courts in interpreting the constitutional provisions dealing with rights of women especially the right to non-discrimination. Thirdly, It concludes that there is an emerging trend of developing a uniform regional jurisprudence for the protection of the rights of women.

2. Legal Framework for Judicial Enforcement of Rights of Women
Apart from the international legal regime for protecting women's rights represented mainly by CEDAW and the Beijing Declaration, there are various constitutional and legislative instruments at the national level in Southern African countries for protecting the rights of women, or rather which constitute the legal framework and basis for judicial protection of human rights in the countries under consideration. The constitutions of these countries embody Bills of Rights which catalogue a number of rights of the individual including women rights especially the right to non-discrimination.

In Botswana, the constitutionally entrenched Bill of Rights entitled ‘Protection of Fundamental Rights and Freedoms of The Individual’ recognizes and protects a variety of human rights norms such as the right to life, personal liberty, the right to a fair trial, protection against cruel, inhuman or degrading punishment or treatment, non-discrimination and the right to property. Most importantly, the High Court of
Botswana is entrusted with the responsibility of enforcing the provisions of the Bill of Rights. Section 18 (1) of the Constitution stipulates that 'subjects to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress. The Court may make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 16 (inclusive) of this Constitution' following a determination in pursuance of subsection (1). Sections 3 to 16 catalogue the various human rights norms embodied in the Bill of Rights.

In Namibia, Chapter 3 of the 1990 Independence Constitution embodies a Bill of Rights entitled "Fundamental Human Rights and Freedoms. As in Botswana, the Bill protects a variety of human rights norms, including the right to life, personal liberty, the right to a fair trial, protection against cruel, inhuman or degrading punishment or treatment, non-discrimination and the right to property. However, unlike in Botswana, the Bill also protects the right to education and culture (what are commonly called second generation rights). According to Section 80(2) of the Constitution, the Namibian High Court has original jurisdiction 'to hear and adjudicate upon...cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder.' This clause accords the Namibian High Court with the responsibility of enforcing national human rights law.

Likewise, in Zimbabwe, the 1980 Independence Constitution contains a Bill of Rights which recognizes and protects rights such as the right to life, personal liberty, the right to a fair trial, protection against cruel, inhuman degrading punishment or treatment, non-discrimination and the right to property. Section 24 of the Constitution provides that any person who alleges an infringement of his or her rights may apply directly to the Supreme Court (the highest courts in Zimbabwe) for redress.

Similarly, in South Africa the Constitution of 1996 embodies a Bill of Rights that protects rights of individuals including rights of women. These rights include the right to human dignity; freedom from slavery, slave trade and forced labour; privacy; religion; expression and equality and equal protection of the law. The Bill also protects other rights not usually found in Independence Constitutions of the 1960s such as freedom to trade, occupation and profession; labour relations; environment; housing; health care; food, water and social security; education; language and culture. The Constitution further provides that anyone can approach a competent
court alleging that a right in the Bill of Rights has been breached or threatened and
the court may grant appropriate relief including a declaration of rights. A competent
court for these purposes will either be the Provincial High Court, Supreme Court or
Constitutional Court.

There are indeed similar Bills of Rights in Constitutions of other Southern
African countries that catalogue the various rights of individuals including the right of
non-discrimination against women and girls alike. These Bills of Rights also empower
the judiciary to enforce these rights. Thus the courts have the constitutional mandate
to protect and enforce the rights including the rights of women.

3. Judicial Application of the Principle of Non-discrimination
The judiciary in the Southern African countries has entertained a number of cases
involving discrimination against women. These cases have involved not only
traditional discrimination based on gender or sex but also discrimination against gays
and lesbians, and similar practices. Below is an examination of the cases from some
of the countries under discussion.

