

**The impact of the  
Protocol on the Rights  
of Women in Africa on  
violence against women  
in six selected Southern  
African countries:  
An advocacy tool**

*The impact of the Protocol on the Rights of  
Women in Africa on violence against women in six  
selected Southern African countries: An advocacy  
tool*

**Published by:**

The Centre for Human Rights  
Faculty of Law  
University of Pretoria  
For more information, please see [www.chr.up.ac.za](http://www.chr.up.ac.za)

**Printed and bound by:**

ABC Press  
Cape Town

**To order, contact:**

Centre for Human Rights  
Faculty of Law  
University of Pretoria  
South Africa  
0002  
Tel: +27 12 420 3810  
Fax: +27 12 362 5125  
[chr@up.ac.za](mailto:chr@up.ac.za)  
[www.chr.up.ac.za](http://www.chr.up.ac.za)

**Cover:**

Yolanda Booyzen, Centre for Human Rights

ISBN: 978-0-9814420-1-3

© 2009

The financial assistance of the May and Stanley Smith  
Charitable Trust is gratefully acknowledged.

# TABLE OF CONTENTS

<b>Glossary of terms</b>	v
<b>Preface</b>	vii
<b>1. Introduction</b>	5
1.1 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	5
1.2 Violence against women	7
1.3 Violence against women, HIV and the Women's Protocol	7
1.4 Objective and scope	9
1.5 Methodology and limitations	12
<b>2. Review of provisions and compliance</b>	13
2.1 Non-discrimination	13
2.2 Physical and sexual abuse	25
2.3 Harmful practices	36
2.4 Early marriage	42
2.5 Access to justice and equal protection before the law	44
2.6 Sexual harassment and abuse in schools	49
2.7 Sexual harassment in the workplace	54
2.8 Health and reproductive rights	58
2.9 Widows' rights	63
2.10 Inheritance	65
2.11 Elderly women	71
2.12 Women with disabilities	75
2.13 State reporting	78

<b>3. Conclusion</b>	80
<b>Annexure</b>	82
<b>Bibliography</b>	83

## GLOSSARY OF TERMS

**Affirmative action** refers to a policy that takes gender, race, or ethnicity into account in an attempt to promote equal opportunity.

**Claw-back clause** refers to a contract provision that requires a party who has received a benefit to return that benefit due to specially arising conditions.

**Constitution** refers to an overarching law that defines the fundamental political principles and establishes the structure, procedures, powers and duties of a government.

**Convention** refers to a legally binding agreement between states that is voluntarily entered into. It is enforceable to the extent acknowledged by the parties.

**Domesticate** refers to the process of transforming or incorporating international laws into national legal systems.

**Epidemic** refers to a disease that grows in a human population.

**Female genital mutilation** refers to ‘all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs whether for cultural, religious or other non-therapeutic reasons.’<sup>1</sup>

**Globalisation** refers to the process of transformation of local or regional phenomena into global phenomenon. It can be described as a process by which the people of the world are unified into a single society and function together.

---

<sup>1</sup> World Health Organization ‘New study shows that female genital mutilation exposes women and babies to significant risk at child birth’ (2006) <http://www.who.int/mediacentre/news/releases/2006/pr30/en/index.html> (accessed on 8 July 2009).

**Protocol** refers to an international agreement that adds to an existing international instrument.

**Ratification** refers to a formal action under international law that makes a state a party to particular treaty and indicates a state's consent to be bound by the treaty.

## PREFACE

In 2003, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol) became the first human rights treaty to be adopted by the African Union (AU). When the required number of AU member States (15) had become parties to the Women's Protocol, it entered into force on 25 November 2005. Since then, more States have accepted the Women's Protocol as binding, bringing the number of State parties to 27.

In Southern Africa, nine States have become party to the Women's Protocol: Angola, Lesotho, Malawi, Mozambique, Namibia, South Africa, Tanzania, Zimbabwe and Zambia. These States are also all members of the Southern African Development Community (SADC). Angola and Mozambique are not included in this study due to language difficulties, and Zimbabwe is omitted because it ratified the Protocol when the research had already been undertaken.

Formal acceptance of an international treaty means very little if the acceptance is not followed by 'domestication' – the process of giving effect to the treaty in national law and practice.

This report traces the impact of the Women's Protocol with respect to violence against women in these six States. In the process, a picture emerges of the laws and policies that States have adopted to bring their legal systems in line with the Women's Protocol. A synopsis is provided of these measures taken, best practices are identified and recommendations made.

It is anticipated that the report would serve as a tool for advocacy, assisting civil society to hold these six States accountable for their failure to give effect to the Women's Protocol.

The report was prepared by Karen Stefiszyn, at the time head of the Gender Unit at the Centre for Human

Rights and Alex Prezanti an intern at the Centre for Human Rights. The information in the report is based on research by way of desk research.

The report is also available on the website of the Centre for Human Rights, [www.chr.up.ac.za](http://www.chr.up.ac.za).

**August 2009**





© Rob Annandale/IRIN

## 1. Introduction

This advocacy tool presents the findings of research on adherence to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Women's Protocol or Protocol) by six Southern African Development Community (SADC) countries: Lesotho, Malawi, Namibia, South Africa, Tanzania and Zambia. The research focused specifically on the provisions of the Protocol dealing with violence against women.

### 1.1 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Women's Protocol was inspired by a recognised need to compensate for the inadequate protection afforded to women by the African Charter on Human and Peoples' Rights (African Charter). While the African Charter guarantees non-discrimination on the basis of sex, equality before the law, and the elimination of discrimination against women, it does not articulate specific violations of women's rights which result from discrimination. Moreover, by providing for the elimination of discrimination against women in the context of the family, 'the custodian of morals and tradition' which, in some cases, is the very domain whereby discrimination against women flourishes, it inadvertently conflicts with the attainment of gender equality. The Preamble of the Protocol sheds further light on the motivation behind its drafting noting concern that

despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices.

After seven years from conception through several drafts, with input from civil society and government experts under the leadership of the Special Rapporteur on the Rights of Women in Africa, the Women's Protocol was adopted in Maputo in July 2003 and entered into force in November 2005. It has been ratified by twenty-seven African States. It is both comprehensive and innovative with its inclusion of civil and political rights, economic, social and cultural rights, group rights, and for the first time in an international treaty, health and reproductive rights. Other innovations are the call for the legal prohibition of female genital mutilation and the authorisation of abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus. The Protocol is the first international human rights treaty to explicitly refer to HIV/AIDS. Many of its other provisions provide responses to and protection against HIV through addressing some of the root causes of the spread of HIV such as inequality, violence against women, harmful traditional practices, child marriage, polygamy, inheritance, economic empowerment, and education. The Women's Protocol can be a powerful tool in addressing HIV in Africa.

The Protocol presents advocates of African women's rights with a tool to effect positive change for women on the continent through lobbying governments and monitoring and evaluating their progress in terms of implementation. The Protocol must now be domesticated by those states that have ratified it. Too often, States are complacent or, in fact, delinquent, when it comes to fulfilling their obligations upon ratification of binding human rights treaties. The UN Convention on the Elimination of Discrimination against Women (CEDAW) is a stark example of this, whereby all but two African countries have ratified the Convention yet in many instances women still suffer discrimination. This is exemplified

by women's status as legal minors in marriage and family laws, precedence of customary law over non-discrimination clauses in some constitutions, the perpetuation of harmful traditional practices such as widow inheritance and child marriage, and prohibitive abortion laws, to name only a few examples of violations of internationally recognised standards of gender equality.

## 1.2 Violence against women

Violence against women is defined in article 1 of the Women's Protocol as follows:

all acts perpetuated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war.

Numerous rights of women are included in the Women's Protocol, including those relating to marriage, participation in the political and decision-making process, peace, education and training, economic and social welfare rights, health and reproductive rights, and sustainable development, among others. This guide focuses on those relating to violence against women, defined broadly in accordance with article 1, in recognition of the link between violence against women and the realisation of all the rights addressed in the Protocol. As noted in the UN Secretary General's recent in-depth study on violence against women, promoting and protecting the rights of women and strengthening efforts to achieve substantive equality between women and men are key to preventing violence against women.

Importantly, while the Protocol outlines legislative measures required to address violence against women, it also prescribes other measures, such as social and economic measures including provision of

adequate budgetary resources, public education and awareness-raising. Given that violence against women is deeply rooted in attitudes towards women perpetuated by patriarchy, the Protocol recognises the limits of the law in addressing violence against women. It therefore provides 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 traditional practices and all other practices which are based on the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

In some of the countries referred to in this study girls experience violence, even sexual violence at a young age by boys. This is a reflection of the ways boys are socialised from a young age, through a combination of influences, to undermine the equal dignity of the opposite sex. In order to eradicate violence against women, gender equality must be promoted from childhood. Accordingly, States are obligated under the Protocol to eliminate all stereotypes in textbooks, syllabuses and the media that perpetuate discrimination against women.

Apart from legislative measures, and modifying behaviour, States are further obligated to investigate violence against women, punish perpetrators of violence against women, provide remedies, such as access to justice and reparation, and provide free services such as shelters and medical care. These requirements are in recognition of the accepted principle in international law that states must not simply refrain from violating rights, but they must promote and protect rights through positive measures. Furthermore, the obligations under the Protocol clearly confirm that violence against women is not a private matter, as is often an argument for inaction, but a public concern with serious consequences for survivors and society.



© Nancy Palus/IRIN

### 1.3 Violence against women, HIV and the Women's Protocol

There is a link between violence against women and HIV and AIDS. Violence against women is both a cause and consequence of HIV transmission. Women who are victims of sexual violence, in particular, are at risk of contracting the virus. An unequal balance of power in relationships, often exacerbated by violence, makes it difficult, if not impossible, for women to negotiate safe sex, particularly condom use. Fear of violence often prevents women from seeking testing and counselling and other services. Women struggle to adhere to treatment regimes due to abuse by violent partners. Furthermore, women are also at risk of violence upon disclosure of positive HIV status, accused of infidelity and of bringing the virus into the home.

In 2007 almost 60 percent of adults in Sub-Saharan Africa living with HIV were women. *Women and AIDS: Confronting the Crisis*, a joint report by UNAIDS/UNFPA/UNIFEM, notes that 'violence, poverty, inequality and the lack of basic rights all need to be addressed if HIV/AIDS is to be brought under control'. The Women's Protocol, if universally ratified in Africa and domesticated, can be a powerful tool in the struggle to halt the spread of HIV. It can also be used as a tool to create awareness of women's rights violations on the continent as root causes of the HIV pandemic and to lobby states to protect women from such violations, using the Protocol for guidance, in their strategies to address HIV and AIDS. Violence against women is one manifestation of gender inequality. The United Nations General Assembly Special Session on HIV/AIDS (UNGASS) in 2001 acknowledged that gender equality and the empowerment of women are fundamental elements in reducing the vulnerability of women and girls to HIV. States' commitment to alleviating the HIV pandemic can be measured by their commitment to addressing

the rights of women, including measures taken to eliminate violence against women. The link between HIV and all the rights discussed in this guide are highlighted in the corresponding commentary for each section.

#### **1.4 Objective and scope**

This guide presents the findings from a desktop review of legislative and other measures undertaken by Lesotho, Malawi, Namibia, South Africa, Tanzania, and Zambia towards fulfilling their obligations under the Women's Protocol. By ratifying the Women's Protocol, these countries have committed themselves to domesticate its provisions into their national laws. The aim of this publication is to contribute to popularisation of the Women's Protocol, in this case with respect to its provisions relating to violence against women, by elaborating on the content and meaning of the relevant articles. Furthermore, the findings are intended to be used by civil society to advocate for the necessary legislative reform and implementation of other prescribed measures under the Protocol and by relevant government agents to undertake the required steps toward giving effect to the protection for women offered by this instrument.

This advocacy tool presents the findings of our research on adherence with the Women's Protocol in SADC countries: Lesotho, Malawi, Namibia, South Africa, Tanzania, and Zambia. While 27 African states have ratified the Protocol and studies into legislative compatibility with the treaty of all parties is important, we narrowed our focus to members of SADC due to our placement in the region and accessibility of information. Zimbabwe ratified the Protocol in September 2008. However, the study was too far underway to include it. Angola and Mozambique in the region are also State parties but are excluded from our



research due to our lack of capacity to access the required information in English.

***The following provisions of the Protocol relating to violence against women are the focus of this project:***

- Article 2: Elimination of discrimination against women
- Article 4: The rights to life, integrity and security of the person
- Article 5: Elimination of harmful traditional practices
- Article 6: Marriage
- Article 8: Access to justice and equal protection of the law
- Article 12: Right to education and training
- Article 13: Economic, social and welfare rights
- Article 14: Health and reproductive rights
- Article 20: Widow's rights
- Article 21: Right to inheritance
- Article 22: Special protection of elderly women
- Article 23: Special protection of women with disabilities
- Article 26: Implementation and monitoring

The guide focuses on violence against women rather than providing an overview of compliance with all the Protocol's provisions. This is so largely in recognition of the link between violence against women and HIV and AIDS in Sub-Saharan Africa which requires urgent and increased efforts towards its alleviation, and the link between violence against women and the enjoyment of all of the rights enshrined in the Protocol, such as political

participation, development and dignity. As stated in the UN Declaration on Violence against Women:

Violence against women is a violation of women's human rights and prevents women from enjoying their human rights and fundamental freedoms, such as the rights to life and security of the person, to the highest attainable standard of physical and mental health, to education, work, and housing and to participation in public life. Such violence perpetuates the subordination of women and the unequal distribution of power between men and women. It has consequences for women's health and well-being, carries a heavy human and economic cost, hinders development and can also lead to displacement.

