



## Journal of Southern African Studies

---

Women, Law and Human Rights in Southern Africa

Author(s): Fareda Banda

Source: *Journal of Southern African Studies*, Vol. 32, No. 1, Women and the Politics of Gender in Southern Africa (Mar., 2006), pp. 13-27

Published by: [Taylor & Francis, Ltd.](#)

Stable URL: <http://www.jstor.org/stable/25065064>

Accessed: 21/05/2014 05:37

---

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <http://www.jstor.org/page/info/about/policies/terms.jsp>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



Taylor & Francis, Ltd. and *Journal of Southern African Studies* are collaborating with JSTOR to digitize, preserve and extend access to *Journal of Southern African Studies*.

<http://www.jstor.org>

# Women, Law and Human Rights in Southern Africa

FAREDA BANDA

(School of African and Oriental Studies)

*This article examines the development of human rights in the Southern African Development Community (SADC).<sup>1</sup> It looks at personal laws and the attempts of parties in postcolonial states to deal with conflicts that arise between the dictates of state customary law, which may be discriminatory towards women, and the move towards embracing human rights with their focus on the removal of sex and gender-based discrimination. While it is clear that there has been enormous progress made in enshrining women's rights, the article urges caution, noting that there are limits to the law's power to change behaviour. Law cannot always provide a solution to discrimination rooted in socio-economic and cultural dispossession. The article is divided into four parts. Part one introduces the legal systems of the region. Part two offers a discussion of the different constitutional models illustrated by case law relating to inheritance. Part three provides an overview of the African engagement with human rights before moving on to consider the two Declarations of the SADC in dealing with gender-based discrimination and violence against women.<sup>2</sup> Part four focuses on the rights contained within the Protocol to the African Charter on Human and People's Rights on the Rights of Women, adopted by the African Union in July 2003.<sup>3</sup>*

## Introduction to the Legal Systems of Southern Africa

Common to all SADC countries is a history of colonialism. During the colonial period there were differences in the way that the colonisers chose to deal with the laws of the colonised people. The original British attempt at Direct Rule, had eventually to be abandoned in favour of Indirect Rule, which allowed the 'native populations' limited decision-making powers in the private sphere and, in particular, with regard to personal or family laws.<sup>4</sup> In British colonies, Africans were allowed to practise their traditions as long as they were not considered to be 'repugnant to natural justice and morality', a phrase that was defined by the Chief Justice of Southern Rhodesia thus: 'The words "repugnant to natural justice and morality" should only apply to such customs as inherently impress us with some abhorrence or are obviously immoral in their incidence.'<sup>5</sup> It is worth noting that although evidencing

---

1 The SADC comprises thirteen states, not all of which are in the strict geographical sense in southern Africa and not all of which will be discussed in this article. The countries are Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

2 Gender and Development: A Declaration by Heads of State or Government of the Southern African Development Community (SADC), (1997); The Prevention and Eradication of Violence Against Women and Children, An Addendum to the 1997 Declaration on Gender and Development by SADC Heads of State or Government, 1998; SADC, *Gender Monitor* (1999), p. 33. The Prevention and Eradication of Violence Against Women and Children: An Addendum to the 1997 Declaration on Gender and Development by SADC Heads of State or Government, 1998, SADC, *Gender Monitor* (1999), p. 37.

3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003. Assembly/AU/Dec.14(II), Draft Decision on the Draft Protocol to the African Charter on Human and Peoples' Rights Relating to the Rights of Women. Available at [www.africa.union.org](http://www.africa.union.org).

4 F. Lugard, *The Dual Mandate in British Tropical Africa* (London, William Blackwood and Son, 1922).

5 *Chiduku v. Chidano* (1922) SR 55, at p. 58.

a Victorian world view, Palléy has argued that the repugnance clause was used for the most part to deal with issues pertaining to the status of women. This included trying to prevent early marriage and the pledging into marriage of girls as well as to facilitate women being awarded custody of children and being allowed to divorce.<sup>6</sup>

Even with the adoption of a relatively *laissez-faire* approach to personal laws, difficulties still arose when there were disputes that needed the intervention of colonial courts. Called upon to interpret 'native law' or customary law, the authorities needed to understand the law. It was not like English or 'European' law in an easily ascertainable form. There were no statutes and precedents did not exist. What were they to make of it?

According to Chanock,<sup>7</sup> the perceived gap in knowledge of 'native law' was filled in by a combination of selective presentation of norms by African males who, fearful of losing control over women, presented 'masculinist' constructions thereof.<sup>8</sup> There was also the selective understanding of legal norms by male colonial officers who themselves discriminated against 'their' women by according them fewer rights than those enjoyed by men in their societies. For both groups the view of the African woman as entitled to fewer rights was consonant with their patriarchal worldviews. As a result, African women were largely left out of this norm making, leading to the charge that customary law is gendered and excludes the female voice, in much the same way that the feminist analysis of international<sup>9</sup> and indeed national law<sup>10</sup> claims happens at the national and international level.

Regardless of the colonial experience and the manner of its conclusion, the common theme in all these countries is that postcolonial legal systems are plural. This means that they recognise general law (statute law), usually based on the law of the colonising state,<sup>11</sup> customary laws and religious laws including those based on Islamic and Hindu principles. There is also what is now known as the living law, an informal, flexible 'law' reflecting the day-to-day practices of people, which may differ from the customary law enshrined in statutes or found in court judgements.<sup>12</sup> The living law is contrasted with 'state' customary law, which is said to have ossified and not kept up with changes in social behaviour.<sup>13</sup>

The extent of the official recognition of this *de facto* pluralism and the arrangement of the legal systems vary. Let us take marriage as an example. Tanzania recognises general,

6 C. Palley, *The Constitutional History and Law of Southern Rhodesia 1888–1965* (London, Oxford University Press, 1966), p. 511.

7 M. Chanock, 'Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform', *International Journal of Law and Family*, 3 (1989), p. 72; M. Chanock, 'Neo-Traditionalism and the Customary Law in Malawi', in M. Hay and M. Wright (eds), *African Women and the Law: Historical Perspectives* (Boston, Boston University Press, 1980), p. 88; M. Chanock, *Law, Custom and Social Order, the Colonial Experience in Malawi and Zambia* (Cambridge, Cambridge University Press, 1985). See too Ranger's thesis on the invention of tradition and the challenge by Roberts. T. Ranger, 'The Invention of Tradition', in T. Ranger and E. Hobsbawm, *The Invention of Tradition* (Cambridge, Cambridge University Press, 1983), pp. 211–62. Contrast this with S. Roberts 'Some Notes on "African Customary Law"', *Journal of African Law*, 28 (1984), pp. 4–5.

8 See also N. Bhebe and T. Ranger, 'Introduction to Volume 1', in N. Bhebe and T. Ranger (eds), *The Historical Dimensions of Democracy and Human Rights in Zimbabwe* (Harare, Zimbabwe Publishing House, 2001), p. xxxii.