Botswana
As a preliminary note, it should be observed that he Constitution of Botswana flatly
and unambiguously outlaws discrimination. Section 3 thereof stipulates that 'whereas
every person in Botswana is entitled to the fundamental rights and freedoms of the
individual, that is to say, the right whatever his race, place of origin, political opinions,
colour, creed or sex, but subject to respect for the rights and freedoms of others and
the public interest.' This provision should be examined conjunctively with Section 15,
which regulates discrimination in greater details. Section 15(1) declares that 'subject
to the provisions of subsections (4), (5) and (7) of this section, no law shall make any
provision that is discriminatory either of itself or in effect.' Subsection 2 thereof states,
in part, that 'no person shall be treated in a discriminatory manner by any person
acting by virtue of any written law or in the performance of the functions of any public
office or any public authority.' Significantly, Section 15(1) prohibits the enactment of
any law that is discriminatory. In terms of Section 15(3) of the Constitution the term
discrimination is described as 'affording different treatment to different persons,
attributable wholly or mainly to their respective descriptions by race, tribe, place of
origin, political opinions, colour or creed whereby persons of one such descriptions
are subjected to disabilities or restrictions to which persons of another such
description are not made subject or are accorded privileges or advantages which are
not accorded to persons of another such description.' These provisions completely

Chapter 2 entitled the 'Bill of Rights'.


[1991] B.L.R 231 at p.243. For a discussion of this case and the adverse consequences the court was referring to, generally see Quansah, ibid., at p. 195.

Ibid., p. 244.


The two dissenting judges were JJ Puckrin and Schreiner.


1992 (BLR) 119.

Ibid., pp.131-2.

Ibid., p.165.

Ibid., pp.169-71.


Civil Appeal No. 13/1994 (unreported).

Ibid., p. 30.

Ibid., pp. 30-1.


Ibid.


Ibid., p. 185.

Ibid., p. 186.

(1999) 3 LRC(const) 35.

Kausea v. Minister of Home Affairs 1995 (1) S.A. 21 (Nm HC).

1992 (1) SA (Nm HC).

Id., at 516.

Chapter 1, section 1(a) and (b).

Paragraph 1.

Paragraph (3).

(1998) 3 LRC 648

S.A. 2000 (6) 1.
prohibit, or rather outlaw discrimination in the municipal legal order of Botswana. There is a positive duty imposed on the National Assembly not to enact a law that discriminates against any individual both of itself and in its effect. Moreover, no individual acting on the basis of any written law or in an official capacity is supposed to discriminate against any person.

The issue of sex or rather gender-based discrimination arose in the landmark case of Attorney General (Botswana) v. Unity Dow. Unity Dow, a female citizen of Botswana, was, on 7 March 1984, married to Peter Nathan Dow, a citizen of the United States of America who had lived in Botswana for a period of fourteen years. By that time, Unity Dow had already had a child born out of wedlock in 1979. Subsequently, two children were born of the marriage in 1985 and 1987. By virtue of Section 21 of the Constitution of Botswana, every person born in Botswana on or after 30 September 1966 shall become a citizen of Botswana at the date of his or her birth. The first child became a citizen of Botswana. Meanwhile earlier in 1984, a new Citizenship Act had been enacted which repealed Section 21 of the Constitution. Section 4(1) thereof provided, inter alia, that "A person born in Botswana shall be a citizen of Botswana by birth and descent if, at the time of his birth – (a) his father was a citizen of Botswana; or (b) in the case of a person born out of wedlock, his mother was a citizen of Botswana. The last two children were, therefore, not citizens of Botswana because their father was not a citizen of Botswana. Unity Dow applied for an order declaring that Section 4 of the Citizenship Act was ultra vires the Constitution of Botswana since it violated her fundamental rights to pass her citizenship to her children. In particular, the said provision discriminated against her in that unlike male citizens of Botswana married to foreigners she cannot pass her citizenship to her children. Thus, she was discriminated against on the basis of sex. She based her argument on Sections 3 and 15 of the Constitution of Botswana. These clauses prohibit discrimination against any person on any ground whatsoever.

The respondent, on the other hand, contended that the applicant did not only lack locus standi to litigate on behalf of her children, but she herself had suffered no loss of guaranteed rights. Moreover, since discrimination on the basis of sex was not mentioned under Section 15 of the Constitution, it was not a breach of the Constitution. This argument was predicated on the fact that whilst Section 3 of the Constitution of Botswana mentions the word 'sex' as one of the grounds of discrimination, Section 15 does not.

Therefore, the main issues that the court had to determine were first, whether or not the respondent, Unity Dow, had the requisite locus standi to bring an action on behalf of her children. Secondly, whether or not the Citizenship Act discriminated
against her for not recognizing her other two children as citizens of Botswana. These grounds were argued at great length both in the High Court and the Court of Appeal. But here we are concerned not so much with the first ground dealing with *locus standi*. Rather our main focus is on the second ground concerning whether or not the Citizenship Act discriminated against the applicant by failing to accord her the same treatment availed her male counterparts.