Furthermore, with respect to the rationale for the project's focus, certain provisions are more measurable in terms of implementation than others. For example, within the confines of desktop research, information on legislative measures on violence against women is more accessible than ensuring that 'the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women' in accordance with article 19 on the right to sustainable development. In most cases, for the information presented herein, the relevant indicator of compliance was the existence or lack thereof of legislation. While recognising the limits of legislation, particularly in dual legal systems and with respect to violence against women which is often a result of patriarchy and entrenched social norms, it is indeed an important step and worthy of taking stock.

The Protocol however, and importantly, also prescribes numerous non-legislative measures to ensure effective implementation of the laws, such as adequate budgetary provisions, and social measures relating to public education and awareness-raising. Again, within the limitation of the chosen methodology for this research, that of desktop research, these measures are difficult to assess without active solicitation of information from relevant officials through, for example, questionnaires and

interviews. They are therefore excluded, with exceptions, from the presented findings, and were determined beyond our chosen scope. It is recommended that subsequent research be undertaken to examine states' compliance with the Protocol beyond legislative measures.

## **1.5 Methodology and limitations**

Desktop research was undertaken to compile the findings presented herein. Sources of information include state reports and shadow reports to the CEDAW's Committee, the African Commission on Human and Peoples' Rights and to the African Union under the Solemn Declaration on Gender Equality in Africa, national gender and HIV policies, news articles, civil society reports, and other secondary sources such as books or book chapters and journal articles.

Desktop research has limitations, namely that much information is not in the public domain. This was particularly the case, for example, with respect to article 2(2) of the Protocol which requires States to modify the social and cultural patterns of conduct of men and women. Measures taken in this respect are difficult to identify without visiting relevant government ministries and actively soliciting examples. In many instances, and not only concerning article 2(2), emails were sent to government offices and officials, and civil society organisations but not once did the researcher receive a response.

The findings within this publication are not exhaustive by any means. It is possible that key steps have been taken in one or more of the six countries under review that have been overlooked. While every effort was made to provide accurate information based on the sources located, some findings may be outdated or may have been rendered outdated by an amendment to a law or enactment of a law since

finalising the report. The Centre for Human Rights welcomes any such relevant information to be brought to its attention to file for subsequent studies of this nature.

## 2. Review of provisions and compliance by the six selected States

### 2.1 Non-discrimination

***Article 2: Elimination of discrimination against women***

1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall:

(a) 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;

(b) enact and effectively implement appropriate legislative or regulatory measures, including those prohibiting and curbing all forms of discrimination particularly those harmful practices which endanger the health and general well-being of women;

(c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;

(d) take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist;

(e) support the local, national, regional and continental initiatives directed at eradicating all forms of discrimination against women.

2. 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 traditional practices 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 women and men.

The principle of non-discrimination is universal and is guaranteed in all international human rights instruments and African constitutions. Gender based discrimination is the underlying basis of all violations of women's rights including gender based violence. The UN Declaration on Violence against Women recognises that violence against women

is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.

The Solemn Declaration on Gender Equality in Africa (2004), signed by the Member States of the African Union, emphasises the need to implement 'gender-specific economic, social, and legal measures aimed at combating the HIV/AIDS pandemic' as well as requesting full participation of women in decision making processes and other measures such as public campaigns against gender violence and equitable development measures. Millennium Development Goal 3 equally emphasises the importance of achieving gender equality and women's empowerment, focusing on eliminating gender disparity in primary and secondary education and in public sector employment.

Despite numerous commitments by States to eliminate gender inequality, women continue to be

discriminated against in all spheres of life. Women dominate the poverty, illiteracy and unemployment indicators as well as being heavily disadvantaged within the job market. In the public sphere, direct discrimination is complemented by the more covert but no less harmful measures of indirect discrimination. In the private sphere, discrimination is widespread and widely tolerated both within family units and by the local community. Discrimination is inherent in many cultural and religious practices and continues to plague the legal framework of many Southern African countries. Furthermore, in such circumstances, legislation and policy providing for equal treatment does not guarantee equality of outcome and can in fact, perpetuate injustice. This status quo helps to fuel the HIV/AIDS pandemic as women remain powerless to negotiate the use of condoms with their partners or to protest against harmful cultural practices and domestic violence, due to their culturally and legally reinforced inferiority to men. Finally, access to education is at often restricted for girls based on other violations of rights such as child marriage which denies them means to empowerment and access to information needed to prevent HIV infection.

Article 2 of the Protocol seeks to address these issues by ensuring that all national constitutions contain the fundamental principle of equality between men and women. The Protocol requires that this principle is effectively implemented through laws and regulations, through the integration of the gender perspective into all laws, policies and other spheres of life, and by demanding punishment for those who continue to discriminate. Article 2(1)(d) also expects governments to take affirmative action to ensure an equality of outcomes, while article 2(1)(e) requires them to cooperate on regional and global levels with the same purpose. Notably, article 2(2) obliges governments to eliminate social and cultural stereotypes and practices which reinforce inequality

and harmful practices, through education and awareness programmes.

## **Findings**

Each of the six countries under review has enshrined the principle of equality in their national constitutions as prescribed by article 2 of the Women's Protocol. However, the constitutions of Lesotho and Zambia include a claw-back clause, which places a limitation on the right, in these cases, allowing for gender-based discrimination under personal and customary law. Zambia is in the process of drafting a new constitution where this clause is removed. South Africa and Namibia on the other hand, make it clear that where there is a conflict between two legal systems, the Bill of Rights takes precedence.

Further complying with the Protocol, South Africa's constitutional provision is reinforced by specific obligations under the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000. This Act also sets up specialist Equality Courts which focus on discrimination cases. The National Health Act 2004 promotes equal access to health care and gender-sensitive measures with regards to privacy and dignity in the health care sector. The Employment Equity Act ensures an equal enjoyment of the right to work. The National Education Policy Act (1996) provides a framework to achieve equality in access to education, where the Further Education and Training Act (1998) sets the basis for equal access to further education for marginalised persons, including women.

On the institutional level, South Africa has established gender-sensitive departments in all levels of government, such as the Office on the Status of Women and the Gender Focal Points within the executive, the Joint Monitoring Committee in the Legislative, and Equality Courts in the Judiciary. The Commission on Gender Equality is an advisory body



which monitors and evaluates government measures to ensure that gender equality is protected and promoted. These and other developments are envisaged by the National Policy Framework for Women's Empowerment and Gender Equality.

In Namibia, a number of legal reforms have taken place in the last fifteen years which aim to guarantee gender equality in Namibia. As well as amending labour law and income tax law, several other economic and social rights have been extended to women. The Communal Land Reform Act of 2002, for example, provides for the equal right of women to apply for and be granted land rights in communal areas, and secures the right of inheritance of land to many women who were otherwise denied this right by virtue of customary law and practices. The Married Persons Equality Act of 1996 eliminates the concept of marital power, and allows women more freedoms with regards to the property, which they share with their husbands. The Affirmative Action Act of 1996 requires governments to take positive steps to promote women's equality. The approval of the Combating of rape Act 2000, together with the Domestic violence Act, has given women legal support in reporting cases of sexual abuse and violence. Namibia also boasts a series of institutional measures aimed at protecting women's rights such as the Ministry of Gender Equality, the Department of Women Affairs, the Gender Sectoral Committee, the Gender Commission, the National Information-Sharing Forum and the Gender Network Coordinating Committee. The National Gender Policy (1997) and the National Gender Plan of Action (1998-2003), although in need of renewal, commit the government to involve women in all state-related activities, including conflict resolution.

The Zambian legal system has very restricted potential for addressing gender inequalities. Most inequalities in Zambia derive from the traditional view

on the role of women in society and in the family. This view is reinforced by the predominance of customary law in such areas as land and property ownership. 90% of all land in Zambia is controlled by traditional leaders who manage it according to patriarchal principles. The claw-back clause in Article 23 of the Constitution, referred to above, protects this traditional system. Section 108 of the Industrial and Labour Relations Act, which prohibits all forms of discrimination in employment, is one of the only existing legislative measures on discrimination. The lack of legal measures is somewhat compensated by institutional measures which include a Gender in Development Department in Cabinet, Gender focal points in the ministries, and a Committee on Legal Affairs, Governance, Human Rights and Gender Matters in the Legislature. Zambia also has a national gender policy but requires a further institutional mechanism for its implementation. A strategic action plan was adopted in 2004 for the implementation of the national gender policy.

The first piece of legislation in Malawi which directly addressed discrimination against women was the Employment Act 2000. This law lists several measures necessary for the advancement of a broad spectrum of women's rights and includes affirmative action measures in the fields of education and efforts to modify socio-cultural practices and stereotypes. The proposed National Registration Bill (2006), the Deceased Estates (Wills, Inheritance, and Protection) Bill (2004), and the Domestic Violence Act (2004) indicate a willingness to address gender inequalities in all spheres of life. The government of Malawi has created the Malawi Gender Related Law Reform Commission on the Development of a Gender Equality Statute, with high hopes vested in this future law which is to cover the civil, political, social and economic spheres of everyday life in Malawi. Furthermore, gender policy measures are clearly stipulated in the National Platform for Action, the

National Gender Policy, the Malawi Poverty Reduction Strategy Paper, the National Strategy on Gender Based Violence, and the National Gender Program.

A very important step in the movement towards gender equality and women's empowerment in Lesotho was the adoption of the Married Persons' Equality Act 2006. It equalises the marital status of spouses by eliminating the concept of marital power, where the husband takes full ownership of the wife and her rights and possessions. Equality over access to credit, livestock and economic resources granted by that Act is supplemented by the 2006 Labour Law Act which promotes non-discrimination on the right to work. Nevertheless, the claw-back clause in the Constitution which allows discriminatory customs to stand is a major hurdle in these developments. These legal measures are supported by institutional measures both within and outside of government structures, including the Gender Focal Points, the Gender Caucus Groups and the Basotho Women's Parliamentary Caucus. The Gender and Development Policy of 2003 envisages further legal and administrative changes with the aim of closing the gap between men and women, although a Gender Audit in the same year revealed that much work must be done before this can be achieved.

The Tanzanian Land Act 4 and Village Act 5 of 1999 are further examples of a country's attempt to change discriminatory customary rules on property ownership rights. Both of these laws aim to equalise the power of men and women with regards to co-ownership, mortgages and inheritance, as well as certain political rights such as securing a 25% representation for women in Village Councils and their dispute settlement committees. The institutions which are responsible for safeguarding these initiatives are the Ministry of Community Development, Gender and Children, and the Commission for Human Rights and Good Governance. Gender equality is widely covered in

government published policy documents, including the Policy on Women and Development (2000), the National Plan of Action on VAW (2001-2015), and the Women and Gender Advancement Programme (1997-2003).

All of these countries have undertaken initiatives to fulfil their obligation under article 2(2) with respect to modifying the social and cultural conduct of men and women.

For example, in the 2001-2015 National Plan of Action for the Prevention and Eradication of Violence against Women and Children, Tanzania includes the elimination of female genital mutilation by involving practitioners, community leaders, men and women. It also includes the use of measures to sensitise the public through the mass media, seminars, workshops, community theatre, peer groups and drama, on the need to eliminate GBV and the necessity to build a positive portrayal of women, as well as training of the media personnel to report on VAW. One of these measures is the **National 2008 campaign of 'Say No to Violence Against Women'**.

In Namibia, the Ministry of Gender Equality and Child Welfare has **Gender Liaison Officers** in all 13 regions of the country who disseminate information, including to rural areas, to promote legal literacy and to sensitise traditional leaders and the community at large on gender equality. For this purpose, the Ministry has developed a gender training manual and resource guide, in English and translated into local languages, which is used by trainers at workshops. The National Literacy Policy and the Namibian HIV/AIDS Charter of Rights also provide for nation-wide education campaigns on reproductive health available to men and women.

Namibia has also extended the 16 days of no violence against women campaign to 365 days of Action to end Gender-based violence and developed a

national plan aimed at reducing gender based violence.

Lesotho also has a **365 Day National Action Plan to End Gender Violence**. Also towards fulfilment of article 2(2), the Lesotho Education Sector Strategic Plan 2005-2015 includes the creation of gender-sensitive curricula in relation to the strategic objective to attain gender equity and parity in primary and secondary education by 2015.

South Africa has an extensive **National Policy Framework for Women's Empowerment and Gender Equality** and **Adult Basic and Education Training Centres** which concentrate on achieving women's empowerment through education, including adolescent education. Also, there have been several easily accessible information and awareness campaigns about issues such as safe sexual practices and national and international human rights, including the **16 Days of Activism to End Violence against Women Campaign** observed annually and the 365 days National Action Plan to end Violence against Women and Children.

South Africa's National HIV/AIDS Strategic Plan 2007-2011 includes sustainable behavioural change as does the National Policy on HIV/AIDS for Learners and Educators in Public Schools and Students and Educators in further Education and Training (1999).

As part of its National Gender Policy, the Zambian government has pledged to increase the intake of girls into science colleges and provide further facilitation of women's access to financial loans.

Malawi has undertaken an information campaign as part of its 'Women in Development Policy and Plan of Action (1993)', reaching 3.7 million people on sexual reproductive health rights and women's roles. More recently, the government, and several NGOs, has conducted several human rights and women's rights

awareness programmes throughout the country, as well women-specific literacy programmes which have reached 10,000 indigent women.

