

## 7. Scope of regional instruments: a perspective on the Southern and East Africa region

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### **Background**

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has been drawn on for the development and adoption of regional Southern and East African instruments relating to eliminating discrimination against women, promoting gender equality and equity and facilitating sustainable and equitable development.

CEDAW has been ratified by all the countries in Southern Africa and in East Africa, except Somalia. However a number of countries have entered reservations to the articles relating to marriage and family life, nationality and to equality before the law. Despite the reservations, CEDAW has been a catalyst for change in many aspects, including women's participation in employment, education, politics and decision-making and reforms of laws to provide better for the rights of women.

Many national constitutions and domestic legislation have also taken their cue from CEDAW and other international instruments. Several shades of gender equality and non-discrimination provisions exist in a number of constitutions, and some progressive pieces of legislation on various aspects of women's human rights are found in this part of the world.

However, the impressive lists of instruments that are recalled, reaffirmed, noted and so on in subsequent instruments do not appear to have brought about commensurate changes in the lives of women of the East and Southern African region.

While significant improvements in the role and status of women are recognised in some spheres of life, such as education and participation in politics, gender equality and equity and a life free from discrimination is still a dream for many. Women and girls in the region continue to face increasingly brutal incidences of gender-based violence, still form the majority among the poorest of the poor and toil on land that they do not own and have no control over. They continue to be vulnerable to infections of HIV and bear the heaviest burden of caring for the sick, even when they are sick themselves.

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Although many of these women would have heard of the instruments from various conferences, seminars, workshops, the media and sometimes friends and family, few know how to claim the rights contained in those instruments, few have the means to do so, many are constrained by the realities of their lives from claiming the rights and many are forced to make painful choices to forfeit the chance to pursue their rights. Yet others are confronted with hostile or uninformed traditional, judicial, religious systems, so they do not benefit from the progressive provisions of those instruments.

Inadequate attention to and erroneous assumptions with regard to the interrelationship between law, culture and gender has led to the limited impact of the plethora of instruments we have at the international, continental and regional levels. It has been observed that there is a lack of connection between law reform and policy formulation on the one hand, and the realities of women's daily lives on the other.

Some obstacles to the implementation of laws and policies have been identified as being based on either customary laws and practices or religious doctrines and practices. The issue of culture is addressed in article 5 (a) of CEDAW, as it provides that: 'State parties shall take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.

In the 14th paragraph of the preamble of the Convention, the state parties reaffirmed an awareness that, 'a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women'.

Gender relations fostered and supported by positive customary laws and practices, gender-sensitive religious practices, and gender-responsive law reform and administration of justice is the aspiration. Due acknowledgement and recognition of the nexus of gender, culture and the law is key to having real, measurable and sustainable changes in women's lives.

The law does not operate in a vacuum and neither is custom and tradition static. This is why The Commonwealth Plan of Action for Gender Equality (2005–2015) 'acknowledges the value of laws and legal mechanisms for advancing women's rights' and also recognises the 'significance of customary laws and practices in the daily lives of women, men and their communities'.

### Regional picture

While instruments and programmes at the international level set landmarks and standards for all to follow, **the development of regional instruments** offers an entry point for addressing the nexus between gender, culture and the law. This has, in fact, expanded the scope of human rights and highlighted specific issues like culture, customary laws, traditional and religious doctrines and practices.

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Women activists, government reformers, implementers and other stakeholders have also found that emerging and continuing issues confronting the realisation of women's rights were not adequately covered by CEDAW and other instruments. For example, violence against women and children, HIV and AIDS, and trafficking of women and girls were not major issues at the time the Convention was being drafted. Furthermore, other economic and social developments in the world have exacerbated old problems – like limited access to land and property, the feminisation of poverty, female genital mutilation (FGM) and property grabbing.

African women have also wanted to have issues that are peculiar to Africa addressed by a developed instrument that will really respond to the needs and challenges of African women. The African Charter on Human and People's Rights<sup>1</sup> was found not to be expansive enough to meet all the challenges. Therefore, a decision was made to have an instrument drawn up by African women for African women to expand on the generic provisions in the Charter. After many discussions and negotiations over a number of years, the Organization of African Unity took up the drafting of a protocol to the Charter.

The Protocol to the African Charter on Human and People's Rights, which focuses on the rights of women in Africa, is a milestone as it addresses issues that are missing from international instruments: issues that previously were considered too personal to be part of human rights instruments, yet that actually affect and touch upon the lives of millions. These include the rights and responsibilities of widows, the treatment of the elderly and the right to protect oneself from HIV infection.