In order to pave the way for answering the second question, the High Court, per Acting Judge, Martin Horwitz (as he then was) wasted no time in rejecting the respondent argument that the applicant lacked *locus standi* to institute the action. It held that the applicant possessed the necessary *locus standi* to litigate on behalf of her children since she would be adversely affected by the application of the relevant provision of the Citizenship Act. Justice Horwitz observed:

I have difficulty in accepting the proposition that the applicant, due regard be had to the possible consequences to her, can be said to have 'no sufficient interest in the proceedings' to give her *locus standi* in terms of section 18 of the Constitution...In my view it is sufficient if she can show that there are consequences upon the application of sections 4 and 5 of the Citizenship Act which affect her adversely to give her *locus standi*.™

Concerning the effects, or rather adverse consequences that the applicant would have to suffer from flowing from section 4 of the Citizenship Act, Justice Horwitz opined:

It seems to me that the effect of section 4 of the Citizenship Act is to hamper *unnecessarily* free choice, the liberty of the subject to exercise her rights in terms of the Constitution in the way she sees fit. No evidence of any national concern such as security and such like has been placed before me to justify the section on such grounds.™

Thereafter, the Court proceeded to deal with the second issue, that is, whether or not the Citizenship Act discriminated against the applicant for not recognizing her other two children as citizens of Botswana. Again, the High Court was forthright in holding that the Act was discriminatory against the applicant. Justice Horwitz examined Section 15 of the Constitution whose subsection (1) prohibits any law that makes any provision that is discriminatory either of itself or its effect. He noted that the word 'discrimination' is defined in the Oxford Dictionary as 'to make or afford different treatment in between, or to differentiate, to perceive in or between'. In his view, 'discrimination against' is to make 'an adverse distinction with regard to.' The judge then concluded that:
In my opinion, the effect of section 15(3) is not restrictive to the definition but it extends the meaning or is explanatory of the word ‘discriminatory’, in that it gives examples of different kinds of discrimination which it is sought to prohibit...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. 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 ground of sex...It is difficult if not impossible to accept Mr Kirby's argument 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.12

An important point to note is the approach adopted by the High Court in interpreting Section 4 of the Citizenship Act vis-à-vis the non-discriminatory clauses of the Constitution in order to arrive at the conclusion that the Citizenship Act was discriminatory against the applicant. Justice Horwitz noted, a fortiori, that in construing constitutional human rights guarantees the court must adopt a generous and liberal approach.13 The judge cited a number of judicial decisions in Botswana and other comparative national judicial pronouncements from the United Kingdom, South Africa, Bermuda on the need to embrace a purposive, generous and liberal to construction of constitutional human rights stipulations and noted:

I have no doubt that upon the authorities I have quoted, and they come from different jurisdictions and different contexts, social, legal, political and socio-economic, I am driven to take a generous or liberal approach to the questions raised in this matter.14

Finally, the High Court held that Section 4 and 5 of the Citizenship Act were discriminatory in their effect against women and as such were ultra vires the Constitution of Botswana and thereby unconstitutional.

The majority of the members of the Court of Appeal endorsed the High Court decision.15 The Court Held that Sections 4 and 5 of the Citizenship Act discriminated against the applicant. In the words of Justice Akinola Aguda:

It is plain and beyond any controversy, in my view, that the effect of section 4 of the Act is to accord an advantage or privilege to a man which is denied to a woman. The language of the section is extremely clear and the effect is incontrovertible, namely, that whilst the offspring of a Botswana man acquires his citizenship if the child is born in
wedlock such an offspring of a Botswana woman similarly born does not acquire such citizenship. A more discriminatory provision can hardly be imagined.\textsuperscript{16}

According to the Court, a provision in the law that accords a privilege or an advantage to one person or group of persons but not to the other is discriminatory and cannot be sanctioned by the law. Such a provision or even law is unconstitutional.