### Synopsis of findings

	Lesotho	Namibia	Malawi	South Africa	Tanzania	Zambia
<b>Principle of equality and non-discrimination enshrined in Constitution</b>	Sec 18 clawback: 18(4)(c) personal law exceptions	A.10; see also A.14 (family rights)	S.20(1) (discrimination); S.24(1) (equal protection of the law)	S.9(1); S.9(3)	A.12 & A.13(1-2) but see A.13(6); A.22 (equal right to work)	A.23 (but see claw back clause)
<b>Legislative measures</b>	Legal Capacity of Married Persons Act 2006 (repealing marital powers); Labour Code Act 2006	Labour Act 1992 & 2004; Cooperatives Act 23 of 1996; Affirmative Action Act 1998; Income Tax Act (amended); Communal Land Reform Act 2002; Married Persons Equality Act 1996	Labour Relations Act and Employment Act; Prevention of Domestic Violence Act 2006	Promotion of Equality and Prevention of Unfair Discrimination Act of 2000; National Health Act 2004; Employment Equity Act 1998; National Education Policy Act 1996; Further Education and Training Act (1998)	Land Act no.4 & Village Act no.5 of 1999	S.108 Industrial and Labour Relations Act

<b>Institutional measures</b>	Gender Focal Points; Gender Caucus Groups; Basotho Women's Parliamentary Caucus	Ministry of Gender Equality; Department of Women Affairs; Gender Sectoral Committee; Gender Commission; National Information-Sharing Forum; Gender Network Coordinating Committee	Malawi Gender Related Law Reform Commission	Office on the Status of Women and Gender Focal Points (executive); Commission on Gender Equality; Parliamentary Joint Monitoring Committee; Equality Courts	Ministry of Community Development, Gender and Children; Commission for Human Rights and Good Governance	Gender in Development Department in Cabinet; Gender focal points in ministries; Committee on Legal Affairs, Governance, Human Rights and Gender Matters in Legislature
<b>Party to CEDAW/ timely reporting</b>	YES (2/02/1989; no reports)	YES (26/05/2000; 2nd submitted 9/03/2007)	YES (1987; last report 19/05/2006)	YES (15/02/1995; 2nd and 3rd reports overdue)	YES (20/08/1985); last report 11/07/2008)	YES (21/06/1985; last report 2002)
<b>Reporting to AU on Solemn Declaration on Gender Equality in Africa</b>	YES	YES	NO	YES	NO	NO
<b>Public education, information, education and communication strategies</b>	Lesotho Education Sector Strategic Plan 2005-2015; 365 Day National Action Plan to End Gender Violence	National Literacy Policy; Namibian HIV/AIDS Charter of Rights; Gender liaison Officers	Human rights and women's rights awareness programmes; Women In Development Policy and Plan of Action 1993 reaching 3.7 million people	Dissimination of Constitutional and legal rights in accessible format; Adult Basic Education and Training Centres	National campaign of 'Say No to Violence Against Women' 2008	Increased intake of girls into science colleges; facilitation of women's access to loans

<b>Policy measures</b>	Gender and Development Policy (2003)	National Gender Policy (1997); National Gender Plan of Action (1998-2003)	National Gender Programme 2004; Free primary education; Pregnancy policy; Vocational recruitment policy	National Policy Framework for Women's Empowerment and Gender Equality	Policy on Women and Development 2000; National Plan of Action on VAW (2001-2015); Women and Gender Advancement (1997-2003)	National Gender Policy 2000; Strategic Action Plan 2004
------------------------	--------------------------------------	---------------------------------------------------------------------------	---------------------------------------------------------------------------------------------------------	-----------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------	---------------------------------------------------------

### Best practices

Millions of rands have been spent in South Africa on educating the public on the Constitution with an emphasis on the Bill of Rights which includes important equality provisions (including pocket-size and cartoon versions of the document).

The South African Land Redistribution and Tenure Reform Programme has benefited 155,003 households from 1994 to 2003, of which 12.7% of the beneficiaries were female-headed households, representing an increase from only 1.2% in 1994. Also, 49% of all housing subsidies since 1994 have been granted to women (about ZAR 10 billion).

Namibia's Ministry of Agriculture, Water and Rural Development alongside the Food and Agriculture Organisation has developed an outreach programme for communal farmers and female-headed households in rural areas to increase information and advisory services aimed at changing societal perceptions and attitudes on the role of women.

Workshops in local Namibian communities on gender and women's participation in politics and decision-making, bring together women, men and community leaders to sensitise the general public on the role of women in politics and decision-making. An emphasis was placed on encouraging men to support



women in standing for elections and voicing their opinions.

In the case of *Ephrahim v Pastory* (22 February 1990) The Tanzanian High Court equated women's inheritance and disposition of property rights to male members of the clan (previously only rights to hold land for life).

The Gender Consultative Forum in Zambia brings together government, civil society and other cooperating partners to review the progress on the national gender policy.

Lesotho adopted the Married Persons' Equality Act abolishing women's minority status in marriage.

The Malawi Human Rights Commission trains magistrates and judges on CEDAW.

### **Recommendations**

- Zambia and Lesotho must amend the Constitution to remove the claw-back clause which permits discrimination in personal and customary law.
- All countries must address all the aspects (economic, social, cultural and political) of gender equality through further legislation and policy.
- All countries under review should ensure timely state reporting under CEDAW and the African Charter on Human and Peoples' Rights (on the legislative and other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the African Charter, art 62 of the Charter). These reports shall include the measures taken to realise the rights in the Women's Protocol (art 26 of the Protocol).
- Malawi, Tanzania and Zambia must report to the AU Commission on their implementation of the Solemn Declaration on Gender Equality in Africa.

- All six countries need to allocate more resources and create partnerships with NGOs and civil society to implement article 2(2) by attempting to change cultural stereotypes that prevent gender equality. More attention needs to be given to working with boys and men in this respect.
- Institutions to oversee implementation of national gender equality policies must be strengthened and afforded the necessary human and financial resources.

## 2.2 Physical and sexual abuse

***Article 4: The rights to life, integrity and security of the person***

...

2. States Parties shall take appropriate and effective measures to:

(a) enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex *whether the violence takes place in private or public*;

(b) adopt such other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence against women;

...

(e) punish the perpetrators of violence against women and implement programmes for the rehabilitation of women victims;

(f) establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women;

(g) prevent and condemn trafficking in women, prosecute the perpetrators of such trafficking and protect those women most at risk.

Full compliance with the provisions of article 4, both on paper and in practice, can significantly reduce the spread of HIV.

***The link between violent sexual acts and HIV transmission:***

- The virus can be directly transmitted as a result of the cuts and abrasions received due to the violent nature of the sexual encounter.
- Women and girls in violent relationships are unlikely to be able to negotiate safe sexual relations because of fear and intimidation.
- Young girls may go on to engage in risky sexual behaviour as a result of the abuse.
- since women are more likely to test for HIV, through ante-natal care, for example, they run the risk of being blamed for contracting the virus and being exposed to further violence.

The first step towards addressing violence against women is for the state to comply with article 2(a), which obliges it to pass and enforce specific laws which define and prohibit all forms of violence against women, especially rape and other forms of sexual abuse.

Not all the counties examined in this study have complied with this provision. For instance, Malawi and Zambia have no specific laws on sexual offences beyond the provisions of the penal code, which do not define the offences with sufficient detail and therefore do not send out a strong and clear message that sexual violence is condemned by the state, although Malawi's Constitution (1994) provides in its art 24 on the rights of women that legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as; sexual abuse, harassment and violence. Zambia is preparing

a Sexual Offences and Gender Violence Bill to address this shortcoming, but customary law may hamper any future legislation, as under custom the right to sue is derived from the family's status and can only be claimed by the family.

Lesotho, Namibia, South Africa and Tanzania have passed laws on sexual violence. These are:

- Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (South Africa)
- Combating of Rape Act No 8 of 2000 (Namibia)
- Sexual Offences (Special Provisions Act) 1998 (Tanzania)
- Sexual Offences Act 2003 (Lesotho)

### ***Marital rape***

While the Protocol does not explicitly refer to a state's obligation to legislate against rape in marriage, article 2(a) refers to the prohibition of unwanted or forced sex whether occurring in public or private, which can be inferred to include marital rape. The Declaration on the Elimination of Violence against women confirms the shift in the legal definition of rape across the globe to include marital rape as a form of violence against women. Making it clear that such acts are criminal proves a state's dedication to increasing women's empowerment in their homes and in society.

One of the largest categories of those newly infected with HIV are married women, many of whom are surprised when they learn that their relationship has not been monogamous. Contrary to popular perception, marriage is not a haven from HIV. It is therefore unfortunate that the laws of Malawi, Tanzania and Zambia continue to fail to recognise that rape within marriage is a criminal offence.

This issue has been adequately addressed in Lesotho (Sexual Offences Act 2003), Namibia

(Combating of Domestic Violence Act 4 of 2003) and South Africa (Prevention of Family Violence Act 133 of 1993 & Criminal Law (Sexual Offences and Related Matters) Amendment Act 2006).

Other forms of violence, such as domestic violence, must also be explicitly covered by criminal legislation. Leaving such issues to be treated under the general laws on assault ignores the specific problem of domestic abuse and leaves most women unprotected due to the traditional views that wife abuse is a matter to be confined to the private sphere. Of the countries under review, specific laws on domestic violence are still absent in Lesotho, Tanzania and Zambia. The three other countries cover domestic violence in the following laws:

- Protection against (Prevention of) Domestic Violence Act 2006 (Malawi)
- Combating of Domestic Violence Act No 4 of 2003 (Namibia)
- Domestic Violence Act 116 of 1998 (South Africa)

### ***Trafficking***

A further form of violence against women is the lucrative form of modern-day slavery known as trafficking. Commercial exploitation of women and children within or across a country's borders increases the incidence of violent sexual acts as well as exposing both the victims and receivers of those services to the risk of contracting HIV. All six countries have ratified or acceded to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), which supplements the United Nations Convention against Transnational Organised Crime. This is one measure taken in compliance with the Women's Protocol to take appropriate and effective measures to prevent and condemn trafficking in women, but by no means does

it fulfil the stipulated obligation without at least enacting and enforcing specific legislation.

Trafficking is defined in article 3(a) of the Trafficking Protocol as: "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs."

While existing laws prohibiting forced labour, slavery, kidnapping, and child prostitution, can be used to prosecute trafficking cases, they cannot effectively address trafficking, as they lack specific provisions setting out the elements of the offence, and specific penalties and provisions to protect the rights of victims. Article 2(g) can only be understood to require the passing of comprehensive legislation aimed specifically at combating trafficking and protecting trafficking victims. Such legislation has only been passed in Namibia with the Prevention of Organised Crime Act of 2004 but even this law is ineffective until Parliament passes the implementing regulations required by that law. The five other countries are at varying stages of drafting anti-trafficking legislation and continue to rely on existing and largely inadequate law:

***Southern African legislation to combat trafficking***

- Lesotho – Proclamation No. 14 of 1949 imposes penalties for the procurement of women or girls for purposes of prostitution; Sexual Offences Act 2003 prohibits commercial sexual exploitation of children; Child Protection and Welfare Bill will prohibit trafficking of children under the age of 18;
- Malawi – trafficking prohibited in Penal Code; Child Care, Protection and Justice Bill will prohibit child trafficking; drafting of comprehensive anti-trafficking legislation underway;
- South Africa – Children’s Act; Sexual Offences Act; Draft Trafficking in Human Persons Bill;
- Tanzania – Draft anti-trafficking legislation;
- Zambia – amendment to Penal Code (2005) to prevent human trafficking (increasing the prison sentence to 20 years to life); Draft comprehensive anti-trafficking law, currently with Zambian Law Development Commission for review.

***Punishment***

Apart from enacting legislation to prohibit the above, it is also important to examine whether the government is effectively punishing the perpetrators of those acts. Article 2(e) is not a simple restatement that violence against women must be labelled as a criminal act. A detailed and inclusive criminal statute is of no use in the fight against sexual violence and HIV where law enforcement agencies and the judiciary do not make use of the law to curb the violence, sending out conflicting messages to potential offenders.



© Tiggy Ridley/IRIN



According to official statistics, only 18% of reported rape cases in Namibia and 5.5% of reported rape cases in South Africa result in a criminal conviction.

Even though the conviction rates are allegedly 30% higher in Zambia, “in spite of the heavy penalties provided for under the Penal Code, the perpetrators of rape are often punished with little more than a small fine, thus sending the message that rape is not considered by the Judiciary to constitute a serious criminal offence” (UNHCR 2007).

Similar trends emerge from Lesotho, Tanzania and Malawi. For example, on 26 August 2008 the Tanzanian Daily News reported that gender violence goes unpunished in Zanzibar, off mainland Tanzania, due to the culture of secrecy, and insensitivity of the police and hospitals on gender violence cases. Furthermore, law enforcement agencies and the judiciary have failed to create a climate of trust for the victims of violence, which leaves most cases of violence against women unreported and therefore completely unpunished.

Legislative prohibitions are not enough to effectively limit violence against women and address the physical, psychological and social traumas of its victims. Articles 2(b), (e) and (f) oblige the government to establish and financially support extensive non-legislative measures such as special investigative units, specialised training courses for law-enforcement and health workers and rehabilitation centres for victims.

In Lesotho some of this work is done by the **Child and Gender Protection Unit** including provision of a restorative justice programme for survivors of domestic violence.

In Malawi, the **Sexual Assault and Rape Guidelines of 2005** grant rape survivors free access to treatment and prevention for STDs and require police stations to have trained victim support officers to direct victims to these services.

