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Zimbabwe and CEDAW compliance: pursuing women's equality in fits and starts

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1 Introduction

This chapter seeks to chart Zimbabwe's history in the utilisation and the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[1] Progress in implementation over the years since the CEDAW came into effect in 1979 has been slow and, at best, partial. This is despite sporadic state rhetoric recognising the importance of the CEDAW in relation to women's human rights and unfulfilled promises to incorporate all of the CEDAW into domestic law. Zimbabwe signed the CEDAW without any reservations in 1991 and ratification took place in 1997. But this is not sufficient for international treaties and conventions to be incorporated into domestic law: section 111B of the current Constitution requires an Act of Parliament for domestication; this is yet to be accomplished.

2 The political and constitutional situation in Zimbabwe

Zimbabwe is presently in the throes of political and legal change, after twenty-seven years of de facto one-party rule, which brought rampant

[1] This chapter began with a paper presented by Choice Damiso at the colloquium 'From Ratification to Implementation: CEDAW in International and National Law' in Oslo, 11–12 March 2010. After the colloquium, an embellishment and finalisation of the chapter was undertaken by Julie Stewart. The research informing this chapter was predominantly desk research, which involved examining the reporting processes, checking for information from government reports, gender policies and Parliamentary reports of proceedings, and looking for clues as to the role that the CEDAW played in legislative, policy and judicial interventions. Personal experiential data was invoked, and interviews were conducted with women who had been involved in CEDAW advocacy, lobbying and reporting activities in the past.

economic mismanagement and human rights abuses. A Government of National Unity (GNU) is shakily in place.[2] Under regional and international pressure, a Global Political Agreement (GPA) was approved by the three main political parties ZANU (PF), MDC (T) and MDC (M) (as it then was) in September 2008. The GPA took effect on 11 February 2009.[3] According to the GPA, a new Constitution was to be formulated, which would then be followed by free and fair elections. The formulation and drafting of the new Constitution was a protracted, at times acrimonious, and costly affair. The final version was a product of political compromise mainly on the part of ZANU (PF). This draft went to a national referendum on 16 March 2013, although it was only finally released by the Parliamentary Select Committee (COPAC)[4] for publication on 31 January 2013.[5] The nation approved the draft by an overwhelming 93.5% in the referendum. The projected date for the finalizing of the adoption of the new constitution is 8 May 2013.

3 The constitutional and legal position of women in Zimbabwe

The Constitution drafting process has actively addressed the rights of women in Zimbabwe. If the draft approved in the referendum is adopted

[2] In Zimbabwe currently, with an uneasy GNU, the term *government* has to be carefully qualified to single out one specific sector or ministry depending on the governance activities being carried out. A short explanation of the lead-up to this government of so-called National Unity is required. On 21 July 2008 after much political wrangling over the outcomes of the 2008 national and presidential elections, which were alleged to have been grossly manipulated by Zimbabwe African National Union (Patriotic Front) ZANU (PF), the interparty Global Political Agreement (GPA) was entered into by the three main political parties ZANU (PF), Movement for Democratic Change (Tsvangirai) (MDC (T)) and the junior player MDC (Mutambara) (MDC (M)), which is now MDC (Ncube) (MDC (N)). This is a complex power-sharing agreement between the three parties, which left Robert Mugabe as President, with considerable personal power, but created a number of senior political posts for leaders of the other parties, the most significant being the post of prime minister, which went to Morgan Tsvangirai, leader of the MDC (T) faction. The detail of this whole agreement lies beyond the scope of this chapter (a copy can be located at www.copac.org.zw/home/government-of national-unity – last accessed 16 August 2012). The critical point to note is that a nationally inclusive process for creating a new Constitution was one of the key components of this agreement.

[3] The GPA has twenty-five Articles ranging from the composition of the new government to enhancing freedom of the press. However, many of the Articles have not been implemented.

[4] COPAC is the acronym for the Parliamentary Select Committee responsible for coordinating the constitutional review and drafting of a new Constitution.