Significantly, in arriving at its decision the Court of Appeal also adopted a broad and generous approach to interpretation of non-discriminatory clauses of the Constitution.\textsuperscript{17} Austin Amissah, J.P., (as he then was) reviewed judicial approach to the interpretation of constitutional human rights provisions in other jurisdictions and articulated the liberal approach in the following language:

\begin{quote}
In my view these statements of learned judges who have had the occasion to grapple with the problem of constitutional interpretation capture the spirit of the document they had to interpret, and I find them apposite in considering the provisions of the Botswana Constitution which we are now asked to construe. The lessons they teach are that the very nature of the Constitution requires that a broad and generous approach be adopted in the interpretation of its provisions; that all the relevant provisions bearing on the subject for interpretation be considered together as a whole in order to effect the objective of the Constitution; and that where rights and freedoms are conferred on persons by the Constitution, derogations from such rights and freedoms should be narrowly or strictly construed.\textsuperscript{18}
\end{quote}

Justice Amissah's sentiments were re-sounded by Justice Aguda. After embracing the generous and broad approach to construction of the human rights clauses of the Constitution, Justice Aguda elucidated on the meaning of generous and broad construction of the human rights clauses of the Constitution. He observed:

\begin{quote}
Generous construction means in my own understanding that you must interpret the provisions of the Constitution in such a way as not to whither down any of the rights and freedoms unless by clear and unambiguous words such interpretation is compelling. The construction can only be purposive when it reflects the deeper inspiration and aspirations of the basic concepts which the Constitution must for ever ensure, in our case the fundamental rights and freedoms entrenched in Section 3.\textsuperscript{19}
\end{quote}

It should be observed that in adopting the broad, generous and purposive approach to the interpretation of the human rights provisions of the Constitution particularly the discriminatory clauses, both the High Court and Court of Appeal did

Justifying the court's reliance upon the international human rights agreements to construe constitutional human rights clauses, Aguda, J.A., it is submitted, quite correctly noted:

In my view it is the clear duty of this court when faced with the difficult task of the construction of provisions of the Constitution to keep in mind the international obligation. If the constitutional provisions are such as can be construed to ensure the compliance of the state with its international obligations then they must be so construed.

Finally, the Court of Appeal concluded that Sections 4 and 5 of the Citizenship Act infringed the fundamental rights and freedoms of the respondent conferred by Sections 3 and 15 of the Constitution and was indeed ultra vires the Constitution.

It is abundantly clear that the liberal and purposive approach adopted by the Court to constitutional interpretation of human rights clauses and reliance on international human rights treaties and instruments in construing constitutional human rights provisions influenced the court to outlaw the relevant discriminatory clauses of the Citizenship Act. As Quansah noted 'this approach undoubtedly influenced the outcome of the application.'²¹

Another case in which the court discussed the issue of the right of women against discrimination is SRC, Molepolole College of Education v. Attorney General of Botswana.²² The point of contention in this case was whether the Teacher Training College Regulations requiring pregnant students to withdraw from colleges and only to have their return to college conditioned by the approval of the Permanent Secretary of the Ministry of Education was discriminatory against the female students and, therefore, unconstitutional. In deciding this issue, the Court of Appeal had to construe the relevant Regulations against the discriminatory clauses of the Constitution of Botswana with a view to finding out whether or not indeed the regulations discriminated against the female students of the colleges. In so doing, the Court approvingly adopted the reasoning Attorney General of Botswana v. Unity Dow. Aguda, J.A., made the following reference to the case:
Any constitutional challenge in our courts on the basis of sex discrimination must begin with the examination of this court's decision in the Attorney General v Unity Dow (Court of Appeal Civil Appeal Number 4/1991). It was in that case that this court held that discrimination based on sex is repugnant to sections 3 and 15 of the Constitution of Botswana.23

Justice Aguda proceeded to recall what he said in Attorney General of Botswana v. Unity Dow case. He noted that treatment of different sexes based on biological cannot be taken or is not per se discrimination for it may be one way of regulating the lives and affairs of one gender in a manner which was inapplicable to the other. But Justice Aguda issued this caveat:

When such a situation occurs, the law or regulation under consideration must be reasonable and fair, and made for the benefit of the welfare of the gender without prejudice to the other; it must not be punitive to the gender in question.24

Ultimately, the Court concluded that the regulations were not, as claimed by the college and accepted by the High Court, protective measures to the mother and child, and an encouragement of a well planned maternity leave. Rather, they were designed to punish unmarried young mothers. This is particularly so since the recurrence of pregnancy results in permanent exclusion from colleges. Moreover, married students are not subjected to similar measures. Their cases are considered as “particular cases.” The Court emphasized the fact that the whole intention of making regulations specifically for women was unreasonable and unfair, and struck down the Teacher Training College regulations for being discriminatory against unmarried female students. It is submitted that the non-discrimination principle propounded in Attorney General of Botswana v Unity Dow case influenced the Court of Appeal to arrive at this decision.