In Namibia, the police force has a **Serious Crime Unit** which investigates trafficking offences and a **Women and Child Protection Unit** through which specialised training in providing services to victims of sexual abuse was provided to 102 police officers and 25 Ministry of Health social workers.

In South Africa, there are a number of measures such as the **Family Violence, Child Protection and Sexual Offences Unit**, special **sexual offences centres**, **family courts** dealing with domestic violence cases, an **inter-ministerial victim empowerment programme** (providing victims of domestic violence with counselling, information and shelters). The South African government has also recently published a **training manual** for social workers and community members, as well as a set of **guidelines** for the judiciary on how to effectively deal with domestic violence cases. The government has also set up a **Human Trafficking Desk** within the **Organised Crime Unit** and a 10-member **Trafficking in Persons Task Team**.

Tanzania also has a specialised **Anti-Human Trafficking Unit**.

Zambia has a **Victim Support Unit (VSU)** in all police stations which deals with cases relating to property grabbing, spouse battering and sexual abuse. Unfortunately, both the VSU and the **Sex Crimes Unit**, which deals with sexual assaults and rape, have very limited resources to make any significant difference to the plight of women experiencing violence.

## Synopsis of findings

	Lesotho	Malawi	Namibia	South Africa	Tanzania	Zambia
<b>Domestic violence laws</b>	NO	Protection against (Prevention of) Domestic Violence Act 2006	Combating of Domestic Violence Act No 4 of 2003	Domestic Violence Act 116 1998	NO	NO
<b>Specific Sexual offences laws</b>	Sexual Offences Act 2003	NO	Combating of Rape Act No 8 of 2000	Criminal Law (Sexual Offences and Related Matters) Amendment Act No.32, 2007	s.130-139 of Penal Code as amended by Sexual Offences (Special Provisions) Act 1998	NO
<b>Prohibition of rape in marriage</b>	Sexual Offences Act 2003	NO	Combating of Domestic Violence Act 4 of 2003	Prevention of Family Violence Act 133 of 1993; Criminal law (Sexual Offences and Related Matters) Amendment Act (2006)	NO (unless separated)	NO

<b>Administrative and other measures</b>	Child and Gender Protection Unit; ARV for rape victims	Victim Support officers in police stations	Women and Child Protection unit in police	Family violence, child protection and sexual offences unit; Special sexual offences centres; Family Courts; Thuthuze la Care Centres; Inter-ministerial victim empowerment programme	Anti-Human Trafficking Unit	Victims support unit and Sex Crimes unit in police stations
<b>Specific anti-trafficking legislation</b>	NO Sexual exploitation prohibited by Proclamation 14 (1949) & Sexual Offences Act 2003	NO covered in penal code	Prevention of Organised Crime Act 2004 (still ineffective for lack of implementing regulations)	NO covered in Children's Act and Sexual Offences Act	NO	NO covered in Penal Code (Amendment) Act 15 of 2005
<b>Party to UN trafficking protocol</b>	YES	YES	YES	YES	YES	YES

### Best practices

- The Constitution of South Africa guarantees the right 'to be free from all forms of violence from either public or private sources'.
- South Africa's Sexual Offences Act states that sex trafficking victims are not liable to stand trial for any criminal offence, including migration-related offence, which was committed as a direct result of being trafficked.
- South Africa's specialised Sexual Offences Courts and one-stop centres for victims of sexual violence are geared towards a gender-sensitive, swift and

effective response to violence against women (provided there is requisite funding and training for the staff)

- South Africa's Thuthuzela Care Centres are 24 hour one-stop victim support centres which provide a facilitated access to much needed services such as police, counselling, health workers and legal aid.
- Tanzania's Anti-Human Trafficking Unit provides a plain-clothes female police officer to visit shelters to obtain sex trafficking victims' statements in a less intimidating setting than the police station.
- The Government of Lesotho, in collaboration with UNICEF is compiling a national database which aims to collect accurate details of sexual violence cases as they are reported to make them available to service providers and senior policy makers. Alongside the database, the programme also provides training for specialised police units and community-level awareness programmes.
- The Ministry of Safety and Security of Namibia, in collaboration with the Women's Act for Development (WAD), and the University of Namibia conducted a study on the root causes of violence against women. This study focused on the violent crimes against women committed by men.
- The Namibian legal system provides protection to victims who wish to testify against their abusers and a comprehensive asylum policy under which trafficking victims can seek relief from deportation to countries where they would face retribution or hardship.
- The Ministry of Health and Social Services in Namibia has published guidelines for anti-retroviral therapy which includes a section on post exposure prophylaxis (PEP) and other medical treatment for rape complainants.

## Recommendations

- Increased financial resources should be allocated to measures to effectively combat violence against women.
- States should undertake to raise awareness amongst men and women of the causes and consequences of violence against women.
- States must enact specific anti-trafficking legislation. States should undertake to sensitize the police, judiciary and traditional leaders to effectively respond to reports of violence. Training of law enforcement and other relevant government officials on the human rights of trafficked victims should be undertaken. States, in collaboration with civil society, should launch a public awareness campaign to educate women about the dangers of human trafficking.
- Zambia and Malawi should enact legislation which prohibits marital rape.
- Tanzania should amend the Sexual Offences Special Provisions Act to explicitly outlaw rape in marriage regardless of whether the spouses are separated at the time as it is currently stated.

## 2.3 Harmful practices

### ***Article 5: Elimination of harmful practices***

States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognised international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including:

(a) creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;

(b) prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them;

(c) provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;

(d) protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

Although traditional practices are an important aspect of the many communities and cultures living in Southern Africa, some of these practices may be increasing the spread of HIV. Governments must draw a delicate balance by prohibiting and condemning the harmful and dangerous aspects of those practices whilst promoting the safe aspects of local cultures.

Some examples of cultural practices in Southern Africa which are deemed to increase women's vulnerability to HIV include:

- Scarification, piercing, tattooing, circumcision and hair shaving using the same sharp instruments for a number of people
- Female genital mutilation (FGM): although not widely practiced in the countries under review except for Tanzania, it still exists in some clans
- Virginity testing
- Other initiation rites, including forced sexual intercourse for girls or boys
- Dry sex
- Polygamy

- Widow inheritance by brother in law or other male relative of the deceased husband
- Sexual cleansing, whereby the surviving partner has sexual intercourse with a relation of the deceased, or hired 'healer', in order to appease the spirit of the deceased husband
- Virgin cure - the belief that having sex with a virgin cures HIV/AIDS
- Exchange of daughters of a young age for a financial loan or service to the family
- Temporary husband replacement
- Wife or husband exchange or lending

Article 5 seeks to address this problem by calling on states to prohibit and condemn these harmful practices by enacting criminal laws.

## **Overview of findings**

Lesotho and Malawi have not criminalised harmful practices.

Section 39(3) of the South African Constitution makes all customary laws subject to the South African Bill of Rights. The Children's Act 38 of 2005 specifically prohibits in its art 12: FGM of children and virginity testing under the age of 16, which is the age of consent established by the Sexual Offences Act 2007 (whereas virginity testing of children older than 16 may only be performed under certain conditions). The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 includes the prohibition of discriminatory practices including traditional, customary or religious practice (in particular FGM) which impairs the dignity of women and undermines equality between women and men, including the girl-child.

The Tanzanian 13<sup>th</sup> Constitutional Amendment 2000 seeks to prohibit traditional harmful practices, but this is not supported by comprehensive



legislation. The Children's Act 38 of 2005 only prohibits FGM and only for children under 18 and omits other acts such as wife inheritance and widow cleansing which are still practiced in Tanzania.

In Zambia, practices as sexual cleansing, FGM and initiation ceremonies resulting in injury and disease transmission are prohibited in the Penal Code (Amendment) Act 15 of 2005, but only when these are done on children. The draft Constitution of Zambia declares void all laws, customary or regulatory, that permit or have the effect of discriminating against women and calls on Parliament to enact legislation to provide for the protection of women against all forms of violence. It is however, subject to review.

Article 5 also emphasises that legislative prohibitions are not the only measures needed to stop harmful practices. Article 5(a) requires the creation of public awareness programmes and other measures to circulate information about the dangers of certain practices to all members of society.

While NGOs such a Women for Change are raising awareness amongst traditional leaders on harmful practices, no evidence of a state initiated nation-wide awareness programme was found for Zambia, where any shifts in traditional practices depend almost entirely on the attitudes and willingness of traditional leaders, some of whom have been successful in reducing harmful practices.

The Ministry of Gender, Youth, Sports, and Recreation held a 1-day workshop in 2003 to raise awareness about the importance of human rights in Lesotho. Also, its 2006 National HIV and AIDS Policy provides for an information, education and communication campaign which makes use of the media and widely distributed educational materials, including hospitals and ante-natal clinics, to disperse information about the different modes of transmission of HIV and safe sexual practices.

In Malawi, the National Police conducted a two-day child protection orientation for district police commanders and a two-week training-of-trainers workshop for 16 child protection officers from police units. Likewise, the Malawi Programme and National Plan of Action on Women, Girls and HIV/AIDS (2005-2010) aims, amongst other things, to modify harmful cultural practices and unequal gender relations and improving access of young people to gender-sensitive information and skills to prevent HIV transmission by mobilising traditional leaders and the faith community, and empowering community-based women's groups for grassroots education and monitoring.

Article 19 of the Namibian Constitution grants its people the right to enjoy and practice their traditions and culture subject to the rights of others and national interests. However, there is no specific legislation defining and prohibiting those existing practices which do infringe on human rights. The Namibian National HIV/AIDS Policy provides for the sensitisation of traditional leaders to the dangers of harmful traditional practices and obliges them to alter those practices. As part of this process, traditional leaders must incorporate sexual and reproductive health education into initiation and other cultural rites, and advocate the use of new and clean needles and blades for scarification, tattooing and circumcision, with particular emphasis on the sensitisation of female members of society. Similar national policies exist in other states, such as:

The Committee against Harmful Traditional Practices in Tanzania, which was established under the Ministry of Health and Social Welfare, is involved in sensitising the public about FGM and its effect on women's health.

As well as prevention through education and training, the government must also take measures to

identify those who are at risk and actively protect them. Likewise, for those who have already fallen victim to harmful practices, the State must take appropriate steps to address their physical, psychological and social problems by providing healthcare, counselling, vocational training and access to legal representation.

Some examples of national policy fulfilling these criteria include the Malawi 2006 Ministry of Gender, Child Welfare and Community Services' Mangochi workshop to enable stakeholders to develop strategies to combat child abuse as well as the November 2005 Plan to introduce a child abuse hotline during the year. The Ministry is also in the process of converting its regional offices into rehabilitation centres.

The National HIV/AIDS Policy of Namibia provides for the protection of all persons, especially females, against violence and traditional practices negatively affecting their sexual health but the extent to which this aspect of the policy is implemented is difficult to measure.

### Synopsis of findings

	Lesotho	Malawi	Namibia	South Africa	Tanzania	Zambia
<b>Legal prohibitions</b>	NO	NO	Constitution A.19	Constitution s.39(3); Children's Act 38 of 2005; Promotion of Equality and Prevention of Unfair Discrimination Act 2000	13th Constitutional Amendment and Sexual Offences (Special Provisions) Act (minors)	S.42 Draft Constitution; Penal Code (Amendment) Act 15 of 2005 (children)

National Policy	National HIV and AIDS Policy (2006)	Programme and National Plan of Action on Women, Girls and HIV/AIDS (2005-2010)	National HIV/AIDS Policy	National HIV/AIDS Strategic Plan 2007-2011; National Policy on HIV/AIDS for Learners and Educators in Public Schools and Students and Educators in further Education and Training (1999);	Committee Against Harmful Traditional Practices	
-----------------	-------------------------------------	--------------------------------------------------------------------------------	--------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------	--

### Best practices

South Africa & Namibia: Both countries' constitutions clearly state that in case of conflict between the Constitution and a customary law, the Constitution takes precedence.

Zambia: A Lusaka Local Court Justice passed judgment in favour of a woman who had brought an action against the family of her late partner seeking recognition of the marriage and cleansing thereof. The judge advised families to desist from sexual cleansing based on, among other things, an increased risk to HIV infection.

Zambia: In November 2005 over 100 chiefs from across the country met in a first-ever traditional leaders' national HIV/AIDS conference, and resolved to clamp down on harmful traditional practices which increase the spread of HIV/AIDS.

## Recommendations

- All countries must enact culturally sensitive legislation identifying and restricting all existing practices or aspects of existing practices which are harmful to women and are likely to increase HIV/AIDS prevalence.
- All countries must put more resources into the identification and protection of potential victims of harmful practices.
- All countries must implement the measures elaborated in their national gender policy documents.
- Comprehensive national sensitisation programmes should be developed for traditional leaders and other members of local communities about the harmful aspects of traditional practices, as well as training for health and social service workers to help them identify and address victims of such practices.
- To comply with article 5(c), more resources need to be diverted to the social, physical and emotional rehabilitation of victims.
- Lesotho and Malawi must enact specific legislation identifying and prohibiting traditional harmful practices.
- Zambia and Tanzania must extend the legal prohibitions on FGM to adult women as well as minors and include other harmful practices into those prohibitions.



© Claire Mc Evoy/IRIN

## 2.4 Early marriage

### ***Article 6: Marriage***

State Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage. They shall enact appropriate national legislative measures to guarantee that:

...

(b) the minimum age of marriage for women shall be 18 years.

...

Article 6(b) of the Protocol prescribes the minimum age of marriage for women to be 18 years and calls on the States to pass laws to that effect. Early marriage is a form of gender-based violence which often leads to sexual and other forms of physical violence.