9 H. Charlesworth, C. Chinkin and S. Wright, 'Feminist Analysis of International Law', *American Journal of International Law*, 85 (1991), p. 613. H. Charlesworth, 'Human Rights as Men's Rights', in J. Peters and P. Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (New York, Routledge, 1995), p. 103. H. Charlesworth and C. Chinkin, *Boundaries of International Law* (Manchester, Manchester University Press, 2000).

10 C. Mackinnon, *A Feminist Theory of the State* (Princeton, Yale University Press, 1989), pp. 282–4.

11 However, Botswana, Lesotho, Swaziland, South Africa and Zimbabwe are Roman-Dutch jurisdictions.

12 C. Himonga and C. Bosch, 'The Application of Customary Law Under the Constitution of South Africa: Problems Solved or Just Beginning?', *South Africa Law Journal*, 117, 2 (2000), pp. 306–41.

13 *Chiku Liddah v. Adam Omari* at Singida, (PC) Civil Appeal No. 34 of 1991 (Unreported). Reproduced in C. Peter, *Human Rights in Tanzania: Selected Cases and Materials* (Cologne, Rudiger Koppe Verlag, 1997), pp. 66–7.

customary and religious laws, but places them all under a single marriage statute making the pluralism conform to some minimum standards.<sup>14</sup> This is also the approach adopted by Botswana recently.<sup>15</sup> Namibia, South Africa, Zambia and Zimbabwe amongst others, recognise multiple marriage systems governed by different statutes. South Africa is working towards the formal recognition of Muslim marriage.<sup>16</sup> Moreover, in keeping with its constitution, which outlaws discrimination based on sexual orientation,<sup>17</sup> the only constitution in the world to do so, South Africa also recognises the right of people in same-sex relationships to marry.<sup>18</sup> The countries following a civilian tradition include Angola and the Democratic Republic of Congo and they tend to have Family Codes.

Needless to say that whatever the legal system, many people have relationships or unions outside the purview of the law. These are called variously irregular unions, or cohabiting relationships, or relationships in the shadow of the law. The African family structure also lends itself to other types of marital relationships including woman-to-woman marriages in Tanzania and the discredited but still practised levirate or 'inheritance' marriages recognised by the Zimbabwean Customary Marriages Act.<sup>19</sup>

Although reflecting and acknowledging diversity, plural legal systems have the potential to raise internal conflict of law concerns and to disadvantage women who may be caught in a pincer movement when two or more legal systems collide.<sup>20</sup> Other problems raised in post-independence legal systems include the question: Should race still be a determining factor in deciding the system of law that is to apply to a person or case? In an attempt to provide some guidelines on these issues Zimbabwe enacted the Customary Law and Local Courts Act<sup>21</sup> providing for choice of law rules:

Subject to this Act and any other enactment, unless the justice of the case otherwise requires –

- (a) customary law shall apply in civil cases where –
  - (i) the parties have expressly agreed that it should apply; or
  - (ii) regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply;
- (b) the general law shall apply in all other cases.

'Surrounding circumstances' are defined as including:<sup>22</sup>

- (a) the mode of life of the parties;
- (b) the subject matter of the case;

14 Tanzania Law of Marriage Act, 1971 (No. 5 of 1971).

15 Botswana Marriage Act (2000). S. Morolong, 'Overview of Recent Developments in the Law of Marriage in Botswana', in A. Bainham (ed.), *International Survey of Family Law 2002* (Bristol, Jordan Publishing, 2002), p. 67.

16 As a result of the Constitution, which recognises the right to practise one's religion and also respects and accommodates different cultures, Islamic unions have already received recognition. *Rylands v. Edros* (1997) (1) BCLR 77 (CC); *Daniels v. Campbell N.O and Others* (2004) (7) BCLR 735 (CC).

17 Constitution of the Republic of South Africa (Act No. 108 of 1996) s. 9 (3). Please note that, unless otherwise cited, all constitutions referred to in this article can be found in C. Heyns (ed.), *Human Rights Law in Africa* (Leiden, Martinus Nijhoff, 2004), Volume 2.

18 *Fourie and Another v. Minister of Home Affairs and Another* (2005) (3) BCLR 241 (SCA). For a discussion of the potential difficulties that could arise if a same-sex couple tried to live together as spouses in other African states, see F. Banda, *Women, Law and Human Rights: An African Perspective* (Oxford, Hart Publishing, 2005), pp. 106–108.

19 Customary Marriages Act (Chapter 5:07), s. 3 (1).

20 F. Banda, 'Between a Rock and a Hard Place: Courts and Customary Law in Zimbabwe', in Bainham (ed.), *International Survey of Family Law 2002*, p. 471.

21 Customary Law and Local Courts Act (Chapter 7:05), s. 3 (1).

22 *Ibid.*

- (c) the understanding by the parties of the provisions of customary law or the general law of Zimbabwe as the case may be which apply to the case;
- (d) the relative closeness of the case and the parties to customary law or the general law of Zimbabwe as the case may be.

Using the criteria cited above, the Supreme Court of Zimbabwe found a white farmer liable to pay seduction damages under the customary law to his black African female worker.<sup>23</sup> He had challenged the jurisdiction of the Community Court, which applied customary law, to try him. His plea of ignorance of customary law due to his race was dismissed by Dumbutshena CJ who noted that the colour of a person's skin was not determinative of his or her closeness to a legal system. Being a farmer in a rural environment who dealt daily with his mainly black African staff, he was taken to be familiar with customary law.

Overhanging a country's legal system is its constitution, which is regarded as the supreme law of that country. The next part looks at different constitutional models in the region.

## Constitutions

The constitution of every country in SADC has a bill of rights. Many constitutions use the Universal Declaration of Human Rights, 1948 as their starting point.<sup>24</sup> Constitutions guarantee civil and political rights. The more recent ones, which include the South African Constitution, also guarantee socio-economic and cultural rights. As already noted, in most states, customary law is seen as part of the national legal system receiving constitutional recognition and protection. The difficulty that arises is in determining what to do when laws within a state are in conflict and in particular what should happen when personal laws violate principles of equality.

Although most constitutional bills of rights include prohibition of gender or sex-based discrimination, not all do. That there is a potential for conflict between some aspects of personal law, and the non-discrimination or equality before the law provisions are recognised in the constitutions of Namibia,<sup>25</sup> Malawi<sup>26</sup> and South Africa.<sup>27</sup> These constitutions make clear that in the event of a conflict, the non-discrimination or equality provisions are there to rank above the custom or culture under consideration.<sup>28</sup> These 'women friendly' constitutions are generally found to have been drafted after 1990. They reflect and acknowledge the sacrifices made by women during the struggles for liberation which led to independence. The Constitution of Mozambique gives specific recognition to the sacrifice of women in the war against the Portuguese.<sup>29</sup> This group of constitutions reflects an understanding of the fact that

23 *Lopez v. Nxumalo* SC-H 115/85. Discussed in W. Ncube, *Family Law in Zimbabwe* (Harare, Legal Resources Foundation, 1989), p. 20.