Recently, the High Court embraced the decision in Attorney General of Botswana v. Unity Dow in Ishmael Dintwa v. The State.25 This case does not deal with the principle of non-discrimination nor with women’s rights. However, it illustrates the influential value of the decision in Attorney General of Botswana v. Unity Dow in construing human rights clauses of the Constitution. The applicant was charged with raping a young lady. He was brought before the Francistown Magistrates Court and was remanded in custody. He later on decided to file an application for bail before the High Court in Francistown. When the matter went before the High Court, the applicant had already been freed and released from custody following the withdrawal
of the charges against him. Nevertheless, it was upon the apprehension that his bail application will not succeed on account of the Penal Code (Amendment) Act No. 5 of 1998 that denies bail to persons charged with rape, that he sought to have the Act declared ultra vires the Constitution of Botswana.

In arguing that the Penal Code (Amendment) Act was unconstitutional, the applicant based his argument on, or rather invoked the provisions of international human rights treaties and instruments on the right to bail such as Article 6 of the Universal Declaration of Human Rights, 1948 and Article 9(3) of the International Covenant on Civil and Political Rights, 1996. In addition, the court did not hesitate to rely on the Attorney General of Botswana v. Unity Dow Case as a guide to the interpretation of human rights provisions of the Constitution. Justice Mwaikasu poignantly observed:

As I search for the appropriate stand that this court should adopt in its application upon the constructing of the above cited provisions of the Constitution, I am minded of and find valuable guidance in the decision of their Lordships of the Court of Appeal of Botswana in that monumental Case of ATTORNEY GENERAL v. UNITY DOW, cited above. It is in that case that their Lordships went at great length in reviewing various cases from within and outside jurisdictions as to how courts are expected to interpret the provisions of a written Constitution in the course of the enforcement of fundamental rights and freedoms of the individual as enshrined and entrenched in a Constitution, which I have the privilege to adopt.26

The judge proceeded to observe:

I should therefore be forgiven for making frequent references to such cases in the course of my ruling.27

It is submitted that, obviously, Justice Mwaikasu cannot be forgiven for making frequent references to these cases. It is now becoming a widely accepted judicial practice for judges to seek guidance from comparative national and international judicial pronouncements to reinforce their decisions. In fact, as the self-confessedly acknowledged, the decision in the Unity Dow case enunciates and illuminates on the fundamental tenet or canon of construction of constitutional provisions to be adopted by the courts. This approach to constitutional construction affords individuals protection in fundamental justice. It is an enlightened approach especially to the construction of constitutional human rights clauses.

Relying on Attorney General of Botswana v. Unity Dow case, the High Court adopted a broad, generous and liberal approach, and declared that Section 142(1)(a)
of the Penal Code, as amended by Penal Code (Amendment) Act No. 5 of 1998 was ultra vires Section 5(3)(b) of the Constitution of Botswana guaranteeing individuals the right to bail. In fact, the judge noted that the Attorney General of Botswana v. Unity Dow case has made the work of the courts in interpreting the provisions of the country's Constitution in the process of enforcing fundamental rights and freedoms of the individual, much easier.

It is abundantly clear that although the Attorney General of Botswana v. Unity Dow case was decided approximately a decade ago, and indeed enunciates important principles with respect to non-discrimination and the liberal and purposive approach to be adopted in interpreting non-discrimination clauses in particular and the human rights provisions of the constitution generally, it has nevertheless had a limited influence in Botswana especially within the judiciary. These are the only two decisions in which eloquent reference was made to the case. Admittedly, there have been very few cases dealing with non-discrimination, or rather interpreting non-discrimination clauses of the Constitution. But there has been cases dealing with the interpretation of the human rights provisions of the Constitution in general. Yet, little, if at all, assistance has been sought from the Attorney General of Botswana v. Unity Dow case concerning the approach to be adopted in construing constitutional human rights provisions.