[5] Available at: www.copac.org.zw/index.php?…copac-draft…31-january-2013…draf… (last accessed 23 February 2013).

by Parliament this will make way for full and unfettered equality for women.[6]

Since colonisation of what is now Zimbabwe by the British in the late nineteenth century, the formal legal and political status of the indigenous population, especially women, has been one of political, legal and social marginalisation. Full political recognition of the indigenous population was only achieved in the Independence Constitution, which came into force on 18 April 1980. Full legal recognition was unequivocally granted to all male Zimbabwean citizens regardless of race. However, for all women equality with men on legal grounds remains incomplete, more so for indigenous women. The reason for this lies embedded in the colonial history of the country and in a chronic case of serial cultural relativism. Granting indigenous women equality rights was seen as politically risky because of assumed cultural resistance from men.

Throughout the colonial period there had been progressive advances for white women such as the right to vote, capacity to enter Parliament, equal status with white men in relation to the public service (at least on paper), and the right to hold and manage their own property. Few of these advances were granted to indigenous women, who continued to be generally perceived at the level of state law and official customary law as minors, trapped in a perceived customary law web of inferiority. Indigenous men also suffered from severe discrimination, but after Independence their legal situation was better than that of women.

Zimbabwe attained formal Independence on 18 April 1980,[7] after a protracted guerrilla war in which both men and women fought

[6] Both the MDC factions accepted the draft without amendment but ZANU (PF) withheld acceptance of the draft, employing delaying and negative tactics until the very last moment. Neither of the other two parties wavered on the content of the draft and ZANU (PF) capitulated. According to the (Zimbabwe) Independent newspaper of 14 August 2012 the main objections relate to presidential powers.

[7] Although there had long been opposition to white minority rule, matters came to a head on 11 November 1965 when the white minority Rhodesia Front government made a Unilateral Declaration of Independence, attempting to avoid the imposition of majority rule that was taking place across the continent at the behest of Britain. This led to sanctions being applied to the country; the white minority-rule Rhodesia Front government ultimately capitulated.

side by side.[8] The Zimbabwe Constitution (1980)[9] was negotiated prior to Independence between the Rhodesia Front Party, the British government (which had temporarily resumed its colonial role), the Zimbabwe African National Union and the Zimbabwe African People's Union. The 1980 constitutional provision on equality, section 23, outlawed discrimination on the grounds of race, tribe, place of origin, political opinions, colour or creed. It made no reference to sex or gender as grounds of unlawful discrimination. As with other 'Westminster' export model post-colonial constitutions, it contained and still contains a provision, section 23(3), that protects customary law and personal law from the application of non-discrimination provisions.[10]

Although the Independence Constitution did not provide adequately for the rights of women, there has been incremental change over the years. Sixteen years after Independence in 1996, gender was added as a further ground on which discrimination was not permitted,[11] but it remained subject to the overriding application of the claw-back clause in matters of personal law and customary law. These are the areas that most affect the pursuit of rights by women. Sex, marital status and disability were added in 2005, as was an affirmative action clause, which mandated that women be treated on an equal basis with men in the land redistribution processes, and this is expressly stated not to be subject to section 23(3).

[8] There had been previous attempts to oust the colonial regime in 1893 and 1896, which were quashed by the superior 'firepower' of the colonial administration. Significant in relation to the situation and status of women is that the most-lauded leader of the early *Chimurenga* (struggles/wars) was Mbuya Nehanda, a spirit medium (*mbuya* meaning literally grandmother, a term of deep respect for a woman in Shona society; one interpretation in her case would be revered grandmother of the nation). At the time of her execution by the colonial authorities for instigating and leading the 'rebellion', she was still a young woman in her mid-thirties.

[9] This Constitution is locally referred to as the Lancaster House Constitution after the British government building in which the negotiations took place.

[10] The Zambian Independence Constitution and the Kenyan Constitution had more or less identical sections, both section 23.