24 Universal Declaration of Human Rights, adopted by the UN General Assembly Resolution 217A (III) of 10 December 1948.

25 Constitution of the Republic of Namibia 1990, article 10. The first principle of state policy enjoins the state to aim for 'the enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society...', article 95 (a). However, note that these policies are non-justiciable – article 101.

26 Constitution of Malawi, 1994, articles 20 (1) and 24 (1). See also principles of national policy, article 13 (a) (ii).

27 South African Constitution, 1996 articles 9 (1) and 9 (3).

28 Namibian Constitution, 1990, article 66; Malawian Constitution, 1994, article 24 (2); South African Constitution, 1996, articles 30 and 31 (2). Article 37 (5) (c) makes clear that even in the event of the declaration of a state of emergency, there can be no derogation from article 9, the equality clause. See also Constitution of Mozambique, 1990, articles 66, 67, 162.

29 Constitution of Mozambique, 1990, article 57 (2). See also the preamble and article 7.



women, and African women in particular, have experienced multiple and intersecting discrimination based on grounds of sex, race and class.<sup>30</sup>

The next group of constitutions include that of Tanzania, which while recognising the existence of customary law as well as containing an equality before the law provision,<sup>31</sup> is silent about what is to happen in the event of conflict between personal laws and the constitutional guarantee of equality.

The final group of constitutions illustrated by Botswana, Lesotho, Zambia and Zimbabwe all ring-fence customary law, meaning that customary law is exempt from the scrutiny demanded by the woman-friendly constitutions discussed earlier.<sup>32</sup> What distinguishes the constitutions is the historical framework within which they were drafted. The progressive constitutions arose as a result of internal negotiation with substantial input from women. By way of contrast, the last group of states have merely kept the gender provisions that they were given in British drafted constitutions at the time of political handover. It speaks poorly of them that they have not moved beyond that discriminatory phase.

I will now consider, by way of case law on inheritance, how these constitutional models result in women having their rights to property recognised or not.

### *Case Law on Inheritance*

In October 2004, the Constitutional Court of South Africa passed a judgment that put beyond all doubt the supremacy of the principles of non-discrimination and equality before the law in relation to customary law.<sup>33</sup> The three cases (considered together) all challenged the customary law rule of male primogeniture, which provided that when a person died without leaving a will (intestate), then his/her estate would be inherited by the eldest or closest male relative. The rationale for the primogeniture rule is that although an individual (male) is named as heir, he inherits in a representative capacity. His role is merely to administer the property on behalf of the family or kin group. As women are expected to marry and join the marital family, it is said that they are not suitable guardians for the family property.

The applicants contended that the customary law rule discriminated against African women, violated the equality before the law provision,<sup>34</sup> discriminated against (African) female children in violation of article 28 of the Constitution and was also not in keeping with their human right to dignity as provided for in section 10 of the Constitution. Finally the applicants argued that the primogeniture rule, enshrined in section 23 of the Black Administration Act, 1927 constituted unfair discrimination against them based on their gender and birth.<sup>35</sup> Striking down section 23 and the relevant provisions of the Intestate Succession Act,<sup>36</sup> the Constitutional Court agreed that the rule violated all the provisions

30 The opening section of the South African Constitution makes clear that South Africa is founded on the principles of: 'Human dignity, the achievement of equality and human rights', and also 'non-racialism and non-sexism', ss. 1 (1) and 1 (2) respectively. See also, N. Mandela, 'Diversity – From Divisive to Inclusive', in UNDP, *Human Development Report 2004. Cultural Diversity in Today's Diverse World* (New York, United Nations, 2004), p. 43; M. Pieterse, 'The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Final Nail in the Customary Law Coffin?', *South Africa Law Journal*, 117 (2000), pp. 627–35; Promotion of Equality and Prevention of Unfair Discrimination Act (Act 4 of 2000) (The Equality Act).

31 Constitution of the Republic of Tanzania 1988, s. 13 (1) (2).

32 Constitution of Botswana, 1966, s. 15 (4) (c), Constitution of Lesotho, 1993, s. 18 (4) (b), Constitution of the Republic of Zambia, 1991, s. 23 (4) (c), Constitution of the Republic of Zimbabwe, 1979, s. 23 (3) (a).

33 *Bhe and Others v. Magistrate Khayelitsha and Others, Shibi v. Sithole and Others, South African Human Rights Commission and Another v. President of the Republic of South Africa and Another*, 18 BHRC 52. Also in 2005 (1) BCLR 1 (CC).

34 Constitution of South Africa, s. 9 (1).

35 *Ibid.*, s. 9(3).

36 Intestate Succession Act (Act 81 of 1987).

of the Constitution cited by the applicants. It also noted that customary law had to be seen to evolve to reflect changes in society.<sup>37</sup> Giving reasons for its decision, the court noted:

The importance of the right to equality in our constitutional democracy cannot be gainsaid ... The right to equality is related to the right to dignity. Discrimination conveys to the person who is discriminated against that the person is not of equal worth. The discrimination against women conveys a message that women are not of equal worth as men. Where women under indigenous law are already a vulnerable group, this offends their dignity.<sup>38</sup>

In the Tanzanian case of *Ephraim v. Pastory*,<sup>39</sup> a Haya woman inherited land from a deceased relative. She then sold the land to a third party. Her nephew challenged the sale pointing to a customary law rule that said while women could inherit land to use during their lifetimes, they could not, if there was a male of that clan, alienate it. As already noted, the Constitution of Tanzania is silent on what is to happen in the event of a clash between customary norms and constitutional protection of equality before the law. The Court of Appeal held in favour of the aunt. In so doing it pointed to the fact that Tanzania had, by its ratification of the International Covenant on Civil and Political Rights (ICCPR)<sup>40</sup> and the Convention on the Elimination of all forms of Discrimination against Women (CEDAW),<sup>41</sup> pledged to uphold human rights and not to discriminate against women. It also noted that the Constitution was built on the Universal Declaration on Human Rights (UDHR). Tanzania had of course ratified the African Charter on Human and Peoples' Rights, 1981.<sup>42</sup> The court ruled that the customary law on inheritance was taken to have been modified and qualified and therefore any law banning women from selling inherited land was void and of no effect.<sup>43</sup>

By way of contrast is the Zimbabwean case of *Magaya v. Magaya*.<sup>44</sup> A polygynous man died leaving two sets of children. At the meeting held to appoint a heir, the eldest son refused to be heir saying that he was not prepared to take on the responsibility of looking after the family. It then passed to his sister Venia. A younger brother challenged this appointment arguing that Shona customary law did not recognise the right of a woman to inherit. Venia Magaya argued that of all the children she had been the one who had looked after her parents. She contended that the Shona rule of primogeniture constituted discrimination because of her sex and gender. This discrimination was untenable in light of Zimbabwe's commitment to uphold human rights principles. The Supreme Court found for her brother. In so doing it pointed to section 23(3) (a) (b) of the Zimbabwean Constitution, which ring-fenced customary law from the non-discrimination provision. In direct contrast to the *Bhe* decision discussed earlier, Muchechetere writing on behalf of the majority noted that changing the law was likely to face resistance from the populace and that:

Great care must be taken when African customary law is under consideration. In the first instance, it must be recognised that customary law has long directed the way African people

37 *Bhe and Others v. Magistrate Khayelitsha*, paras 188–90, 210, 219, 221 and 222.