Early marriage exacerbates the spread of HIV. Husbands of child brides are likely to be much older and therefore sexually experienced, having had one or more partners in their lifetime increasing the chances that they may be HIV positive. The age difference between the child bride and her spouse also exacerbates an often already existing power imbalance between men and women and makes open communication about sexual relations, including negotiating condom use, abstinence, or voluntary counselling and testing, difficult, if not impossible. Child brides are likely to be physically forced into their first sexual experience and are particularly vulnerable in such cases to HIV infection because of physical trauma to their genital tract. Married girls are also likely to have dropped out of school where they would

have had access to information regarding the prevention of HIV and this lack of education leads to even greater disempowerment.

## Overview of findings

With the exception of Tanzania, where the legal age of marriage for girls is 15 according the Law of Marriage Act 1971, which is currently under review, and Malawi, where the Constitution prescribes the minimum marriage to be 18 but no actual law prohibits early marriage, all examined States have a prescribed minimum of 21 for marriage contracts in national law. Nevertheless, in practice these legislative measures fall short of complying with article 6 of the Protocol (which establishes 18 years old as the minimum age of marriage for women). In those countries where the official legal age is set at 21, boys can still be married at 18 and girls as young as 15, or 16 in Lesotho, with the consent of their parents. Moreover, in Lesotho, the Marriage Act 10 of 1974 stipulates that boys and girls below those ages can be wed with the consent of the Minister. A similar power is given to Ministers in Namibia through the Married Persons Equality Act 1 of 1996, and the South African Marriage Act 25 of 1961.

All six countries recognise customary marriages alongside legal marriages, and if a minimum age for these is set at all, it is far below the age of 18 stipulated in the Protocol. For instance, customary marriages in Lesotho allow children to marry and the Marriage Act recognises the validity of the *lobola*, or agreed bridal price. There is no minimum age for customary marriages in Malawi or Namibia and the minimum age in Zambia is upon reaching puberty. In South Africa, girls below the age of 18 and no younger than 12 can be married with the consent of the Minister, according to the Recognition of Customary Marriages Act 120 of 1998. In Tanzania Islamic law, approved by the Penal Code, permits marriage upon reaching puberty and in some cases, before reaching puberty without consent.



These findings clearly indicate that in practice, none of the legal systems examined effectively protect girls from early marriage and the risks of violence and HIV associated with such arrangements.

### Synopsis of findings

	Lesotho	Malawi	Namibia	South Africa	Tanzania	Zambia
<b>Minimum age for marriage in law without parental consent</b>	21 (Age of Majority Ordinance)	18 (Constitution s.22)	21 (Age of Majority Act 57 of 1972)	21 (Marriage Act 25 of 1961)	18 for males and 15 for females (Law of Marriage Act No 5 of 1971)	21 (Marriages Act Ch.50 of the Laws of Zambia)
<b>Customary marriages recognised with no minimum age requirement</b>	YES	YES	YES	YES (with written consent of the Minister, when under 18)	YES	YES

### Best practices

- South African Recognition of Customary Marriages Act 120 of 1998 brings Customary Marriages within the sphere of legal recognition and sets a minimum age of 18, with the exception of underage marriages under the Minister’s permission.
- The Legal Capacity of Married Persons Act 9 of 2006 in Lesotho abolishes the minority status of married women in customary law, which eliminates the need for the husband’s consent to any of his wife’s contractual relationships.
- Lesotho, South Africa, and Namibia prohibit rape in marriage. In the absence of laws prohibiting child marriages, the criminalisation of marital

rape, provides an avenue for prosecution of men who marry girls although this has never happened.

### **Recommendations**

- All six States must regularise customary marriages and harmonise the age requirements and status equality with civil marriages to avoid this loophole which effectively raises the risk of HIV/AIDS for young girls.
- Tanzania must proceed with the amendment of the 1971 Act to raise the minimum age for civil marriage of girls to 18.

## **2.5 Access to justice and equal protection before the law**

### ***Article 8: Access to justice and equal protection before the law***

Women and men are equal before the law and shall have the right to equal protection and benefit of the law. States Parties shall take all appropriate measures to ensure:

(a) effective access by women to judicial and legal services, including legal aid;

(b) support to local, national, regional and continental initiatives directed at providing women access to legal services, including legal aid

...

In order for the laws to have any significant practical effect, women must have access to, and equal treatment in courts and tribunals. Access to justice must be equal and uninhibited from the very first steps

of the justice process. Women must be given full and unbiased information about all of the legal options which they may have to redress their particular situation. Community leaders, social workers, health and law enforcement workers must be prepared to give comprehensive explanations of the law and the available legal avenues, which may include asking the courts for an order of compensation, a restraining order or filing a criminal charge. Similarly, lawyers, judges and other functionaries involved in the justice process must fully understand the importance of gender equality and be sensitive to the different forms of discrimination and violence against women.

## **Overview of findings**

One of the most vital mechanisms for ensuring access to justice is that of legal aid. Women from poor communities or women who are denied property ownership by their husbands or other family members cannot afford legal representation. Without free legal representation, most women who are subjected to violence would not be able to take their case to a court and would be forced to live with the abuse, making them more vulnerable to HIV. In all six countries examined in this report, the bulk of legal aid work is done by NGOs who rely on foreign donors. This must be seen as a temporary solution only, pending the establishment of a government sponsored legal aid system available to all women.

The Ministry of Justice of Lesotho provides such a service, but due to the lack of resources, both human and financial, gender violence is not given priority over other issues and the service is ineffective from the point of view of women experiencing violence.

A similar situation is taking place in Zambia. Although chapter 34 of the Constitution decrees that the most vulnerable members of society must be provided with free legal services, Human Rights Watch

reports that there are only four legal aid lawyers covering Lusaka, Ndola, Kitwe, and Livingstone which puts most of the rural population of Zambia out of reach of those services.

Section 35(3)(g) of the South African Constitution grants the right “to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly”. The Justice Ministries of Namibia and South Africa have partnered with local NGOs and universities to provide legal aid to a wider community, benefiting from an access to funds available to NGOs and the infrastructure available to the government ministry.

In Tanzania, all persons accused of capital offences are provided with legal aid by the Government, while the Legal Sector Reform Programme (2005-2008) sets out a framework for the provision of legal aid to the most poor and disadvantaged members of society (in cooperation with civil society organisations).

The Legal Aid Act (1964) in Malawi mandates the government to provide legal representation to civil litigants and criminal defendants. In September 2005, the department had ten lawyers, and insufficient funds to pay lawyers in private practice.

### Synopsis of findings

	Lesotho	Malawi	Namibia	South Africa	Tanzania	Zambia
<b>Government supported legal aid in civil and criminal matters</b>	YES	YES	YES	YES	YES	YES

## **Best practices**

- The government, NGO, and university partnerships found in South Africa and Namibia present the best solution for ensuring that every indigent citizen has access to free legal representation. With government infrastructure and NGO access to foreign funding, people are more likely to benefit from legal aid than where these actors are operating separately.
- In South Africa, the Legal Aid Board is an autonomous statutory organisation, which coordinates caseloads, budgetary spending and NGO partnerships on the national level (44 justice centres throughout the country). This type of structure is essential for a well functioning legal aid system and runs more efficiently than legal aid services organised by justice ministries in other states.

## **Recommendations**

- All countries under review should stream more funding into their legal aid programmes and consider partnering with the existing NGOs which provide legal aid to women in order to create a more structured and efficient system of legal aid.
- Tanzania must carry out its intended reforms to expand the category of legal aid beneficiaries beyond capital cases to all indigent litigants.



© Manoocher Deghati/IRIN

## 2.6 Sexual harassment and abuse in schools

### ***Article 12: Right to education and training***

1. States Parties shall take all appropriate measures to:

...

(c) protect women, especially the girl-child from all forms of abuse, including sexual harassment in schools and other educational institutions and provide for sanctions against the perpetrators of such practices;

(d) provide access to counselling and rehabilitation services to women who suffer abuses and sexual harassment;

...

One important aspect of the right to education is the right to be protected from abuse and sexual harassment in educational institutions. Schools and other institutions are naturally organised as hierarchies and create relationships of dependence and power amongst pupils and between pupils and teachers. Young girls are particularly vulnerable to abuse in those situations since they occupy the inferior position in those power relationships.

According to a 2006 study of schoolgirls in Malawi, 50 per cent of the girls said they had been touched in a sexual manner 'without permission', by either their teachers or fellow schoolboys. A 2001 report by Human Rights Watch found that many girls in South Africa are raped, sexually abused, sexually harassed and assaulted at school by male learners and educators. The risk of HIV infection is very high in such circumstances, and this state of affairs may turn into a

vicious cycle as discrimination against girls is reinforced when perpetrators go unpunished sending the message that violence against girls in school is acceptable. Girls will subsequently not report incidences of harassment or violence if they feel nothing will be done about it and would rather choose to be absent from school or drop out altogether. They are also more likely to drop out because of the additional factors of intimidation or pregnancy. If they do not return to school they are left uneducated, increasing their vulnerability to poverty, HIV infection, and possible subsequent violent relationships due to limited options for empowerment and possible economic dependence on a violent spouse.

*There must be an end to the practice of male educators demanding sex with school girls or female educators. It shows selfish disrespect for the rights and dignity of women and young girls. Having sex with learners betrays the trust of the community. It is also against the law. It is a disciplinary offence. Tragically, nowadays, it is spreading HIV/AIDS and bringing misery and grief to these precious young people and their families. (Kadar Asmal, former Minister of Education in South Africa).*

## Overview of findings

Article 12 obliges States to protect young females from such situations not only by legally prohibiting and punishing abuse, but also by educating students and teachers about gender issues and providing counselling and rehabilitation for the victims. South Africa is the only State examined in this report that has a set of laws that specifically tackle the problem of sexual harassment at schools. The situation in South Africa however, as reported by Human Rights Watch, where girls are frequently victims of sexual



harassment and abuse at school, highlights the conflict between policy and practice, which urgently needs to be addressed in all countries.

Sexual harassment of children in Zambia is prohibited through a 2005 amendment to the Penal Code, but this law does not expressly address the issue within the education sector.

The laws of all other countries do not sufficiently comply with article 12 of the Protocol, although the government of Lesotho assures that the Children's Protection and Welfare Bill will be enacted shortly and will effectively protect children in education facilities. Also, the regulations made under the Education Act 16 of 2001, were amended in consultation with the Minister responsible for higher education and now prohibit a teacher from getting involved in any form of romance or sexual relations with a learner or sexual harassment or abuse of a learner.

The South African Schools Act provides a code of conduct for learners in section 8 and requires the suspension of any pupil who commits serious misconduct (including sexual abuse of peers). The Children's Act also creates a legal obligation on educators to report any form of maltreatment, neglect or abuse of children to social welfare services or the police. Moreover, section 17 of the Education Laws Amendment Act of 2000 requires provincial departments of education to dismiss any educator found guilty of having a sexual relationship with a pupil of the school where he or she is employed.

Aside from enacting specific laws, article 12 also requires governments to take non-legal measures aimed at prevention and rehabilitation. One example of these measures is the Child Helpline in the Maseru region of Lesotho which enables children to report sexual abuse incidents in safety and confidence.

The Malawi Ministry of Education has published a statement of professional ethics and a Code of Conduct for teachers, which includes regulations on teachers' sexual misconduct. The Ministry has also put in place a re-entry pregnancy policy to enable girls who drop out of schools due to early pregnancies to come back and finish their secondary education.

In Namibia, the government supports rehabilitation centres for sexually abused children.

The South African National Department of Education has a task team that monitors the implementation of existing policies to address abuse in schools and school support teams to provide face-to-face counselling for both learners and educators who have been abused.

In Tanzania, the government has established a Mlezi (Guardian) system in which one teacher in each of the 185 primary schools is designated to support girls who have been sexually abused, need advice or seek to report an incident. Girls in schools with a Mlezi state that they are much more likely to report harassment than girls in schools without such a guardian.

The Victim Support Unit of the police department in Zambia is tasked with providing confidential support to all child abuse victims, but is undermined by the fundamental shortage of resources, training and equipment. The government is collaborating with UNICEF on the Program for the Advancement of Girls' Education to work with families and community leaders to keep girls in school and to bring back those who had left.

## Synopsis of findings

	Lesotho	Malawi	Namibia	South Africa	Tanzania	Zambia
<b>Legislative measures</b>	NO (soon to be enacted Children's Protection and Welfare Bill)	NO	NO	School Act; Education Act; Education Laws Amendment Act 2000	NO	NO (although Penal Code covers child abuse in general)
<b>Policy Measures</b>	Maseru Child Helpline	Code of Conduct for teachers and post-pregnancy re-entry	Rehabilitation centres for abused children	Policy implementation task team; School support teams	Mlezi System	VSU; Program for the Advancement of Girls' Education

## Best practices

South Africa: The Department of Gender Equity in the Education Department has produced a training manual for use by teachers and other educators entitled *Opening Our Eyes: Addressing Gender-based Violence in South African Schools*.

Zambia: On 30 June 2008 the High Court of Zambia decided in favour of a girl who was raped by her teacher when she was 13 years old in February 2006 and also found the headmaster guilty of knowingly accepting a 'pervert' as staff. The judge awarded the girl damages worth K45 million and referred the case to the Director of Public Prosecutions for a possible criminal prosecution. He also urged the Ministry of Education to set regulations. The judge cited the Women's Protocol.