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa<sup>2</sup> was finally adopted during the second session of the Summit of Heads of State and Government of the African Union (AU). At the same session of the AU, a momentous step to implement the gender parity rule for the Commission of the African Charter on Human and People's Rights was taken by the election of five female and five male commissioners. The Protocol is a milestone for women's rights in Africa.

For African societies, culture has implications for the rights to property, inheritance, treatment of widows, reproductive health, and rights within marriage and in the family, the development of the girl child, the right to protection during armed conflict, the right to peace, adequate housing, and sustainable environment. The Protocol takes into account the statutory, customary, traditional and religious issues that challenge women's ability to claim and enjoy these fundamental rights and freedoms.

Heads of state and government adopted a Solemn Declaration on Gender Equality in Africa in 2004 in which, among other things, they reaffirmed their commitments to

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1. Ratified by all African states, and adopted in 1981.
  2. Adopted in July 2003 in Maputo, Mozambique. Came into force after 15 instruments of ratification in 2006.

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international instruments, to gender equality in Africa and urged the ratification of the Protocol in the shortest possible time. The expressed wish to have it ratified by all countries is yet to be realised. This process will be facilitated by the fact that the Summit is going to be getting a report on the progress of the ratifications annually.

When the Protocol came into force in 2006, it had been ratified by 17 countries: Benin, Cape Verde, Comoros, Djibouti, The Gambia, Lesotho, Libya, Malawi, Mali, Mauritania, Mozambique, Namibia, Nigeria, Rwanda, Senegal, South Africa and Togo. More countries have since ratified it, and a campaign to have universal ratification is ongoing.

This is an African document, drawn up by Africans taking into account that culture has some positive elements that should be retained and built on, but also recognising that some negative elements should be prohibited and eliminated. It needs to be implemented and monitored. However, the Protocol will also become a **white elephant** – a good document, but with little or no impact on the lives of the people – unless its contents are known about by women, men, children, traditional leaders and courts, religious leaders and all other stakeholders, and unless it is implemented in full. There is a need for renewed political will that will lead to allocation of adequate resources and time for monitoring and evaluation of the provisions of the Protocol.

Unfortunately, the African Protocol does not contain provisions on how its implementation is to be monitored, and what strategies are to be adopted to make all countries implement it. Some countries have also entered (and had ratified) many reservations. This is an area for further advocacy – to have reservations removed and provide for enforcement mechanisms.

Africa is not homogenous and the various regional economic communities that are the building blocks for the Economic Community of Africa are also looking at issues of gender equality, as they look at all the other aspects of development and integration.

The Southern African Development Community (SADC) has been more deeply involved in this process for a longer time. In 1997, the SADC heads of state and government adopted a Declaration on Gender and Development in which they specifically undertook to review those aspects of culture and tradition that perpetuate discrimination against women, and eliminate them while building on the positive elements in the culture. This was a landmark step, because they were now looking at real issues existing in their countries.

It is critical to note that there has been greater progress in terms of moving towards gender equality in the public domain – employment, participation in politics and decision-making, but the private domain has seen very little movement. The private area is where culture, tradition and religion are strongest, and even legislation is not having much of an impact. This is also the area in which the majority of the people operate. There is a need to move cautiously to avoid making those concerned defensive.

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The SADC Declaration identified positive elements in culture, tradition and religion, and built on them. The SADC Protocol adopted in August 2008, and ratified by 8 of the 14 member states of SADC, has replaced the SADC Declaration with a legally binding instrument addressing the issues that are considered critical to the development of gender equality and the protection and promotion of the rights of women in SADC. However, there still remains the major challenge of ensuring its effective implementation in a manner that recognises and builds upon the positive elements/aspects of culture and tradition.

### **Way forward**

In moving forward with regional instruments, existing instruments at all levels, including national constitutions and positive legislation, need to be simplified, translated into local languages and disseminated as widely as possible, so that the people know what they contain and can use them. Law reform in any country must also be based on taking the positive elements from customary laws and culture, as well as from the statutory or common law.

There are more than enough instruments at all levels. Each subsequent instrument refers to, reaffirms, recommits, recalls previous instruments, but without sufficient assessment of what has or has not been achieved. It is time to put a break to the development of any more instruments and direct energy and resources to the implementation, monitoring and evaluation of existing ones. It will then be possible to fully identify the gaps.

Political will and commitment to implement what governments have ratified is critical, as is the need to emphasise that there are positive elements in African culture and traditions, to publicise those elements and build on them. At the same time, however, it is important to have the courage to discard the negative elements, as the African Protocol provides.

Judicial advocacy is critical in building a legal culture of applying international and regional human rights instruments for the promotion of gender equality and equity.