38 *Ibid.*, para. 187.

39 *Ephraim v. Pastory* [1990] LRC 757.

40 International Covenant on Civil and Political Rights, 1966, 999 UNTS 171.

41 Convention on the Elimination of All Forms of Discrimination against Women (hereafter CEDAW), 1979, 12 UNTS 13.

42 African Charter on Human and Peoples' Rights, 26 June 1981, OAU Doc. CAB/LEG/67/3REV 5.

43 *Ibid.*, at p. 770. See also CEDAW, article 2(f).

44 *Magaya v. Magaya* (1999) (1) ZLR 100.

conducted their lives ... In the circumstances, it will not readily be abandoned, especially by those such as senior males who stand to lose their positions of privilege.<sup>45</sup>

And herein lies the rub. Offensive as the second part of the quote may be, it tells the unvarnished truth. In much the same way that the majority of white South Africans clung tenaciously to the privileges bestowed upon them by apartheid, seemingly oblivious of the suffering of the majority, so too many men and some women in positions of influence or who enjoy the patronage of powerful or influential men will be resistant to change and cling to an ossified version of customary law that privileges them.<sup>46</sup> This raises the old age conundrum – to force change by way of law reform or to wait for society to evolve in its own time?<sup>47</sup> The former approach has the advantage of satisfying the call for justice and fairness immediately. However, its ‘translatability’ into action or meaningful change is not certain. Indeed it may be counterproductive as it may lead to a backlash and a rolling back of gains made by inter-personal negotiation. The risk of backlash is heightened when the norms sought to be imposed are perceived to be alien or indeed the work of ‘foreigners’.<sup>48</sup> Human rights are sometimes perceived in this way. Given the longstanding denigration of Africa and its peoples and norms,<sup>49</sup> is it any wonder that the resistance to what is seen as external interference may be concerted?<sup>50</sup>

However, to wait for ‘evolutionary’ change may result in stasis. How long are women to wait and who is to determine that society has evolved sufficiently to ‘allow’ women to enjoy equal rights with men? Neither revolution by top-down change, often without consultation or public education, nor evolution with its fudges, compromises and accommodation of discrimination ‘for the meanwhile’, seem satisfactory solutions. Perhaps law is not the answer to what is after all a social/cultural question.<sup>51</sup> Armstrong and Sinclair have argued that the focus of the courts on the rights of

45 *Ibid.*, p. 113. It is arguable that, using a human rights approach, the Supreme Court could have come to a decision upholding the inheritance rights of African women. See F. Banda, ‘Inheritance and Marital Rape’, in Bainham (ed.), *The International Survey of Family Law, 2001 Edition*, pp. 475–83. See also A. Tsanga, ‘Criticisms Against the *Magaya* Decision: Much ado about Something’, *Legal Forum*, 11 (1999), pp 94–101. It is worth noting that the *Magaya* case has been overturned by statute. See Administration of Estates Amendment Act, 1997 (Chap 6:01), discussed in F. Banda, ‘Inheriting Trouble? Changing the Face of the Customary Law of Succession in Zimbabwe’, in A. Bainham (ed.), *The International Survey of Family Law 1997* (Hague, Kluwer International, 1999), pp. 525–49. Cases in which the facts arose after November 1997 would yield a different result to *Magaya*. Finally, it is worth noting that since 1996 the Zimbabwean Constitution prohibits discrimination on the grounds of gender, although customary law is ring-fenced from the non-discrimination provision.

46 The view of culture as static is of course challenged and contested. UNDP, *Human Development Report 2004*, pp. 88–9. See also P. Andrews, ‘Transitional Perspectives in Women’s Rights’, *Interights Bulletin*, 14 (2004), pp. 145–6.

47 T. Bennett, *Customary Law in South Africa* (Cape Town, Juta, 2004), pp. 76–100.

48 A. Allott, *The Limits of Law* (London, Butterworth, 1980). Resistance to challenges to male privilege is comprehensively documented in the region and suggests that there is a long and difficult road to travel. Southern African Research and Documentation Centre (hereafter SARDC), *Beyond Inequalities: Women in Zambia* (SARDC, Harare, 1998); SARDC, *Beyond Inequalities: Women in Mozambique* (SARDC, Maputo, 2000); SARDC, *Beyond Inequalities: Women in Angola* (Harare, SARDC, 2000); SARDC, *Beyond Inequalities: Women in Southern Africa* (Harare, SARDC, 2000).

49 See OAU Cultural Charter for Africa (1976), articles 1 (b) and 1 (c). Available at [www.africa-union.org](http://www.africa-union.org).

50 State reports to the Committee on the Elimination of all Forms of Discrimination against Women routinely flag ‘cultural resistance’ as the reason for non-implementation of CEDAW. See CEDAW General Recommendation No. 21 on Marriage and Family Relations. UN Doc. A/49/38, para. 15. See also A. Tsanga, *Taking Law to the People: Gender, Law Reform and Community Legal Education in Zimbabwe* (Harare, Women’s Law Centre and Weaver Press, 2003).

51 For a more in-depth discussion, see Banda, *Women, Law and Human Rights*, pp. 299–309.



individuals ignores the fact that African societies are said to be communal.<sup>52</sup> The idea of autonomy or separateness from one's kin groups is therefore alien. The impact of capitalism and the HIV/AIDS crisis in southern Africa, which has decimated families and indeed reconfigured family structure, calls into question the extent to which it can be said African societies remain communal.<sup>53</sup>

Although the cases discussed above show that there are a few women willing to challenge patriarchal laws and attitudes, this should not blind us to the social and personal cost to the women involved. This is particularly true for most women whose entire lives are shaped by their familial relationships. Asserting one's rights over those of intimates does not come easily to many. On the basis of research in Zimbabwe, Cheater noted that those women who did finally get access to the courts had the following characteristics:

... the woman's defence of such rights is supported by male agnates and or her husband's family such that she is *not* jeopardising her social entitlements, that she comes from a family with experience of litigation, that the woman herself is reasonably well-educated, able to speak English, with sufficient self-confidence to speak to lawyers as well as to appear in court if necessary; that she has experience of dealing with bureaucracies, that she has access to the money needed for litigation and that she feels very strongly that any reasonable person would regard her case as valid whatever the legal system.<sup>54</sup>

It seems that the one discourse that has gained the most ground and credibility in recent years is human rights.