Namibia: In August 2007 the High Court of Namibia ruled that the Minister of Education had to be held accountable for the negligence on the part of employees of the then Ministry of Basic Education, Sport and Culture regarding a case five years prior

whereby a 17 year old mentally handicapped girl was raped and sexually assaulted by a male teacher.

Tanzania: *Mlezi* (Guardian) system in which one teacher in each of the 185 primary schools is designated to support girls who have been sexually abused, need advice or seek to report an incident.

## **Recommendations**

- Lesotho must honour its promise and pass the Children's Protection and Welfare Bill and begin to implement it as soon as possible.
- Malawi, Namibia, Tanzania and Zambia need to enact specific laws on the abuse in schools by teachers and peers to effectively address this type of harassment and abuse left virtually unprotected by general provisions on sexual abuse and harassment.
- South Africa must bridge the gap between its extensive protective legislation and the situation of schoolchildren in practice.
- Any future legal developments must be supplemented by policy and grassroots measures such as the Tanzanian *Mlezi* system or the Lesotho Child Helpline.

## 2.7 Sexual harassment in the workplace

### ***Article 13: Economic and social welfare rights***

States Parties shall adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall:

...

(c) ensure transparency in recruitment, promotion and dismissal of women and combat and punish sexual harassment in the workplace;

(d) guarantee women the freedom to choose their occupation, and protect them from exploitation by their employers violating and exploiting their fundamental rights as recognised and guaranteed by conventions, laws and regulations in force;

...

(m) take effective legislative and administrative measures to prevent the exploitation and abuse of women in advertising and pornography.

The Protocol outlines numerous measures towards the fulfilment of economic, social and cultural rights. There is a relation towards this category of rights, particularly economic rights and violence against women. Economically disempowered women are vulnerable to violence as poverty limits their choices and makes them dependant on others, often a spouse or partner for their livelihood. In such situations, women are forced to remain in violent situations and are unable to access available mechanisms, such as the law, for protection. Poverty, in itself, is also a form of violence against women, particularly when

perpetuated by discrimination and inequality whereby girls do not access education or women are denied equal opportunity in the workplace. For these reasons, it is recognised that the promotion of the broad range of economic, social and cultural rights, is necessary towards addressing violence against women. Our findings focus on sexual harassment in the workplace, one aspect of economic, social and cultural rights provided for in the Protocol which can inhibit the enjoyment of several related rights and perpetuate economic disempowerment.

Guaranteeing equality in the job market, equal rights of female employees and freedom to choose one's occupation is crucial to the reduction of violence against women and the risk of HIV. An accessible job market and equal rights in the workplace, including freedom from harassment, increases women's economic empowerment and provides them with choices. Moreover, it evens out the power imbalance between women and men in the home and in broader society. This makes violence against women less prevalent and allows women to have access to more information about HIV and to negotiate safer sexual practices with their partners. Therefore, addressing economic harm to decrease the financial dependency of women on their male partners is as important as enacting laws prohibiting physical harm.

The United Nations Development Fund for Women defines sexual harassment as "unwelcome or unwanted verbal, non-verbal, physical or visual conduct based on sex or of a sexual nature; the acceptance or rejection of which affects an individual's employment."

Sexual harassment can include, for example, demands for sex in exchange for job promotion, public display of offensive or degrading pictures, or comments of a sexual nature. There is no equity in the

workplace where sexual harassment persists. To comply with article 13, laws must not only promote equal rights of employment and prohibit harassment, but must explicitly outline employer's responsibility to create an environment free from harassment and forbid sanctions against any employee who complains.

In order to ensure that these laws will actually be used by women, it is also important for the law to prescribe that the employer must prove he did no wrong, instead of placing the burden of proof on the female employee.

## **Overview of findings**

The filing of sexual harassment cases is low in all six countries due to the intimidation and fear of sanction that is associated with reporting these incidents.

Zambia, for example, has no specific laws for harassment in the workplace and no national policy on sexual harassment or mechanisms to provide women with the legal, psychological and financial support they need to publicly take up their case.

Malawi also has no specific legislation on the issue, although the Law Reform Commission has called for the inclusion of a criminal charge for sexual harassment in the Gender Equality Bill.

The Lesotho Labour Code Order 1992 prohibits sexual harassment in the workplace which is defined as 'any person who offers employment or who threatens dismissal or who threatens the imposition of any other penalty against another person in the course of employment as a means of obtaining sexual favours or who harasses workers sexually shall commit an unfair labour practice.'

Section 6 of the Namibia Labour Act 11 of 2007, the South African Employment Equity Act 55 of 1998 and the Tanzanian Employment Act 11 of 2005

prohibit sexual harassment in the workplace. Of note is Notice 1367 of 1998 attached to the South African Labour Relations Act which contains a Code of good practice for handling sexual harassment cases.

It is also notable that laws on sexual harassment may be found outside labour law, as for instance, in the Tanzanian Sexual Offence (Special Provisions) Act 1998 which imposes criminal liability for the 'use of words or actions which cause sexual annoyance or harassment'.

### Synopsis of findings

	Lesotho	Malawi	Namibia	South Africa	Tanzania	Zambia
<b>Specific laws prohibiting sexual harassment in the workplace</b>	Labour Code Order 1992	NO	Labour Act 11 of 2007	Employment Equity Act 55 of 1998; Code of Good Practice for Handling Sexual Harassment Cases	Employment and Labour Relations Act 11 of 2005; Sexual Offences (Special Provisions) Act	NO

### Best practices

South Africa: *Reddy v University of Natal*, 1998: leading 1998 case on sexual harassment which held that any unwanted sexual behaviour or comment that has a negative effect is sexual harassment;

Commission for Conciliation, Mediation and Arbitration (CCMA): *Pick'n Pay Stores Ltd and Individual*, 1994: sexual harassment constitutes any unwanted conduct which is sexual in nature, and can be physical, verbal or non-verbal, it must affect the dignity of the person affected, or create a negative or hostile environment & Sexual harassment is relevant in a workplace if granting sexual favours becomes a



condition of employment, or refusal to do so affects employment decisions, or if it unreasonably affects the employees work or creates a hostile environment.

Namibia: the Ministry of Labour is considering a draft of a Code of Practice on Sexual Harassment

## Recommendations

- All countries should back up their labour laws on sexual harassment with specific criminal law provisions sanctioning sexual harassment in the workplace as a punishable crime.
- All countries must provide information, assistance and financial support to women to take their cases to tribunals to make existing provisions effective
- All countries should adopt a South African style Code of Good Practice and to implement its provisions in national policy programmes
- Malawi and Zambia must enact labour laws that specifically prohibit sexual harassment in the workplace

## 2.8 Health and reproductive rights

### ***Article 14: Health and reproductive rights***

1. States Parties shall ensure that the right to health of women, including sexual and reproductive health is respected and promoted. This includes:

...

(d) the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS;

...

2. States Parties shall take all appropriate measures to:

...

(c) protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

The Women's Protocol is the first legally binding human rights instrument to include women's reproductive health rights and to include protection from HIV infection as a women's right. Violence against women impedes women's ability to protect them from HIV infection. One concrete measure that governments must take in order to comply with this provision is to provide access to post-exposure prophylaxis (PEP) to rape survivors. PEP is a short course of antiretroviral drugs administered following potential exposure to HIV, ideally within 72 hours, to substantially reduce the risk of contracting the virus. The treatment should be available at all health facilities in the country at no cost and administered in a timely manner by trained health professionals.

## Overview of findings

In Lesotho, provision of PEP is provided for in the National HIV and AIDS Policy, which also instructs the sensitisation of health and law enforcement workers as to the availability and importance of PEP.

A similar policy in Malawi extends these preventive measures to other sexually transmitted diseases as well as providing for trained victim support officers in

police stations to refer victims to these services (Sexual Assault and Rape Guidelines 2005).

However, only South Africa that has guaranteed PEP to rape victims by law in the 2007 Sexual Offences Act. It is important to note however that the 2007 Act has important limitations as the drugs are only available to those who either lay a criminal charge with the South African Police Service or those who formally report the incident to a 'designated health establishment' within 72 hours of the alleged offence. By making formal and timely 'reporting' a condition to the availability of PEP, the Act may have left a considerable number of women who are pressured not to report or simply ignorant of this condition, without access to these preventive measures.

Namibia's National AIDS Policy, in chapter 3, provides for PEP for survivors of rape, assault and accidental exposure to HIV. It further provides that health care and other workers such as the police should be well trained to give accurate information on how to access PEP at hospitals and that health care workers should be adequately trained in assessing the need for and administering PEP.

Based on our findings, subject to the methodology and subsequent limitations outlined, Tanzania and Zambia lack any legal provisions or national policy on the matter, although the Zambian legislature has been considering a draft law on this issue for over 6 years. NGOs and International Organisations attempt to fill the gaps left by the governments, but the provision of PEP is an obligation on the State and will only be effective when implemented through the State infrastructure on a nation-wide level.



© Charles Akena/IRIN

Another form of violence against women and a violation of reproductive health rights as provided for in article 14 is the denial of access to abortion. The Women's Protocol is the first legally binding instrument to provide for abortion where pregnancy is the result of rape, sexual assault or incest as well as 'where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus'. The intentional withholding of safe abortion services is a form of violence against women, including risk to their health and lives, and in many instances forces women to seek unsafe terminations that can even result in death. Furthermore, victims of rape may suffer great psychological pain, by being forced to carry the rapist's child. Other side effects of such pregnancies may be greater poverty, a reduced social status and less possibility of continuing education, all of which contribute to further vulnerability to HIV.

Out of the six countries, only Namibia (Abortion and Sterilisation Act 1975) and South Africa (Choice of Termination of Pregnancy Act of 1996) specifically allow abortions in cases of rape, sexual assault and incest.

The Lesotho common law and the Tanzanian penal code only allow abortions in cases of necessity, which is left undefined in Lesotho and restrictively defined as 'preservation of a woman's life and physical and mental health' in Tanzania.

In Zambia, the Termination of Pregnancy Act 1972 goes a little further to include certain social and economic reasons for possible abortions, but does not specifically include rape or sexual assault as a valid pretext.

Malawi has no legislation on abortion but is in the process of drafting a law that will re-define the concept of 'necessity' to comply with the Protocol.

## Synopsis of findings

	Lesotho	Malawi	Namibia	South Africa	Tanzania	Zambia
<b>Provision of PEP to rape survivors in law/policy</b>	National HIV and AIDS Policy	Sexual Assault and Rape Guidelines (policy)	National AIDS Policy	Sexual Offences Act 2007 (but see limitations)	NO	NO
<b>Abortion permitted in cases of rape, incest and sexual assault</b>	NO (unless danger to woman's health)	NO	YES (Abortion and Sterilisation Act 1975)	YES (Choice of Termination of Pregnancy Act 1996)	NO (unless danger to life/health)	NO (unless falls within other criteria)

## Best practices

- The preamble of the South Africa Choice of Termination of Pregnancy Act of 1996 recognises the principle of equality between women and men and the advancement of human rights and freedoms underlying a democratic South Africa. It promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs.
- The Zambian Termination of Pregnancy Act 1972 is very progressive in its consideration of social and economic pretexts for abortions, an aspect of women's lives which is often ignored when considering the question of 'necessity'.

## Recommendations

- Lesotho, Malawi, Namibia, Tanzania and Zambia need to enact legislation for the unconditional provision of PEP to all rape and assault victims.

- South Africa must amend the Sexual Offences Amendment Act to remove restrictions and conditions on the provision of PEP.
- Lesotho, Malawi, Tanzania and Zambia must amend existing legislation or enact new laws to make clinical abortions available to victims of rape, incest and sexual assault.

## 2.9 Widows' rights

### ***Article 20: Widows' rights***

States Parties shall take appropriate legal measures to ensure that widows enjoy all human rights through the implementation of the following provisions:

(a) that widows are not subjected to inhuman, humiliating or degrading treatment

...

Inhuman, humiliating and degrading treatment is prohibited by many international and regional human rights treaties. However, the drafters of the Protocol have sought to specifically highlight the plight of widows by imposing an obligation on States to take appropriate legal measures to protect their human rights. The need for this becomes clearer when faced with such harmful cultural practices as sexual cleansing and widow inheritance, and the fact that most existing national laws and policy only protect children and minors from traditional harmful practices. The sudden loss of a husband leaves widows vulnerable both physically and economically to violence, abuse and the associated risks of HIV. Widows are sometimes accused of witchcraft upon the death of their husbands and of having caused the death. Moreover, fear of related forms of

discrimination and rights denial such as ‘property-grabbing’ and loss of inheritance may put additional pressure on women to accept degrading and inhuman treatment. Specific laws and policy must be created to address these unique issues.

### Overview of findings

No widow-specific laws or policies that would qualify as complying with article 20 of the Protocol were identified, apart from those relating to inheritance which is addressed below. The clause that requires customary laws and practices to be consistent with the Bill of Rights found in the constitutions of South Africa, Namibia, Tanzania, and the Draft Constitution of Zambia are not specific or extensive enough to offer genuine protection to widows.

### Synopsis of findings

	Lesotho	Malawi	Namibia	South Africa	Tanzania	Zambia
Specific legislation prohibiting inhuman or humiliating practices against widows	NO	NO	NO	NO	NO	NO

### Recommendations

- All six countries should develop detailed national policy on the specific issue of protecting widows against harmful and degrading treatment. This may involve awareness programmes, training for health and law enforcement workers and traditional leaders.



- We also recommend amending existing laws on physical and sexual violence to include explicit provisions to protect widows from violence, including such harmful practices as sexual cleansing and widow inheritance.

