

SADC Protocol on Gender and Development: Road map to equality?

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Is it another ‘gender document’?

There have been a substantial number of documents generated by both the Southern African Development Community (SADC) and the African Union (AU) which have either directly or indirectly provided for gender equality. One generation on, very little substantive change has taken place in the lives of southern African women. The hold of patriarchy has as yet not been effectively challenged by the various documents. This begs the question: Is there any need for another document? The answer is “Yes, but let it be the document that finally delivers!”

The SADC Protocol on Gender and Development (hereafter *SADC Gender Protocol*) was signed on 17 August 2008. The Protocol is intended to take the Region a step closer to finding home-grown, concrete ways of achieving gender equity throughout its 15 member countries. By August 2010, only Angola, Lesotho, Mozambique, Namibia, Seychelles, Tanzania and Zimbabwe had ratified the Protocol; the Democratic Republic of the Congo and South Africa were in the process of doing so. For the Protocol to enter into force, two-thirds of the member states need to ratify it. Already the slow rate of ratification is a concern because many of the Protocol’s objectives are required to be met by 2015.

The SADC Gender Protocol is founded on the rights-based approach to development. This approach requires the mainstreaming of human rights in the development process. This means embracing human rights in policies as well as in the implementation of programmes. Gender inequality, which is widespread throughout the SADC region, is one of the problems that a rights-based approach is intended to resolve. Equality, liberty and dignity – particularly the equality, liberty and dignity of women – are a critical part of mainstreaming. The SADC Gender Protocol is, therefore, both a policy document and an implementation framework for mainstreaming gender equality and equity. The Preamble to the Protocol notes that gender equality and equity are fundamental human rights arising out of various international instruments, including the Convention on the Elimination of All Forms of Discrimination against Women and the Protocol to the African Charter on

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Human and Peoples' Rights on the Rights of Women in Africa (hereafter *African Women's Protocol*).

The rationale for a protocol lies in the evident lack of progress by most SADC countries in meeting targets set under non-binding agreements or pursuing substantive law reform to support gender equality. It was considered important to move the region from an era of paying lip service to their regional commitments into one in which they would be compelled to act through the process of an obligatory, action-oriented framework. Such a framework required the support of various instruments already in force; but, because of their number and scope, their content needed to be consolidated into one, comprehensive document. This not only ensures clarity of normative expectation, it also permits the inclusion of and focus on region-specific manifestations of gender inequity.

Thus, the Protocol should result in an increased accountability on the part of member states on issues of gender equality, both domestically and regionally. By creating common normative standards, the Protocol should empower policymakers, service-delivery institutions, human rights activists, and beneficiaries of the stated rights with the legal tools to demand and claim gender equality. The Preamble to the Protocol states that it is committed to drawing up a plan of action setting specific targets and time frames for achieving gender equality and equity in all areas, as well as instituting monitoring and evaluation mechanisms for measuring progress. Implementing the measures is expected to lead to more measurable, comprehensive, relevant and sustainable change across the region. It creates an imperative for taking immediate action.

Consolidating gains and breaking new ground

The substantive content of the Protocol is not new. However, it introduces a new approach to the implementation of gender equality goals and objectives, and articulates areas of inequality not previously conceptualised. The hope is that this fresh approach will result in a breakthrough in the stalemate that seems to characterise attempts in the subregion to move beyond the many commitments made on paper. The revised approach specifically means that SADC states will now be legally bound to speed up efforts towards gender equality. States are not only expected to commit themselves to making far-reaching changes, but they are to achieve them within the time frame provided.

Where the Protocol seeks to break new ground, it sometimes employs shock treatment in order to achieve its mission. This is evident from both its general phrasing and in the thrust of a number of its articles. For instance, the language of the document reverses the trend of placing *men* before *women*, i.e. all references to the two genders now begin with the female gender. All the same, the Protocol is quick to award men the same rights as women, sometimes in surprising new areas such as the provision on paternity leave. Furthermore,

unlike many women's rights documents, it attempts to recognise that there is little point in addressing women in a vacuum. In this respect the Protocol recognises that the power relationship at the heart of gender discrimination is not always linear. Hence, the Protocol not only addresses men as perpetrators of rights violations, but it also recognises that men, too, may be victims.