## A Brief Overview of the African Engagement with Human Rights

The ending of the Second World War and the foundation of the United Nations is seen by many as marking the beginning of the modern human rights movement. Gaining independence relatively late, Southern African states did not participate in the drafting of the two instruments which, together with the UDHR, comprise what is known as the international bill of rights. These are the ICCPR and the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR).<sup>55</sup> All three instruments contain provisions proscribing discrimination on the grounds of sex and also provide for equal protection before the law.<sup>56</sup> The exclusion of many African states from the drafting of the foundational United Nations human rights instruments has resulted in the charge that these instruments are not representative of southern concerns and indeed that they reflect the perspectives of those in the north.<sup>57</sup> Indeed Eddison Zvobgo has argued that if the UDHR were to be re-drafted, it would reflect more southern sensibilities.<sup>58</sup>

Zvobgo's position is echoed by Mutua who alleges, amongst other things, that the northern construction of human rights is both essentialist (reflecting a western value system) and hypocritical, constructing African violators of rights as 'savages' in need of northern

52 A. Armstrong, 'Rethinking Culture and Tradition in Southern Africa: Research from WLSA', in A. Stewart (ed.), *Gender, Law and Social Justice* (Oxford, Blackstone, 2000), p. 96. J. Sinclair, 'Embracing New Family Forms, Entrenching Outmoded Stereotypes', in P. Lodrup and E. Modvar *Family Life and Human Rights* (Oslo, Gyldendal Akademisk, 2004), pp. 819–20.

53 B. Ibhawoh, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State', *Human Rights Quarterly*, 22 (2000), p. 836.

54 A. Cheater, 'Investigating Women's Legal Rights and Social Entitlements: Some Suggestions From Social Anthropology', in *Women and Law in Southern Africa*, Working Paper No. 2 (1990), p. 85.

55 International Covenant on Economic, Social and Cultural Rights (ICESR), (1966), 993 UNTS 3.

56 UDHR (1948), articles 2, 7; ICCPR (1966), articles 2(1), 3 and 26, ICESCR (1948), articles 2(2), 3.

57 I. Shivji, *Human Rights in Africa* (Dakar, CODESRIA, 1989), p. 3.

58 E. Zvobgo, 'A Third World View', in D. Kommers and G. Loescher (eds), *Human Rights and American Foreign Policy* (Notre Dame, University of Notre Dame Press, 1990), pp. 90–106.

salvation, while ignoring northern violations. Not only does this highlight northern double standards, but it also results in the privileging of the northern perspective or worldview.<sup>59</sup> Reinforcing Zvobgo, but from a gender perspective, women in South and Central America have argued that the UDHR would be a radically different document had there been more input from women.<sup>60</sup> That Zvobgo's concerns remain current can be seen from the comments made by Evans on the 50th anniversary of the UDHR.<sup>61</sup> Evans highlighted the importance of not forgetting the past and also of factoring in global power imbalances in norm making, noting:

Our contention is that any assessment of the dominant idea of human rights must include an analysis of interests, power and hegemony. Unless politics and power are added to the debate, our understanding of the status of human rights in the past and future eras remains incomplete.<sup>62</sup>

However, the sustainability of the argument that the human rights found in United Nations-derived instruments are alien has become increasingly more difficult to sustain. There are several reasons for this. The first is that the vast majority of African states have, post-independence, voluntarily ratified the international bill of rights. Indeed the ICCPR is ratified by 48 out of 53 African States and the ICESCR by 45. This suggests that there is at least some level of acceptance of the norms contained within these instruments. It is, by and large, north African states that have entered reservations<sup>63</sup> with their ratifications, thus again reinforcing the idea of an unqualified acceptance. It is worth noting that in the SADC region, it is only Lesotho that has entered a general reservation to CEDAW.

However, countering the view that human rights have achieved universal acceptance, is the argument that with human rights, good governance and democracy being seen as preconditions for the receipt of aid, most states now ratify human rights instruments as a means of accessing aid. Thus their ratification of international human rights instruments is a matter of expediency rather than commitment.

Still, the argument that human rights are external impositions and thus alien, is hard to sustain in light of the plethora of regional human rights instruments generated on the African continent.<sup>64</sup> Although identifying African culture and civilisation as their starting points, they differ little in content from the United Nations' human rights treaties. The African Charter, the founding human rights instrument on the Continent, contains civil and political, social, economic and cultural rights. The right to development, a third-generation right, is an innovation. Coming as it did after the adoption by the UN of CEDAW, which has been signed

59 M. Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights', *Harvard International Law Journal*, 42 (2001), p. 201. M. Mutua, 'The Banjul Charter: The Case for an African Cultural Fingerprint', in A. An Na'im (ed.), *Cultural Transformations and Human Rights in Africa* (London, Zed Press, 2002), p. 78. See also, Shivji, *Human Rights in Africa*; R. Murray, *The African Commission on Human Rights and International Law* (Oxford, Hart Publishing, 2000), pp. 1–4; and material on the Asian debate: A. Jacobsen and O. Bruun, *Human Rights and Asian Values* (Richmond, Curzon Press, 1990).

60 Latin American and Caribbean Committee for the Defence of Women's Rights, *Declaration of Human Rights from a Gender Perspective* (CLADEM, 2002). See also, WLSA, 'Women and Law in Southern Africa Standing at the Cross-Roads: WLSA and the Rights Dilemma, Which Way to Go?', (WLSA, Harare, 1998), pp. 25–6.

61 M. Evans, 'Introduction: Power, Hegemony and the Universalization of Human Rights', in M. Evans (ed.), *Human Rights Fifty Years on: A Reappraisal* (Manchester, Manchester University Press, 1998), p. 2. See also F. Banda, 'Global Standards: Local Values', *International Journal of Law, Policy and the Family*, 17 (2003), pp. 3–6.

62 Evans, 'Introduction', p. 3. See also UNDP, *Human Development Report 2004*, pp. 21–2.

63 A reservation is a statement made by a ratifying state indicating that it does not intend to be bound by parts of the treaty. The reservation may be specific, that is targeted at a specific article or provision, or it may be general. General reservations may indicate that the state wishes the treaty to be interpreted or made subject to religious law or its constitution. The permissibility of such reservations is contested not least because in seeking to limit the application of the treaty, the state is violating its objects and purpose.

64 Preamble to the African Charter and the African Charter on the Rights and Welfare of the Child, (1990). OAU Doc. CAB/LEG/TSG.Rev.1

or ratified by all but two African states (Somalia and Sudan), the African Charter is unequivocal in its protection of the rights of women:

The state shall ensure the elimination of *every* discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions.<sup>65</sup> (Emphasis added)

The African Charter also has a chapter on duties, which makes clear that individuals have a duty to promote positive African cultural values.<sup>66</sup> Although the content of these is undefined,<sup>67</sup> commentators have noted that these values must be consonant with the other provisions of the Charter, which include the principles of non-discrimination based on, amongst other things, sex and equal protection before the law.<sup>68</sup> The interpretation of African culture as not permitting discrimination based on sex is reinforced in the African Charter on the Rights and Welfare of the Child, 1990, which in article 21(1) (b) makes clear that the state should take steps to eliminate, 'those customs and practices discriminatory to the child on the grounds of sex or other status'.