[11] In 1996 one further amendment to section 23 was made to the effect that it was not discriminatory if a law takes due account of physiological differences between persons of different gender. In 2005 sex was added to this proviso, but gender remained in place. This reform emerged from the failed 1999–2000 constitutional reform process, where during debates as to the content of the Constitution, the difference between sex and gender had to be carefully explained to the drafters and their advisers (personal recollection, Julie Stewart). Suffice it to say, at this juncture, that it was differences in physiology based on sex that were being targeted.

Whereas progress and quite significant gains for women have been made on paper, there seems, previously, to have been a point that was regarded as one step too far. This was the crossroads between tradition and culture, and conferring full and unfettered rights on women. Progressively over the years, constitutional reforms, legislation and judicial activism have all led to an improvement of women's legal position, but a final blanket unqualified revocation of the offending provisions of section 23 of the Zimbabwe Constitution is still pending. Yet, over the years there has been recognition by various organs of the government that women's equality needs to be addressed and that Zimbabwe has obligations created by its signing and ratification of international and regional instruments. For example, the National Gender Policy (2004) produced by the then-Gender Department in the Ministry of Youth Development, Gender and Employment Creation, states that one of the strategies to deliver equality to women with men is to:

> incorporate the provisions for [*sic*] international human rights instruments into domestic law; e.g. Convention on the Elimination of All Forms of Discrimination Against Women (Article 6.2.3).

Nothing has been done since this assertion to incorporate the CEDAW wholesale into domestic law.

The Constitution[12] approved in the referendum has among the national objectives that: 'the state must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party and which address gender issues … are incorporated into domestic law'. Although national objectives in the draft Constitution are assumed not to be justiciable, the wording could be used to lobby for incorporation of international, regional and sub-regional instruments addressing the rights of women into Zimbabwean law. These include the CEDAW, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Protocol)[13] and the Southern African Development Community Protocol on Gender and Development[14] (SADC Protocol).[15]

[12] See *supra* note 5 for the access reference. The acronym COPAC does not match the full title of the Committee but it readily identifies the body in Zimbabwe.

[13] Signed in 2003 and ratified in 2008 after a vigorous campaign led by the Zimbabwe Women Lawyers' Association.

[14] Ratified in 2010, after a vigorous women's NGO-led campaign.

[15] Some of the conventions that have been incorporated into Zimbabwean law fairly rapidly and with little contention and no public debate or overt external pressure

Zimbabwe has not signed or ratified the Optional Protocol to the CEDAW, which would enable communications to be presented to the CEDAW Committee where individuals or groups perceive there have been violations of rights conferred by the CEDAW. It is unlikely that the Optional Protocol will be acceded to in the near future. A new Constitution and a change of political power could lead to its ratification. The only current external scrutiny of CEDAW compliance is periodic reporting to the CEDAW Committee and to other human rights bodies.[16]

In response to women's demands and, perhaps, to international pressure, in the current constitutional reform process sex and gender equality are high on the reform agenda.[17] The final draft Constitution includes unequivocal non-discrimination clauses with both vertical and horizontal effect and wide-ranging socio-economic rights.

In the final throes of the drafting process there was constant wrangling over issues related to power, local governance, the role of the defence forces and the powers of the President and executive.[18] The equality and non-discrimination clauses, somewhat surprisingly given past reservations over women's equality, did not seem to be contentious. Women's human rights groups breathed a major sigh of relief when the final draft left the equality clauses and socio-economic rights firmly in place.

What started as a process with promises of openness, transparency and gender equality in participation became a closed operation largely

include the Chemical Weapons Prohibition Act Chapter 11:18 (which incorporates the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, ratified in 1994 and incorporated in 1998) and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, which only came into effect in 1997, and was incorporated in 2001. Neither convention is culturally contentious.

[16] These can, however, be influential in stirring government to consider formal change, as will be seen when the two formal CEDAW reporting episodes are discussed.