Zimbabwe
As with Botswana, the Zimbabwean Constitution outlaws discrimination in almost similar terms. Section 11 declares 'Whereas every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, tribe, place of origin, political opinions, colour, creed or sex, but subject to respect of the rights and freedoms of others and for the public interest.' Section 23 prohibits the making of any law that is discriminatory of itself or in its effect and no person is to be discriminated against by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

Judicial examination of the non-discrimination clause arose in Rattigan and Others v. Chief Immigration Officer, Zimbabwe and Others. The issue in this case was whether or not a female citizen of Zimbabwe married to a foreigner is entitled to the right to reside permanently with her husband in Zimbabwe. In this case, the three Zimbabwean women, hereafter called the applicants, met and married their husbands, all from the United Kingdom, who had visited Zimbabwe for a 3 months holiday. Their husband's applications for residence permit were denied on the basis
that they had no scare skill to offer. The applicants brought an application to court alleging, inter alia, that the denial of residence permits to their husbands violated Section 11 of the Declaration of Rights embodied in Chapter III of the Constitution of Zimbabwe providing for non-discrimination and 22(1) on freedom of movement. In other words, the alien status of their husbands constituted an impediment to enjoy their freedom of movement. They were discriminated against purely on the basis of sex or gender.

The Court had to construe Section 22(1) of the Constitution in order to determine whether or not the applicants' fundamental freedom of movement had been infringed. The Court noted that in construing a Declaration of Rights a narrow, artificial, rigid and pedantic interpretation should be avoided. According to the Court, where rights are conferred upon persons, derogations therefrom should, as far as the language permits, be narrowly or strictly interpreted. Significantly, in making this observation the Court interlaced its reasoning with the decision in the Attorney General of Botswana v. Unity Dow case. Reference to the case took this form:

A recent reminder that Courts cannot allow a constitution to be a 'lifeless museum piece' but must continue to breathe life into it from time to time when opportune to do so, was graphically expressed by Aguda JA in Dow v. Attorney General [1992] LRC 623 (Botswana C.A.).

The Court proceeded to note:

I can perceive of no warrant to differ from that analysis and reiterate my respectful concurrence with the reasoning of Amissah JP and Aguda JA in Dow v. Attorney General (supra) in the passages of their respective judgments. I would simply add that their conclusion is much supported by the meaning given to 'Declaration of Rights'.

Finally, the Court observed, per Gubbay, C.J., as he then was, that Mrs Dow's situation seemed analogous to that that pertained to the applicants. The bond between husband and wife may be equally as strong as that between mother and child. The condition of matrimony embodies the obligations to found a home, to cohabit, to have children and to live together as a family unit. In the court's view, matrimony is the most fundamental institution known to mankind. It is the first step from barbarism and the true basis of human progress. In conclusion, the court held that denial of residence permits to applicants' husbands infringed their fundamental freedom of movement. It undermined and devalued the protection of movement of each wife as a member of the family unit. It is submitted that the cases amply
demonstrates one way of developing a uniform regional jurisprudence especially in interpreting an otherwise complicated and complex provisions of the Constitution.

Similarly, the Zimbabwean Supreme Court had the opportunity to examine non-discrimination in Magaya v. Magaya. The case involved the issue of whether or not the denial of heirship to the appellant who was the daughter of the deceased by his first marriage conducted under African customary law contravened Section 11 of the Constitution thereby discriminatory. The Court held that the denial was not discriminatory because the legislature never intended that the courts would interpret the Legal age of Majority Act conferring the eighteen years majority age on females so widely as to interfere with or distort customary law. Moreover, matters of customary and succession were exempted from the constitutional prohibition of discrimination. The decision in this case is completely the opposite of the one in Rattigan case and shows inconsistency on the part of the judiciary in protecting the rights of African women especially against oppressive cultural norms.

Namibia

The Constitution of Namibia extensively protects the right to non-discrimination. It is enshrined in several clauses of the Constitution. Article 10(1) thereof guarantees all persons equality before the law. Paragraph (2) provides ‘No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.’ The above clauses are reinforced by Article 23, which generally prohibits racial discrimination and aims at breaking ranks with the erstwhile legacy, which was anchored on racial discrimination. Importantly, Article 10 prohibits sex or gender based discrimination.