## 2.10 Inheritance

### ***Article 21: Right to inheritance***

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.

Article 21 refers to the right of women to acquire their own property and administer and manage it freely. Denial of property through inheritance to women is a form of economic violence and it exacerbates the effects of HIV. Women who are unable to inherit property upon the death of a spouse can be left increasingly vulnerable to contracting HIV as a result of destitution.

Women in Southern Africa are increasingly responsible for producing or providing food, and managing households. The denial of their inheritance rights makes it difficult not only to secure a place to live, but also to obtain the resources necessary for their survival and the survival of their dependants, as they are denied the ability to reap the benefits of ownership and control of their property. Furthermore, the denial of the title to their land prevents them from

securing loans to buy the raw materials for generating income.

Widowhood causes profound changes to the status, stability and security of women. The denial of the right to inherit undermines their chances to improve this status and their living conditions. An increasing amount of women find themselves in this situation due to the HIV pandemic, which leaves them widowed and also leaves a growing amount of AIDS orphans dependant on female-headed households. A denial of property rights will deny those women and their dependents the means for their survival, including the ability to undertake ARV treatment.

One of the main legal obstacles to inheritance rights is the existence of customary law alongside statutory law. Customary law contains many exceptions to the legal and constitutional provisions on non-discrimination, particularly in the areas of family, marriage and succession rights. The coexistence of both systems results in prevailing discriminatory practices and a denial of inheritance rights to daughters and widows. This discrepancy must be addressed by law and implemented on grassroots level through sensitisation of traditional leaders and dispute settlers. Besides customary family and succession law, there is also the threat of a number of traditional practices such as widow cleansing and wife inheritance, addressed above, which deny widows their inheritance rights, as well as property grabbing and extortion by the deceased husband's family members.

Governments must also address women's lack of knowledge of their legal rights, or the proper procedures, which they must comply with when buying or registering property.

## Overview of findings

In Lesotho, under Basotho customary law, the first male child is the sole heir and a widow can only administer her deceased husband's property in consultation with the deceased's male relatives. Thereafter a woman has no title to pass on property as inheritance. This conflicts with the common law. According to the Intestate Succession Proclamation 1953, when a man dies without leaving a will, his property will be divided equally between his surviving spouse and any children, brothers, sisters or parents which are also entitled to a share of the property.

A Basotho woman may inherit property, including land after the Land (Amendment) Act 1992, by a legally valid will, but the Deeds Registry Act 1967 substantially limits the rights of a married woman to register her inherited property in her name. However, in October 2007, the Lesotho Parliament passed the Legal Capacity of Married Persons Act, which eliminates discrimination against married women in customary law, repealing marital power to administer property and provides for equal participation. It remains to be seen whether this will have significant effects on women's right to inherit and administer their inherited property.

Malawi statutory law governing inheritance does not extend to customary land, which accounts for 70% to 80% of the total land. In customary law, inheritance arrangements can be divided into matrilineal and patrilineal systems depending on the communities. The government is in the process of converting customary land into leasehold land, as well as reforming the capacity of women to decide upon their lands' use, as normally it is limited to user rights only. Following the 1937 Wills and Inheritance Act, property must be distributed in accordance to the wishes of the deceased. In case of a death with no will, the widow must produce a legal document which testifies to joint

ownership of the property, or prove that she contributed financially to the upkeep of the property. Without such proof, the property will go to the family of the deceased man.

In Namibian customary law and practice, property of the deceased can be confiscated from the widow and their children. However, the 1996 Namibian Married Persons Equality Act abolishes the marital power of the husband over the person and property of his wife. The Act also grants equal capacity to both spouses to administer and dispose of their jointly owned property. Nevertheless, section 16 of the law explicitly states that these provisions do not apply to customary law marriages. However, this seems contradict section 10 (equality and non-discrimination) read in conjunction with section 66 (constitutional and statutory law prevailing over customary law). According to the Intestate Succession Ordinance No 12/1944, widows have the statutory right to half of the property of her late husband unless he leaves no other heirs.

In South Africa, the concept of marital power was abolished by the Matrimonial Property Act 88 of 1984. Furthermore, the Constitutional Court of South Africa, in the case of *Bhe* (2004) found that the 1987 Intestate Succession Act repealed the provision of the Black Administration Act of 1927 which allowed for discrimination against girls with regard to inheritance rights in customary law. Such discrimination was deemed unconstitutional in light of the equality clause in the Constitution which overrides any inconsistent customary law. The Customary Reform Law of Succession Bill, which entrenches equal succession rules for males and females in customary law, is currently undergoing debate within the Parliamentary monitoring group.

Furthermore, the South African Recognition of Customary Marriages Act 120 of 1998 abolishes the

customary law matrimonial property regime establishing that customary marriages are concluded in community of property, and recognizes full status and capacity to married women.

In Zambia, due to the claw-back clause in article 23(4) of the Constitution, all legal measures are undermined by a discriminatory customary law of marriage and succession, which allow such concepts as marital powers and primogeniture. This is a significant obstacle to any legal future legal protections since over 90% of all land in Zambia is subject to customary law only. The remaining land is subject to the Lands Act of 1995 and has been increasingly allocated to women as part of the Zambian Gender Policy. Equality in marriage is guaranteed by the Marriages Act, but this law does not apply to customary marriages. The Intestate Succession Act of 1989 (reformed in 1996) devises an equitable distribution of property between the surviving spouse and other dependants and family members, but once again it does not apply to customary land or movable and immovable property belonging collectively to the family. The Wills and Administration of Testate Estates Act equally has no application to land held under customary law, and therefore does not extend its judicial review of 'reasonable provisions' powers to a majority of wills.

In Tanzania, much depends on whether one's land and marriage is governed by customary or statutory law. Customary law or Islamic law, reinforced by the Law of Person Declaration 4 of 1963, does not guarantee any right of inheritance to women and girls, and paragraph 77 of that Declaration states that all immovable properties shall revert to the deceased husband's family when the widow remarries or dies. In Chagga customary law, females can acquire the usufruct of their inheritance, but must also pass it on to the husband's family upon death. If there is no male

of the clan, the woman may inherit the land in full ownership.

In Statutory law, the Land Act No 4 of 1999 in section 3(2) states every woman has the same right to the land as men, while the Village Land Act No 5 of 1999 provides in section 20(2) that any rule of customary law which denies women, children or persons with disabilities lawful access to ownership, occupation or use of the village land shall not be given effect. Nevertheless, the Local Customary Law (Declaration) Order No 4 which denies widows the right to inherit property on the death of their husband remains in force. On 8 September 2006, the High Court of Tanzania declined to declare customary inheritance law unconstitutional. The Law of Marriage Act of 1971 grants more rights to marital property on divorce than on the death of her husband. The Government is currently reviewing discriminatory laws that prevent women from inheriting land and property and from discriminatory customary practice.

### Synopsis of findings

	Lesotho	Malawi	Namibia	South Africa	Tanzania	Zambia
Full property ownership rights of women in civil marriages	NO (see Deeds Registry Act exception)	NO	YES	YES	YES	YES
Full statutory inheritance rights of women	YES	NO	YES	YES	YES	YES
Denial of equal property rights in customary law	YES	YES	YES (Married Persons Equality Act s.16)	NO	YES	YES

## Best practices

- The Namibian and South African Constitutions guarantee the right to equality and non-discrimination despite any contradictory customary laws and practices.
- The South African Constitutional Court decision in the *Bhe* reinforced the notion of non-discrimination in the right to inheritance.
- The Zambian government initiative to allocate an equitable amount of non-customary land to women-headed households is exemplary, but needs to extend to customary land as well.
- The Zambian Victim Support Unit (VSU) treats property grabbing as a criminal offence.
- The Malawi government's process of converting customary land to leasehold land and distributing it to women is a good way forward.
- The Tanzanian government is currently reviewing discriminatory laws that prevent women from inheriting land and property and from discriminatory customary practice.

## Recommendations

- All countries must integrate gender perspectives, including with respect to measures and laws on inheritance rights, into their discussions on national development and policy making.
- All countries must increase public awareness and understanding of women's rights, laws and mechanisms for legal redress and change the social and cultural practices which continue to deny equal property rights to women.
- Lesotho must amend the Deeds Registry Act to give married women the ability to register their own property.
- The High Court of Tanzania must reverse its decision of 8 September 2006, as customary

inheritance law is clearly unconstitutional and in breach of statutory provisions such as the Land and Village Land acts.

## 2.11 Elderly women

### ***Article 22: Special protection of elderly women***

The States Parties undertake to:

...

(b) ensure the right of elderly women to freedom from violence,

including sexual abuse, discrimination based on age and the right to be treated with dignity.

...

According to the international organisation Helpage, elderly women face a unique situation making them vulnerable to violence and HIV, which must be specifically addressed by elderly-orientated government law and policy. Firstly, elderly women are often excluded from HIV education campaigns and testing. Educators and health workers simply assume that elderly women are no longer sexually active and therefore not at risk of contracting the virus. This ignores the fact that elderly women are not immune from rape and sexual abuse. There have been many reports of rape and violence by family members towards older relatives, which can be fuelled by quarrels about inheritance and myths about sex as an AIDS cure, and reports of physical and sexual violence following accusations of witchcraft. A Dar es Salaam newspaper reported recently that between four and five elderly women are killed each month in



connection with witchcraft in the Shinyanga Region in Tanzania.

In a general appreciation of existing laws in Southern Africa, Helpage has noted, "Whatever the nature of the abuse, legal systems fail to protect the rights of older people. Where general legislation does offer recourse, many older people find the judicial systems difficult to access". Therefore, in order to comply with article 22, government must create elderly-orientated national policy with sufficient budgetary allocations to those services required by the elderly population. Other aims of a national policy for the ageing population must include:

- Acknowledgement, support and information for those elderly persons providing care and financial support for their HIV infected relatives;
- An opportunity for representatives of this section of society to voice their specific concerns and for those concerns to be heard and addressed by law and policy;
- Measures to increase the awareness of those concerns amongst the younger population, as well as any social, health and law enforcement workers responsible for dealing with victims of violence or those at risk of HIV; and
- Publicly condemn harmful practices such as spreading myths about using sex with old women as a cure for HIV or accusations of witchcraft.

The national laws and policies of Namibia and Zambia do not address the discrimination, violence and HIV risks faced by the elderly population. The provision of universal pensions in Namibia and certain welfare rights in Zambia are not a replacement for the lack of protection from violence and HIV.

Lesotho also lacks any law and policy to that regard, although the draft national social welfare policy will include specific provisions on monitoring and institutional care for the old.



© G. Cranston/IRIN

Malawi's National Policy for Elderly Persons is also only in draft form, but by comparison, it specifically seeks to tackle poverty, HIV risks, it protects specific elderly-orientated rights and provides for care and support for the vulnerable.

The government of Tanzania has published its National Policy on Ageing in 2003, aimed at, amongst other things, tackling 'outdated' harmful customs against elderly women such as violence and lynching of old women with the pretext of witchcraft.

It is only in South Africa that the combined effect of the Aged Persons Act (amended in 1998) and the 2000 National Guidelines on the Prevention, Early Detection/identification and Intervention of Physical Abuse of Older Persons, lives up to the obligations in article 22 of the Protocol (aimed at protecting elderly women through the adoption of measures commensurate with their needs). Together with those instruments, the Older Persons Act 2006 establishes a framework aimed at the empowerment and protection of older persons and at the promotion and maintenance of their status, rights, well-being, safety and security. In addition, the South African government has also developed the National Policy on the Aged, which stipulates guidelines for subsidies to residential care facilities, highlights the need to deal with abuse of elders and stipulates some minimum norms and standards for the treatment of elderly victims.

## Synopsis

	Lesotho	Malawi	Namibia	South Africa	Tanzania	Zambia
<b>National law or policy on protecting elderly women</b>	NO	NO	NO	Aged Persons Act; National Policy on the Aged; National Guidelines on prevention of abuse	National Policy on Ageing	NO

### Best practices

- The South African legal instruments and policy guidelines are unique in the region in their explicit identification of the problems of elderly people and their attempt at addressing those problems.
- The government of Tanzania is partnering with Help Age to develop an extensive protection programme for the elderly, alongside an information campaign aimed at eliminating the popular perceptions of elderly people as witches.

### Recommendations

- All countries must supplement government action with public awareness programmes to highlight the plight of the elderly and stop traditional harmful and discriminatory practices and accusations of witchcraft.
- Lesotho, Malawi, Namibia, Tanzania and Zambia must enact laws and publish specific policy documents that are aimed directly at addressing the risk of violence and HIV infection of the ageing population.
- South Africa must do more to implement its existing laws and policy.

## 2.12 Women with disabilities

***Article 23: Special protection of women with disabilities***

The States Parties undertake to:

...

(b) ensure the right of women with disabilities to freedom from violence, including sexual abuse, discrimination based on disability and the right to be treated with dignity.

Women with disabilities deserve specific identification and special protection from violence and discrimination. Whether restricted by a physical or mental handicap, these women are also vulnerable to physical and sexual abuse and run an elevated risk of contracting HIV. To comply with article 23, the government must enact disability-sensitive laws and affirmative action policy aimed at decreasing the risks of violence and sexual abuse of disabled women, as well as addressing discrimination based on disability.

In Lesotho, which has no national disability policy or law, most of the social welfare programmes are conducted by NGOs with no law to explicitly identify the increased vulnerability of women with disabilities.

Malawi also has no law or policy, although the Draft Disabilities Bill (2004) is a promising project that aims at combating discrimination based on the grounds of disability. It includes extensive provisions on employment and education and also addresses accessibility, transport and health requirements but regrettably does not touch on protection from violence.