The Protocol articulates, in a more nuanced and peculiarly southern African way, a number of violations of women's rights, offering radical and practical ways of addressing such violations, particularly in the area of gender-based violence. Examples include the treatment of victims of violence. Article 20 provides that there needs to be comprehensive testing, treatment and care for survivors of sexual offences in view of the danger of HIV transmission and the issue of sexual harassment. The same Article provides for emergency contraception, access to post-exposure prophylaxis, and social/psychological rehabilitation of perpetrators of gender-based violence. Sexual harassment, which is for the first time clearly articulated in a southern African document,¹ is broadly defined to include a situation in which a power relationship may not be evident. Thus, *sexual harassment* is –

... any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another whether or not such sexual advance or request arises out of unequal power relations.

In view of the 'joking relationships' that characterise many Southern African cultures and traditional way of life, the prohibition against sexual harassment is likely to have a marked impact on how people relate to and treat each other.

Furthermore, the Protocol reiterates the thrust of the African Women's Protocol, which is to bridge the public/private divide and enjoin member states to legislate on issues that were previously taboo, such as sexual and reproductive rights. Sexual and reproductive autonomy, which is quite alien to the southern African traditional setting, is accorded recognition and support.

The provision in Article 16 requiring states to carry out time-use studies on the multiple roles played by women has the potential to revolutionise the way in which gross domestic product, at the macro level, and the family's resource base, at the micro level, are valued and understood. The potential for reconceptualising women's labour is strengthened by Article 19(2)(c) and (d), which calls for legislation to remunerate and recognise the economic value of agricultural and domestic work. Despite these radical offerings, it is noted that provisions relating to personal laws throughout the document tend to be more

1 The document determines that it should be eliminated by 2015.

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muted in their wording and content, and that Articles 16 and 19 very likely do not envisage the inclusion of household chores.

A quick review of the Protocol indicates that quite a large number of the substantive provisions contain clear imperatives and time-bound targets. These provisions represent the highlights of the document, and include the following:

- Revision, amendment and repeal by 2015 of all sex/gender discriminatory laws
- Abolition by 2015 of the minority status of women
- Enactment by 2015 of laws to promote equal access to and retention in primary, secondary, tertiary, vocational and non-formal education
- Adoption and implementation by 2015 of gender-sensitive educational policies and programmes
- Ensuring equal participation of women and men in economic policy formulation and implementation by 2015
- Conduct of time-use studies on women's multiple roles in order to facilitate the adoption of policy measures to ease the burden on women by 2015
- Adoption and enactment by 2015 of policies and laws (including affirmative action) to ensure equal access, benefit, and opportunities for women in trade and entrepreneurship
- Revision by 2015 of all laws and policies that determine women's access to, control of and benefit from productive resources
- Revision, amendment and enactment by 2015 of laws and policies to ensure equal access to waged employment in all sectors of the economy
- Enactment and enforcement by 2015 of legislation prohibiting and formally prosecuting all forms of gender-based violence
- Revision by 2015 of criminal laws and procedures relating to sexual violence to not only make them gender-sensitive, but also to provide for post-assault treatment and care (against HIV in particular) and social/psychological rehabilitation
- Adoption of integrated approaches to reduce gender-based violence by half by 2015
- Adoption by 2015 of specific legislation to prevent human trafficking and provide holistic services for survivors
- Enactment by 2015 of legislative provisions and adoption/implementation by 2015 of policies, strategies and programmes which define, prohibit and punish sexual harassment in all spheres
- Adoption and implementation by 2015 of legislative frameworks, policies, programmes and services to enhance gender-sensitive, appropriate and affordable quality health care
- Adoption and implementation of gender-sensitive HIV-prevention legislation, policies and programmes, which should prevent new infections, ensure universal access to treatment, and recognise "equality in" and infuse "equality into" care-giving by 2015

- Institution of measures to ensure women's equal representation and participation in key decision-making positions in conflict resolution and peace-building by 2015, and
- Promotion of equal representation of women in the ownership of and decision-making structures of the media by 2015.