However, there has not been much judicial activity on the non-discrimination clause in the Namibian Constitution. The issue arose tangentially in S v. D and Another. The two appellants were each convicted of rape and sentenced to three years imprisonment part of which was conditionally suspended. At stake was the cautionary rule in sexual assault cases, which required the court to consider allegations of sexual assault with abundant caution despite the sex of the complainant. The Court noted that in an overwhelming majority of cases of this nature the complainants are females and in Namibian social fabric this state of affairs is hardly likely to change. In the Court’s view, the so-called cautionary rule has no other purpose than to discriminate against female complainants. The Court concluded that ‘This rule is thus probably also contrary to Art 10 of the Namibian Constitution which provides for the equality of all persons before the law regardless of sex.'
South Africa

The Constitution of South Africa of 1996 unsparingly outlaws discrimination of everyone including women. In its founding provisions it stipulates the Republic of South Africa is founded on the values of 'human dignity and the achievement of equality' and 'non-racism and non-sexism'. The non-discriminatory provision is section 9 which provides that 'everyone is equal before the law and has the right to equal protection and benefit of the law.' Further, '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.' Unlike the other non-discriminatory clauses in the Southern African region, the South African clause covers many factors of possible discrimination. The South African non-discrimination clause has been complemented by various legislation on gender-based discrimination such as Employment Equality Act, 55 of 1998, Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 and the labour Relations Act, 66 of 1995.

Gender-based discrimination before the South African arose in National Coalition for Gay and Lesbian equality and others v Minister of Home Affairs and Others. The applicants, a voluntary association of gay, lesbian, bisexual and transgendered people in South Africa and the South African Human Rights Commission, brought proceedings in the High Court seeking orders, inter alia, that the common law offences of sodomy and unnatural acts between men and other legislation proscribing similar acts were inconsistent with section 9(1) of the Constitution which declare that everyone was equal before the law and the right to equal protection and benefit of the law and section 9(3) providing that the state should not unfairly discriminate directly or indirectly against anyone on the ground of inter alia, sexual orientation. The Court held that the legislation in question were discriminatory and violated section 9(1) and (3) of the Constitution. They were an unfair discrimination against gay, lesbian, bisexual and transgendered people in South Africa. Although this case is more in relation to gay men but it equally applies to lesbian and thus protects the rights of women involved in lesbian practices.

Likewise, in Satchell v President of the Republic of South Africa and Another the issue of gender-based discrimination was addressed. In this case, the applicant, a female judge, lived with the deceased judge in a same sex partnership since 1986. In terms of ss 8 and 9 of the Judges Remuneration and Conditions of Employment Act No. 88/1989 and the regulations thereof only the surviving spouse
of a judge was entitled to gratuity and two third of the judges salary. The applicant argued that this provision did not recognize parties of same set relationships and was thus unconstitutional for being discriminatory. She argued that the Act should include the provision "or a partner in a permanent same-sex partnership." The Constitutional Court held that indeed the Act was discriminatory and ordered that the phrase "should be read into the Act in order to afford the same treatment to people who enter into such relationships.' The reasoning of the case was that people in these relationships had established permanent life relationships similar to marriage creating the duty of support to each other. It is submitted that the decision of the Constitutional Court in the above cases amply protect the rights of women.

Conclusion
The courts have a major role to play in practically implementing, applying and enforcing the rights of women in national law. In Southern Africa there is an emerging trend of interpreting non-discrimination clauses in the various constitutional documents in a broad and purposive manner in order to give individuals especially women maximum protection in fundamental justice. In fact, the Decision in the Unity Down case has been inspiration and influential in this direction as demonstrated by the Supreme Court of Zimbabwe and other courts in the region and elsewhere readiness to follow it. It is submitted that the approach by the courts in the region is one way of developing a uniform regional jurisprudence especially in interpreting an otherwise complicated and complex provisions of the Constitution. Of course, there a some courts in the region that have not embraced this activism compounded by the fact that cases coming before courts involving women's rights have been relatively few. This, notwithstanding, it is duty of the judiciary to give the rights in various international instruments a practical meaning.

1 Literature on the rights of women is extensive. For instance see Cook, Rebecca J. Human Rights of Women: National and International Perspectives (1994); Chihana, C., Women Rights in Law and Socio-economic Development in Southern Africa (1989).
2 There have been a number of international instruments aimed at protecting the rights of women such as Convention on the Elimination of all Forms of Discrimination against Women, 1979.