The discussion above shows a strong normative commitment to human rights. Indeed the seriousness with which human rights are now taken on the African continent can be seen in the founding document of the African Union, the Constitutive Act, 2000. Its key principles include a respect for human rights and gender equality.<sup>69</sup> The AU demands that women be able to participate in equal numbers at all levels of the Union.<sup>70</sup> The first president of the Inter-Parliamentary Union is Tanzanian Gertrude Mongella. Even the regional development blue print for development the New Economic Partnership for Development (NEPAD) is alive to both human rights and gender concerns.<sup>71</sup> The culmination of the African (normative) commitment to human rights, particularly those of women can be seen in the adoption in Maputo, in July 2003, of the Protocol to the African Charter on the Rights of Women (hereafter African Women's Protocol), an instrument that is more radical than CEDAW. Its provisions are considered in the final part of this article.

From the above, it would be easy to conclude that the human rights work has been done. However, as minorities who live in northern states are only too aware, claims that a society and its people believe in human rights and in principles of equality and fairness do not always mean that they practise what they preach.<sup>72</sup> The situation is no different in Africa. Proclamation of a belief and a commitment to human rights are belied by the many civil wars and the daily violations of rights found in most African states. Northern governments are not the only ones who believe in telling others to 'do as I say, not as I do'. African women

65 African Charter, (1981), article 18 (3).

66 African Charter, article 29 (7).

67 The African philosopher Appiah cautions that we should remember that there is no such thing as a unitary African culture arguing that there has been a cross-pollination of cultures. A. Appiah, *In My Father's House: Africa in the Philosophy of Culture* (New York, Oxford University Press, 1992); A. Appiah, 'Citizens of the World', in M. Gibney (ed.), *Globalizing Rights* (Oxford, Oxford University Press, 2003), pp. 212, 224, 227, 228–31.

68 C. Beyani, 'Toward a More Effective Guarantee of Women's Rights in the African Human Rights System', in R. Cook (ed.), *Human Rights of Women: National and International Perspectives* (Philadelphia, University of Pennsylvania Press, 1994), p. 285; Mutua, 'The Banjul Charter', pp. 88–9.

69 Constitutive Act of the African Union, (2002) (available at <http://www.africa-union.org>). See the preamble, the objectives in article 3 (g) and (h), the principles in article 4 (m). See also, Assembly of Heads of State and Government, Third Ordinary Session, 6–8 July 2004, Addis Ababa, 'Solemn Declaration on Gender Equality in Africa', Assembly/AU/Decl.12 (III) Rev. 1, preamble.

70 'Durban Declaration on Mainstreaming Gender and Women's Effective Participation in the African Union, 2002' (available at [www.africa-union.org](http://www.africa-union.org)). R. Murray, *Human Rights in Africa* (Cambridge, Cambridge University Press, 2005), pp. 134–48.

71 Murray, *Human Rights in Africa*, pp. 142–3.

72 F. Banda and C. Chinkin, *Gender, Minorities and Indigenous Peoples* (London, Minority Rights Group, 2004), p. 24.

experience daily the disconnection between rights' provision and rights' implementation and enjoyment.

The above notwithstanding, it is important to examine human rights gains made by women in the region and on the continent. I start by looking at the SADC Declaration on Gender and Development, 1997 and the 1998 Addendum on Violence Against Women.

## The Southern African Development Community Engagement with Rights

From the outset, the SADC group has recognised the importance of principles of non-discrimination and ensuring that women's human rights are respected.<sup>73</sup> For many years SADC has had a gender unit. In 1997, inspired by Beijing,<sup>74</sup> the women of the region lobbied for a separate instrument guaranteeing women's rights. The preamble to the 1997 Declaration makes clear that 'Gender equality is a fundamental human right.'<sup>75</sup> Although recognising and acknowledging progress made within the SADC to mainstream women's rights, the Declaration identifies areas in which women continue to experience discrimination. In addition to women constituting the majority of the poor,<sup>76</sup> the Declaration notes:

... disparities between men and women still exist in the areas of legal rights, power-sharing and decision making, access to and control over productive resources, education and health amongst others.<sup>77</sup>

The list is significant in that it identifies that women experience violations of both their civil and political and socio-economic and cultural rights. To tackle this multiple discrimination, the Declaration makes several suggestions including giving women access to and control over productive resources including land,<sup>78</sup> better access to quality education, which should include removing stereotyping in the curriculum,<sup>79</sup> making available quality health provision for both men and women<sup>80</sup> and ensuring that women's reproductive and sexual rights are protected and promoted.<sup>81</sup> Significantly the Declaration recognises the importance of women's participation in decision-making and provides that states are to aim for 30 per cent participation of women in national legislatures by 2005, a target met only by South Africa and Mozambique. Critically, in light of our earlier discussion of constitutions and the limitations that some of them place on women's rights, the Declaration provides that member states should commit themselves to:

Repealing and reforming all laws, amending constitutions and changing social practices which still subject women to discrimination, and enacting empowering gender sensitive laws.<sup>82</sup>

It is noteworthy that the Declaration requires the state to make 'public' changes to the national laws as well as requiring it to intervene in the private domain by changing social

73 Treaty of the Southern African Community (SADC), 17 July 1992, article 6 (2) (available from: [http://www.iss.co.za/AF/RegOrg/unity\\_to\\_union/pdfs/sadc/8SADC\\_Treaty.pdf](http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/sadc/8SADC_Treaty.pdf)).

74 'Beijing Declaration and Platform for Action, 15 September 1995', reproduced in *International Legal Materials*, 35, 404 (1996).

75 See also SADC Gender and Development Declaration 1997, article B (i). See also article H (vii).

76 *Ibid.*, article C (ii).

77 *Ibid.*, article C (i).

78 *Ibid.*, article H (iii). See WLSA, *A Critical Analysis of Women's Access to Land in the WLSA Countries* (Harare, WLSA, 2001); L. Wanyeki (ed.), *Women and Land in Africa: Culture, Religion and Realizing Women's Rights* (London, Zed Press, 2002); A. Whitehead and D. Tskikata, 'Policy Discourses and Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary', *Journal of Agrarian Change*, 67, 3 (2003).

79 SADC Gender and Development Declaration 1997, article H (v). See also CEDAW, articles 5 (a), 10.

80 *Ibid.*, article H (vi). See also, International Conference on Population and Development, Cairo, UN Doc. A/CONF. 171/13, 18 October 1994.