© Les Neuhaus/IRIN

There is no national policy on disability in Malawi, but other national policy documents on welfare issues indirectly touch on the subject.

In Namibia, the National Policy on Disability has been aiming to achieve a fully socially integrated society since 1997, although Gender and Media Southern Africa (GEMSA) reports that ten years on, discrimination against the disabled is just as prevalent.

In South Africa, the Promotion of Equality and Prevention of Unfair Discrimination Act 2000 deals with the prevention, prohibition and elimination of unfair discrimination, hate speech and harassment, while the Integrated National Disability Strategy implemented by the Office on the Status of Disabled People is aimed at full social integration. Furthermore, South Africa boasts Disability Desks and Units in departments within all spheres of government whose task it is to highlight the particular problems faced by the disabled.

Discrimination in Zambia is tackled by the Persons with Disability Act 1996 while the integration process is outlined in the National Plan of Action on Disability in Zambia document.

Finally, Tanzania does not have a law protecting women with disabilities but does have a National Policy on disability which focuses on the inclusion of the disabled into all the facets of society, public life and freedom from discrimination.

## Synopsis of findings

	Lesotho	Malawi	Namibia	South Africa	Tanzania	Zambia
<b>National laws protecting women with disabilities</b>	NO	No (but in draft stage)	NO	Promotion of Equality and Prevention of Unfair Discrimination Act 2000	NO	Persons with Disability Act 1996
<b>National policy protecting women with disabilities</b>	NO	NO	National Policy on Disability	Integrated National Disability Strategy; the Office on the Status of Disabled People; Disability Desks and Units	National Policy on Disability	National Plan of Action on Disability

## Best practices

- South Africa's institutional framework (Office on the Status of Disabled People and Disability Units) which reinforces the legal and policy developments, is a good indication of real commitment addressing the problems faced by disabled people in the country.
- As part of its National Plan of Action on Disability, Zambia has created nationwide public sensitisation campaigns on the rights and respect for the disabled and actively celebrates International Day for the Disabled as part of this strategy.

## Recommendations

- Lesotho must enact laws and create policy documents that tackle the social, cultural and economic problems faced by disabled people, as



well as the violence and discrimination against women with disabilities.

- Namibia and Tanzania must also enact laws protecting the disabled.
- Namibia must act on the policy commitments decreed on ten years ago.
- Malawi must adopt its Disabilities Bill but not before including an explicit reference to protect the disabled women, and men, from violence and sexual abuse; Malawi must also create an integrated disability policy document and ensure its full implementation.

## 2.13 State reporting

### ***Article 26: Implementation and monitoring***

1. States Parties shall ensure the implementation of this Protocol at national level, and in their periodic reports submitted in accordance with Article 62 of the African Charter, indicate the legislative and other measures undertaken for the full realisation of the rights herein recognised.

The State reporting mechanism in the African Charter is an important tool for advocates, NGOs, development agencies and inter-governmental organisations to identify the strengths and weaknesses of each State with regard to their human rights obligations. The duty to report also puts pressure on governments to comply with the provisions of the Charter in order to avoid international 'shame.' However, State reporting lacks an effective enforcement mechanisms which results in overdue reports, or in many instances, failure to report. The table below shows that three out of the six countries have not reported since the ratification of

the Protocol. In addition, the countries that did report failed to specifically address the Women’s Protocol in their post-Protocol reports (although technically Zambia and Tanzania’s reports were submitted after the signing but just before the domestic ratification of the Protocol).

### Synopsis of findings

	Lesotho	Malawi	Namibia	South Africa	Tanzania	Zambia
State reports since Protocol entered into force in 2005	NO	NO	NO	Report in 2005	2006 (considered May 2008)	March 2006 (considered May 2007)

### Recommendation

- State Parties should avoid ambiguities in their reports generally and concerning implementation of the Protocol. Reports should specifically identify legislative and other measures undertaken for the full realisation of the rights in the Protocol.

### 3. Conclusion

*Violence against women must be given greater priority at all levels – it has not yet received the priority required to enable significant change. Leadership is critical.* UN Secretary General's in-depth report on violence against women

The Women's Protocol provides leaders with detailed guidance towards the elimination of violence against women and those who have ratified the Protocol have committed themselves to promoting and protecting the rights of women as outlined in the Protocol, of which a significant number pertain to violence against women. Due to its interrelatedness with the HIV pandemic and with numerous other women's rights including fundamentally, equality, violence against women must be prioritised. Until such time that it is, a reduction in HIV prevalence amongst women, particularly young women, in the countries under review will not occur.

The discordance between policy and practice is striking amidst the findings. Despite the existence of legislative and other best practices in the countries under review, which demonstrate fulfilment of certain provisions of the Protocol, the levels of violence against women in Sub-Saharan Africa remain unacceptably high and continue to fuel the spread of HIV. Measures to address all forms of violence against are consistently under-resourced conveying a message by states the other priorities are more deserving of attention.

Civil society has an important role to play in monitoring state compliance with the Protocol. For example, organisations advocating for women's rights can encourage states to submit timely reports to the

African Commission on Human and Peoples' Rights and submit their own 'shadow reports' to further inform the Commission on the legislative and other measures that are being taken to fulfil the rights in the Protocol.

There are several other actions civil society organisations can take to promote implementation of the Protocol. These include popularisation of its provisions in local communities using the media, advocating for legislative reform, raising awareness amongst traditional leaders of women's rights and their role in promoting gender equality, particularly through elimination of harmful traditional practices as outlined in the Protocol.

It is hoped that this guide has demonstrated the value of the Women's Protocol in addressing violence against women, a root cause of the HIV epidemic in Southern Africa, and that the recommendations offered in this guide can serve as a starting point for further advocacy.

## Annexure

**Full list of the 27 African states which have ratified the Women's Protocol as at 30 June 2009 (year of formal acceptance of treaty in brackets):**

Angola (2007)  
Benin (2005)  
Burkina Faso (2006)  
Cape Verde (2005)  
Comoros (2004)  
Djibouti (2005)  
DRC (2008)  
Gambia (2005)  
Ghana (2007)  
Guinea-Bissau (2008)  
Libya (2004)  
Lesotho (2004)  
Liberia (2007)  
Mali (2005)  
Malawi (2005)  
Mozambique (2005)  
Mauritania (2005)  
Namibia (2004)  
Nigeria (2004)  
Rwanda (2004)  
South Africa (2004)  
Senegal (2004)  
Seychelles (2006)  
Tanzania (2007)  
Togo (2005)

Zambia (2006)

Zimbabwe (2008)

## Bibliography

### Books and journal articles

- 'Gender violence goes unpunished in Zanzibar'  
*Tanzania Daily News* 26 August 2008
- Human Rights Watch (2007) 19 (18A) *Hidden in the mealie meal, gender-based abuses and women's HIV treatment in Zambia* New York: Human Rights Watch
- Jambaya, NL 'Sixteen days of no violence- time to take stock' *Pambazuka News* 28 November 2008
- Mulikita, NG; Longwe, S; & Siame, M *Beyond inequalities 2005: Women in Zambia* Harare: Southern African Research and Documentation Centre
- Sakkie, P 'Sexual harassment and violence in South African schools' (2006) 26(2) *South African Journal of Education* 305
- Viljoen, F & Stefiszyn, K (eds) (2007) *Human rights protected? Nine Southern African country reports on HIV, AIDS and the law* by the AIDS and Human Rights Research Unit Pretoria: Pretoria University Law Press
- White, S & Kachika, T *Beyond inequalities 2005: Women in Malawi* Harare: Southern African Research and Documentation Centre
- Zalesne, D 'The effectiveness of the employment equity and the Code of Good Practice in reducing sexual harassment' (2001) 17 *SAJHR* 503

### Reports and other documents

- African Charter on Human and Peoples' Rights, 2 – 10<sup>th</sup> consolidated report by Tanzania, submitted in 2006 and considered on 2008 at the 43<sup>rd</sup> session 15 May-2 June 2006

- Bosl, A 'Trafficking in persons Report 2008 Narrative in Namibia' (special case), Windhoek, November 2008
- Committee on the Elimination Against Discrimination against Women 'C Malawi's legal structure must be harmonized with international standards, say experts on Women's anti-discrimination Committee' 19 May 2006 United Nations Doc WOM/1560
- Committee on the Elimination of Discrimination against Women 'Concluding observations of the Committee on the Elimination of Discrimination against Women. Combined fourth, fifth and sixth periodic report: United Republic of Tanzania' 11 July 2008 United Nations Doc CEDAW/C/TZA/6
- Committee on the Elimination of Discrimination against Women 'Consideration of the reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women' 9 May 2007 United Nations Doc CEDAW/PSWG/2007/II/CRP.1
- Committee on the Elimination of Discrimination against Women 'Consideration of the reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined second and third periodic reports of State parties: 2 September 2005 United Nations Doc CEDAW/C/NAM/2-3
- Committee on the Elimination of All Forms of Discrimination against Women General Recommendation No.19, 11th session (1992)
- Committee on the Elimination of Discrimination against Women, Pre-session 'Lists of issues and questions with regard to the consideration of periodic reports, United Republic of Tanzania' (2007) United Nations Doc CEDAW/C/TZA/Q/6



- Committee on the Elimination of Discrimination against Women 'Responses to the list of issues and questions for consideration of the combined second, third, fourth and fifth periodic report, Malawi' 8 May 2006 United Nations Doc CEDAW/C/MWI/Q/5/Add.1
- Committee on the Elimination of Discrimination against Women 'Responses to the list of the issues and questions with regard to the consideration of the combined second and third periodic reports, Namibia' 16 July 2008 CEDAW/C/NAM/Q/3/Add.1
- Committee on the Elimination of Discrimination against Women 'UN Committee on the Elimination of Discrimination against Women: Concluding comments, Namibia' 2 February 2007 United Nations Document CEDAW/C/NAM/CO/3
- Gender and Media Southern Africa, issue 7, 3 December 2004
- Human Rights Watch 'Universal periodic review of Zambia: Human Rights Watch's submission to the Human Rights Council' 4 May 2008
- 'Integrating the Africa Women's Protocol in the Zambia National Legal Policy and Processes: Example from WSLA' (2008) *Programme Insights* 13
- Matibini, P 'Access to Justice and the rule of law' an issue paper presented for the Commission on legal empowerment of the poor
- Ministry of Gender Equality and Child Welfare 'Namibia's country report on the African Union Solemn Declaration on Gender Equality in Africa' (2006)
- Mwale, F & Makhambera, M 'National Response to Gender- Based Violence'
- Malawi Programme Submitted to United Nations Population Fund
- Presidency Office on the Status of Women 'South Africa's report to the AU Secretariat on the

- implementation of the AU heads of States' Solemn Declaration on Gender Equality in Africa' (2006)
- The Guidelines for Anti-Retroviral Therapy, Published by the Ministry for Health and Social Services, Namibia
- 'The Role of Lawyers, Non-Lawyers and other Service Providers in Africa' Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa, Conference on Legal Aid in Criminal Justice: Lilongwe, Malawi, 22-24 November 2004
- United Nations Convention on the Elimination of All Forms of Discrimination against Women, Tanzania Non Governmental Organizations' shadow report to CEDAW: The implementation of the Convention on the Elimination of All Forms of Discrimination against Women, presented by Women's Legal Aid Centre on behalf of Southern Africa Human Rights Non-governmental Organisations' Network (Sahringo) Tanzania Chapter
- United Nations Economic and Social Council Statement by the Hon. Marlene Mungunda, Minister of Gender Equality and Child Welfare at the 51<sup>st</sup> session of the Commission on the status of Women, New York, 28 February 2007
- United Nations Secretary General's Task Force on Women, Girls and HIV/AIDS in Southern Africa 'Facing the Future Together: Report of the United Nations Secretary-General's Task Force on women, Girls and HIV/AIDS in Southern Africa' 28 February 2007 United Nations Doc UNICEF/HQ01-0287/ GIACOMO PIROZZI
- Von Struensee, VMG 'Widows, AIDS, health and human rights in Africa' 26 July 2004
- White, S & Kachika, T 'A list of critical issues to the sixth periodic report of Malawi on CEDAW: Identified by women and Law in Southern Africa Research and Education Trust (WLSA Malawi)' (2009)

World Health Organization 'New study shows that female genital mutilation exposes women and babies to significant risk at child birth' 2 June 2006

## **Websites**

[www.genderlinks.org.za](http://www.genderlinks.org.za)

[www.labourprotect.co.za](http://www.labourprotect.co.za)

[www.equalitynow.org](http://www.equalitynow.org)

[www.state.gov](http://www.state.gov)

[www.iol.co.za](http://www.iol.co.za)

[www.un.int/Namibia/eco28-02-07](http://www.un.int/Namibia/eco28-02-07)

[www.bunanews.gov.za/news](http://www.bunanews.gov.za/news)

[www.unicef.org/southafrica](http://www.unicef.org/southafrica)

[www.wlsa.org.zm](http://www.wlsa.org.zm)

[www.namibia.com.na](http://www.namibia.com.na)

[www.crin.org/rsources/inforDetail.asp](http://www.crin.org/rsources/inforDetail.asp)

[www.state.gov/g/drl](http://www.state.gov/g/drl)

[www.lac.org.na/new](http://www.lac.org.na/new)

[www.awid.org](http://www.awid.org)

[www.malawi.gov.mw/justice/LegalAid](http://www.malawi.gov.mw/justice/LegalAid)



© IRIN