The not-so-small matter of delivery

The new Protocol is justified by the need to facilitate delivery on state commitments. Thus, the Protocol is expected to contain some clear enforcement mechanisms. These mechanisms also need to exist at both the domestic and regional levels.

The last part of the Protocol, Part Ten, contains the Protocol's implementation framework. In terms of this provision, each state is obliged to institute the requisite legislative framework articulating appropriate remedies to promote gender equality, including adjudication by legally and formally constituted bodies. Secondly, a state budget should allocate the necessary human, technical and financial resources to implement the Protocol. At the regional level, there is a three-tier institutional structure made up of a Committee of Gender/Women's Affairs Ministers overseeing a Committee of senior officials, who in turn supervise a Secretariat. The role of the structure is to monitor and evaluate the implementation of the Protocol through national action plans and analysis of data and biennial reports supplied by the state parties.

A holistic reading of the delivery-oriented provisions of the Protocol shows that the targets and time frames are the main impetus behind the expected action plans. The domestic legal systems of each member state are to undergo reform and create suitable dispute resolution and adjudication facilities to enforce the protection of rights and punishment of violations. The reforms will be enforced through monitoring and evaluation as well as reporting by member states. Much is expected of these domestic legal systems, which are the sole source of rights-related justice.

Not quite there, but there is hope

Employing the 'gender' as opposed to a 'women's rights' perspective and the couching of the text in language that is accessible shows the extent to which the Protocol seeks to be a 'popular' document. However, crucial political elements of 'gender' as a relational/power concept may as a result have been lost 'in translation' and compromise. For instance, in Article 1, the interpretation clause, *gender* is defined as the roles, duties and responsibilities which are culturally ascribed to women, men, girls and boys. This definition omits the hierarchical power relationship that is embedded in the conceptualisation and manifestation of gender differentiation and, therefore, limits the extent to which the Protocol can deliver change.

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Despite the range of substantive changes demanded by the Protocol, many of them seem to be in areas that lie in the public domain. This may result in only 'formal' fulfilment of its objectives. Yet, equality in the public domain is problematic largely because member states do not deal with the underpinning private domain issues that the Protocol is soft on. As long as the Protocol compromises on discrimination in the private arena, patriarchy will continue to flourish. Indeed, the Protocol recognises this in its Preamble, where it states that social, cultural and religious practices, attitudes and mindsets continue to militate against the attainment of gender equality. That being the case, the Protocol does precious little to resolve the problematic hierarchy that characterises many practices and beliefs.

Moreover, constitutional and, consequently, legalised discrimination in the name of custom, culture, and religion is a feature of too many constitutions in the SADC region. Yet, Article 4 on constitutional and legal rights merely asks states to "endeavour", by 2015, to enshrine gender equality and equity in their constitutions and to ensure that it is not compromised by law or practice. Hence, Article 6(1) – on the revision, amendment and repeal of discriminatory laws by 2015 – evidently targets statutory rather than customary laws because Article 6(2)(c), on enacting and enforcing legislative and other measures to eliminate practices which are detrimental to women by prohibiting and punishing them, not only avoids all mention of customary law, but also provides no time frame within which to take action.

Article 7, on access to justice – one of the most crucial provisions of the Protocol – is equally disappointing in its phrasing and lack of imperatives or time frames within which to act. Phrases like "put in place legislative and other measures which *promote*"¹ and "measures shall ensure the *encouragement* of all public and private institutions"² are unlikely to yield any results within the foreseeable future. Equality before the law is clearly not prioritised, thereby diminishing the potency of all the other rights in the Protocol. Since the national justice system is the last resort in any attempt to enforce rights provided by the Protocol, the weakness of this Article is profound.

The absence of imperatives and time frames is also evident in Article 8, on marriage. Despite the fact that the region faces a serious problem of 'child marriages' and 'child mothers', the Article does not set out to definitively ban child marriages. Rather, it allows the state to enact legislation that permits marriage under the age of 18. To be fair, this may be inspired by the need to cater for situations in which marriage may be seen as the best option, e.g. where a teenager is pregnant, but it is detrimental to efforts to ensure that girls stay in school until they complete their programme of study. It in fact perpetuates a patriarchal sense of morality.