81 SADC Gender and Development Declaration 1997, article H (viii).

82 *Ibid.*, article H (iv). See also CEDAW article 2 (f).

practices. The Declaration is silent on the strategies that the state should adopt in seeking to bring about changes to social mores. By linking legal and social reform, the Declaration acknowledges that the issues are interlinked. This is the challenge for all African states. As noted earlier when discussing how to reconcile positive African cultural values with the African Charter's injunction that discrimination against women is prohibited, Beyani has argued that custom and culture have always to give way to human rights norms.<sup>83</sup>

Although the SADC Gender and Development Declaration identifies violence against women as an issue deserving of state attention,<sup>84</sup> it was felt that the issue needed greater attention, hence the adoption by SADC in 1998 of an Addendum to the 1997 Declaration on Violence Against Women. This Addendum builds on international developments, not least the UN General Assembly Declaration on the Elimination of All Forms of Violence Against Women, 1993.<sup>85</sup> However, the SADC Addendum goes further than the UN Declaration, adding the concept of economic violence to the existing categories, which include physical, sexual and psychological violence. This addition is an important one in that it recognises that women's economic dependence increases their risk of experiencing violence and also impacts upon their ability to leave difficult marriages.<sup>86</sup>

Perhaps the most radical development in recent years has been the adoption, in July 2003, by the African Union of the Protocol to the African Charter on the Rights of Women in Africa, 2003 (hereafter African Women's Protocol or the Protocol). This Protocol is in force.<sup>87</sup> Although the African Charter clearly proscribes discrimination against women, it was still felt that there needed to be an instrument focusing on women's issues. This was as a direct result of the lack of engagement by the African Commission, which oversees the African Charter, with issues pertaining to discrimination against women. Indeed the reasons given for the need for a separate Protocol echo those given in the preamble to CEDAW, namely that despite the existence of human rights instruments including the African Charter: 'still women in Africa continue to be victims of discrimination and harmful practices'.<sup>88</sup> This reinforces the old cliché that changing the law is easier than changing society.<sup>89</sup> It also leads one to ask whether the adoption of yet another human rights instrument will lead to an improvement in the situation of women or whether the Protocol will join the growing mountain of legal paper tigers.

The SADC group participated meaningfully in the drafting of this Protocol.<sup>90</sup> The SADC contributions were informed by the two Declarations discussed above. The document that emerged constitutes a major breakthrough in women's rights. In outline, it incorporates civil and political and socio-economic rights. It builds on CEDAW but has provisions not found in CEDAW not least on violence against women, defined as including 'deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war'.<sup>91</sup> It also includes sexual harassment and abuse of girls in schools.<sup>92</sup> In light of the high incidence of HIV in the region, it is significant that the innovative article 14

83 Beyani, 'Toward a More Effective Guarantee of Women's Rights'.

84 SADC Gender and Development Declaration, 1997 article H (ix).

85 General Assembly Declaration on the Elimination of All Forms of Violence Against Women, GA Res. 48/104, 20 December 1993. See also CEDAW General Recommendation No. 19 on Violence against Women, UN Doc. A/47/38.

86 See Banda, *Women, Law and Human Rights*, pp. 159–80.

87 It has been ratified by four SADC states: Lesotho, Malawi, Namibia and South Africa.

88 African Women's Protocol, 2003, preamble.

89 Allott, *The Limits of Law*.

90 Comments on the Draft Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, submitted by participants from the eastern and southern sub-regions (unpublished document, on file with the author, 2001).

91 African Protocol on Women's Rights article 1 (j). On violence, see also article 4.

92 *Ibid.*, article 12 (1) (c), 13 (d).



on reproductive rights, which provision includes the first recognition of a limited right to abortion in international law,<sup>93</sup> also recognises the right of a woman to: 'self-protection and to be protected against sexually transmitted infections, including HIV/AIDS'.<sup>94</sup> Linked to this is the right to be informed of the HIV status of one's partner, 'in accordance with internationally recognised standards and best practice'.<sup>95</sup> Again it is worth exploring the limits of the law, for although a woman has the 'right' to refuse intercourse with a husband whom she may suspect of being HIV-positive, the fear of rejection and the inequality of bargaining power in the marital relationship, linked with the social view that women should not refuse to fulfil their conjugal duties, means that the 'rights possessing' woman may still feel compelled to give in to the husband's wishes. Non-consensual sex in marriage is a live issue on the Continent and in the region.<sup>96</sup>

In light of the discussion of inheritance cases earlier, it is significant that article 20 of the Protocol focuses on widows' rights protecting them from customs and practices that constitute degrading and inhuman treatment<sup>97</sup> and also ensuring that women are appointed the guardians of their children, unless it is not in the best interests of said children.<sup>98</sup> Given the continued existence of 'widow inheritance' in some jurisdictions, article 20 (c) makes clear that a woman has a right to remarry and that she may remarry a person of her choice. Given the gender-based discrimination revealed by the cases it is also significant that article 21 on the right to inheritance provides for equal inheritance rights as between male and female children<sup>99</sup> and also provides that a widow and her children should not be evicted from their home on the death of the husband and father.<sup>100</sup> It is also significant that in a provision similar to that found in the SADC Gender and Development Declaration, 1997, states are called upon to:

include in their national constitutions and other legislative instruments, if not already done, the principle of equality between women and men and ensure its effective application.<sup>101</sup>

The continued constitutionally sanctioned discrimination against women in some SADC states indicates that even ratifying states are happy to ignore their obligations. Women are the losers.

While there are many more innovations including the recognition of the rights of disabled<sup>102</sup> and elderly women,<sup>103</sup> guarantees of a right to a healthy and sustainable environment,<sup>104</sup> the right to food security<sup>105</sup> and to housing,<sup>106</sup> it is the provisions dealing with culture that are worthy of scrutiny. Given the role that a non-purposive interpretation of 'culture', broadly defined to include customs, laws and practices, plays in inhibiting the enjoyment by women of their rights, it is interesting to note that the Protocol makes clear that women have the right to live in a positive cultural context. Article 17 makes clear that women

93 *Ibid.*, article 14 (2) (c).

94 *Ibid.*, article 14 (1) (d).

95 *Ibid.*, article 14 (1) (e).

96 A. Armstrong, *Culture and Choice: Lessons From Survivors of Gender Violence in Zimbabwe* (Harare, Violence Against Women Research Project, 1998), pp. 80–1; R. Tenthani, 'Row over Marital Rape Bill', downloaded from: [http://news.bbc.co.uk/1/hi/english/world/africa/newsid\\_1728000/1728875.stm](http://news.bbc.co.uk/1/hi/english/world/africa/newsid_1728000/1728875.stm)

97 African Protocol on Women's Rights, article 20 (a).

98 *Ibid.*, article 20 (b).

99 *Ibid.*, article 21 (2).

100 *Ibid.*, article 21 (1).

101 *Ibid.*, article 2 (1) (a).

102 *Ibid.*, article 23.

103 *Ibid.*, article 22.

104 *Ibid.*, article 18.

105 *Ibid.*, article 15.

106 *Ibid.*, article 16.

are to be involved in the determination of cultural practices, presumably so that they will not be discriminatory.<sup>107</sup> The Protocol also recognises that 'culture' permeates all institutions from the family through to the state and so provides that the state has an obligation to: 'take all appropriate measures to enhance the participation of women in the formulation of cultural policies at all levels'.<sup>108</sup> The preamble to the Protocol makes clear that African values must be based on 'principles of equality, peace, freedom, dignity, justice, solidarity and democracy'. Underpinning the Protocol is the recognition that women have a right to dignity.<sup>109</sup>

The African Protocol has similar provisions on the inter-linkage of legislative and *de facto* or social change to those discussed in the SADC Declaration section, providing that:

States' Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and all other traditional practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.<sup>110</sup>

This suggests a view of culture as dynamic and constantly evolving. Furthermore, the Protocol attempts to engage with women's socio-economic weakness and lack of voice<sup>111</sup> by providing for the state to 'take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist'.<sup>112</sup>

Although potentially controversial, this injunction that states' parties take positive action to address discrimination against women may be key to ending of women's socio-economic discrimination by pushing employers and other institutions to ensure that women are represented in significant numbers in their ranks.<sup>113</sup> Finally, the Protocol also recognises that women may need assistance when seeking to access the law and provides that the state should facilitate such access.<sup>114</sup> There are a large number of organisations<sup>115</sup> in the region working on women's legal rights, meaning that women can continue to build on legal gains. However, Moser notes that the mere assertion of rights is not enough:

...while top-down laws and legal frameworks may provide an important normative basis on which to claim rights, in practice, bottom-up mobilization and local advocacy campaigns may be necessary to achieve success in the contestation of claims.<sup>116</sup>

107 *Ibid.*, article 17 (1). See also article 8 (f).

108 *Ibid.*, article 17 (2). See also articles 2 (1) (b), 2 (2). See A. Rao, 'The Politics of Gender and Culture in International Human Rights Discourse', in J. Peters and A. Wolper (eds), *Women's Human Rights: International Feminist Perspectives* (New York, Routledge, 1995), p. 195.

109 African Protocol on Women's Rights, article 3.

110 *Ibid.*, article 2 (2).

111 World Bank, *Engendering Development Through Gender Equality in Rights, Resources and Voice* (Washington, World Bank, 2001).

112 African Protocol on Women's Rights, article 2 (1) (d).

113 *Ibid.*, article 13. See also CEDAW, General Recommendation No. 25 on Temporary Special Measures. CEDAW/C/2004/WP.1/Rev.1 and UNDP, *Human Development Report 2004*, pp. 69–72.

114 African Protocol on Women's Rights, article 8. See also M. Schuler and S. Kadigamar-Rajasingham, *Legal Literacy: A Tool for Women's Empowerment* (New York, UNIFEM, 1992).

115 These include the Women and Law in Southern Africa (WLSA) organisations based in Botswana, Lesotho, Malawi, Mozambique, Swaziland, Zambia and Zimbabwe and the Women's Law Centre based in Cape Town, South Africa which assisted the plaintiffs in the Bhe case.

116 C. Moser, 'Rights, Power, and Poverty Reduction', in R. Alsop (ed.), *Power, Rights, and Poverty: Concepts and Connections* (Washington, The World Bank, 2005), p. 42. See also Tsanga, *Taking Law to the People*.

Manji argues that formal law is of little use to most African women whose lives are far removed from any interaction with the state or norms generated by it.<sup>117</sup> She sees the living law or internally generated community norms as having a greater impact on women's lives.<sup>118</sup> It may well be, as Maboreke contends that while law grants women rights and legal capacity, it does not address the issue of women's social dependency.<sup>119</sup> I am increasingly persuaded by the view that it is only by way of a realisation of the fundamental values contained in the Millennium Declaration that the condition of all in society can be improved.<sup>120</sup> For women, this calls for an enhancement of their capabilities.<sup>121</sup>

## Conclusion

The article has considered women's rights in the SADC region. It began with an overview of the development of plural legal systems before examining constitutional provisions for addressing issues of discrimination. It then considered case law on inheritance to see the impact of different constitutional models on women's ability to enjoy their rights. Thereafter it looked at human rights on the Continent followed by a consideration of the SADC Declarations before moving on to consider the provisions of the African Protocol on Women's Rights.

It is clear that there are a multitude of human rights instruments, all of which guarantee the rights of women. However, this normative success has not necessarily resulted in women actually enjoying their rights. There are many reasons for this. States may not be committed to enforcing rights, they may not have the resources to do so, they may be reluctant to face down the resistance that often presents itself when people are confronted with change, or it may well be that states do not see women's rights as a priority. For their part, women may be hampered by a lack of knowledge of their rights, fear invoking them if they do know their rights, based on a desire to maintain long-term relationships that they may see as threatened by bringing legal challenges to social norms, and more prosaically by an absence of funding to bring claims. As all these factors are important, one can only surmise that a holistic approach to gender discrimination will bring about the change that sees human rights truly being women's rights.

FAREDA BANDA

*School of African and Oriental Studies (SOAS), Thornhaugh Street, Russell Square, London WC1H 0XG, UK. E-mail: fb9@soas.ac.uk*

- 
- 117 A. Manji, 'Imagining Women's "Legal World": Towards a Feminist Theory of Legal Pluralism in Africa', *Social and Legal Studies*, 8 (1994), p. 434. See also A. Stewart, 'Should Women Give up on the State? The African Experience', in S. Rai and G. Lievesley (eds), *Women and the State: International Perspectives*, pp. 23–50. On resistance to top-down legal change, see also C. Himonga 'Legislative and Judicial Approaches to the Reform of the Customary Law of Marriage and Succession in South Africa: Implications for the Advancement of Women's Rights' (paper presented at the conference on Advancing Women's Rights, hosted by the Women's Legal Centre 30–31 October 2003, Cape Town (Available at [http://www.wlce.co.za/conference2003/2003conference\\_himonga.php](http://www.wlce.co.za/conference2003/2003conference_himonga.php))).
- 118 Manji, 'Imagining Women's "Legal World"'. See also U. Wanjitzek, 'The Power of Language in the Discourse on Women's Rights: Some Examples From Tanzania', *Africa Today*, 49, 3 (2002), p. 12.
- 119 M. Maboreke, 'Understanding Law in Zimbabwe', in A. Stewart (ed.), *Gender, Law and Social Justice* (Oxford, Blackstone, 2000), p. 116.
- 120 United Nations Millennium Declaration, UN General Assembly Resolution 55/2. See paragraphs 19 and 20, and Millennium Development Goals, 2000, especially goals 2 and 3 which focus on education and gender equality (this can be downloaded from [www.un.org/millenniumgoals](http://www.un.org/millenniumgoals)).
- 121 M. Nussbaum, 'Women and Human Development: The Capabilities Approach', in M. Molyneux and S. Razavi (eds), *Gender, Justice, Development and Rights* (Oxford, Oxford University Press, 2003), p. 45. A. Stewart, 'Entitlement, Pluralism and Gender Justice in Sub-Saharan Africa', in J. Murison *et al.* (eds), *Remaking Law in Africa: Transnationalism Persons and Rights* (Edinburgh, Centre of African Studies, 2004), p. 195.