1 Emphasis added.

2 Emphasis added.

Despite the fact that property adjustment upon the dissolution of marriage is also one of the major areas of gender inequality, the equitable sharing of property – as it is couched under Article 8(3)(b) – is subjected to the very feature that has made it so problematic in the past: the ‘choice’ of marriage regime.³ The real danger of Article 10(1)(f) emanates from four words: “property of her husband”. The words are problematic for two reasons. Firstly, they reinforce the common belief that, in the traditional southern African setting, property accumulated during the marriage belongs to the male spouse because he is the head of the household and/or is the main source of the family’s income. Therefore, the words cannot be reconciled with the concept of *matrimonial property* as property jointly owned by the parties to the marriage. Secondly, the words are completely alien to the thrust of the document, which is to take a gender-sensitive approach that promotes women’s equality.

Article 12, on political representation, again employs the phrase “shall endeavour”, thus immediately watering down the impact of the 2015 deadline for the achievement of equal representation in decision-making. This Article is further undermined by Article 13, on participation in electoral processes, which are the bedrock upon which representation is founded: the latter Article has no clear imperatives and no time frames at all.

Article 18, on equal access to productive resources, creates strong rights on paper, but it does not seem to create a responsibility on the part of the state to go beyond law and policy reform and actually ensure delivery, on an equality basis, of life-sustaining resources such as water and land – despite the fact that most of these resources are in the hands of the state.

If there is any doubt that the Protocol is soft on gender discrimination perpetrated in the name of culture and custom that doubt is eliminated by Article 21, which states that –

States Parties shall take measures including legislation, where appropriate, to discourage traditional norms, including social, economic, cultural and political practices which legitimise and exacerbate the persistence and tolerance of gender based violence with a view to eliminate them.

There is no definite target or time frame for the elimination of such practices.

But regardless of all the weaknesses identified, there is light at the end of the tunnel. It comes from the provisions on gender-based violence. Part Six of the

3 There is an assumption that women choose to get married under a particular matrimonial regimen and their matrimonial rights may be diminished under the regime because they have exercised a choice. The reality is that women marry under the regime that governs the space in which they are located and the state has a responsibility to ensure that that all marriage regimens share the basics of equality.

Protocol is devoted to gender-based violence and it does offset some of the concerns raised above to some extent. Article 20(1)(a) provides that “States Parties shall[,] by 2015, enact and enforce legislation prohibiting all forms of gender based violence”. The definition of *gender-based violence* under the United Nations Convention on the Elimination of All Forms of Violence Against Women is all-encompassing, and includes physical, sexual and psychological harm or suffering, whether occurring in the victim’s private or public life, and whether perpetrated within the family, within the community, or by the state. By roundly condemning gender-based violence and linking it to HIV and AIDS, many of the negative customary laws and practices may be tackled; it is a way of evading patriarchy and traditionalists who seek to undermine gender equality by arguing that doing away with traditional southern African customs and practices, regardless of how harmful they may be, panders to the Western concept of *human rights* and alienates Africans from their roots. ‘Sucking’ the ‘violence’ out of custom and tradition can make the practice thereof less problematic for women.

The jury is still out

It is too early to predict whether the Protocol will achieve its desired ends. Much will depend on the ability of southern Africans to change long-held attitudes. Without that change in attitude, the proposed law reform processes will not take place; nor will those that do take place result in gender-sensitive laws and gender-sensitive justice delivery systems. Groundwork to change mindsets will have to precede constitutional and other prescriptive law reforms.⁴ If the Protocol’s deadlines are to be met, the groundwork should include state-sponsored proscriptive laws that operate by forcing change. Proscriptive as well as prescriptive/protective laws need to be exploited by the implementers of the Protocol in order to eliminate harmful behaviour, even as change in mindsets is nurtured.

4 Constitutional reforms carried out recently in one of the SADC countries which were intended to bring about a more democratic order failed to end constitutional protection of discriminatory private or customary laws because of popular traditionalist arguments that portray gender equality as an alien notion.