[17] There was a national outreach programme where the views of the population were gathered: to date the results of this exercise remain virtually inaccessible. Whether sex and gender equality were supported by the population at large is unknown.

[18] The process by April 2012 ceased to be people-focused and became the purview of an exclusive group, the three main political parties and the traditional leaders.

dominated by males.[19] One of the 'parked'[20] issues in the first COPAC official draft of 2 May 2012[21] was representation of men and women in the Senate and House of Assembly. Initially women hoped that 50/50 representation would be provided for; however, this did not materialise. The final draft provides that proportional representation by province based on party lists in which male and female candidates are listed alternately (zebra pattern) will be the format for directly elected senators. A female candidate must head each list. This would give sixty senators, giving roughly thirty female senators. This would not guarantee equality of representation as there would be twenty-eight other senators who would comprise provincial governors, chiefs and persons representing the disabled, where sex-based ratios are not prescribed and males would probably predominate.

In the House of Assembly the final draft provides that women for 'the life of the first two Parliaments' (Clause 6.9) would have an additional 60 seats in addition to the 210 undifferentiated seats as in the current Parliament. This is less than the 50/50 representation that women had campaigned for, but creates a temporary special block that might help develop women's capacity to engage in the political arena. It also preserves the current number of seats for undifferentiated election, which means that all male sitting members would have a chance to be re-elected, which a 50/50 apportioning of seats based on sex would have precluded.

4 Tracking the influence of the CEDAW in legislative and constitutional reforms

The CEDAW as an influence in improving women's rights in Zimbabwe has until recently not been openly acknowledged by the state. Yet, along with the regional instruments, it seems to have a discernible but not compelling influence on the continued progress towards women's equality.

In tracking progress towards partial equality between men and women in Zimbabwe, three distinct periods can be identified. The first from 1980–91 before the CEDAW was ratified is, arguably, the period when the CEDAW and other human rights instruments and guiding principles

[19] There were two technical expert male drafters and one female drafter. The next tier were from the three main political parties and the Council of Chiefs. The six political representatives (five males and one female) had male constitutional and legal experts as advisers, while the Chiefs had a female lawyer as their adviser, Choice Damiso.

[20] 'Parked' – meaning to be dealt with at a later date.

[21] Can be accessed at the same site as the other drafts – see *supra* note 5.

were most regularly invoked by the courts. Legal reform, short of penetrating constitutional reform, led to significant improvement of women's rights. The second period, from 1992 to around 2000, saw legislative reform benefiting women, but there was a reversion on the part of the Supreme Court to a more restrictive view of indigenous women's rights. Post 2001 there have been constitutional reforms to benefit women, but these remain deeply equivocal, partly because section 23(3) remains in place.

5 Legislative reform and judicial activism: 1980–91

The first and potentially the most-significant piece of legislation in addressing discrimination against women after Independence was the Legal Age of Majority Act (LAMA)[22] enacted in 1982.[23] Prior to this Act, as recorded in the Initial Report to the CEDAW Committee, African women were perceived, arguably erroneously, as perpetual minors:

> [p]assing from the guardianship of their fathers (or brothers, uncles, or such other male relative) to that of their husbands upon marriage. They had no legal status of their own and thus could not contract without the assistance of their guardians, acquire property in their own right, sue or be sued in their own right. In politics and public life they were virtually non-existent. They had very little participation in decision making.[24]

When the Legal Age of Majority Act was formulated, it was intended to confer majority status upon attainment of eighteen years of age on all

[22] The Legal Age of Majority Act was repealed in 1996 and its provisions incorporated in section 15 of the General Laws Amendment Act [Chapter 08:07] but it is still referred to as LAMA.

[23] The Parliamentary Debates during the passage of LAMA made no reference to any human rights instruments but couched the arguments in terms of women's contributions to the liberation struggle, (Zimbabwe Parliamentary Debates Vol. 5 at 17 June 1982 at 69ff.). Of significance is the clear evidence throughout that debate that there was awareness that the LAMA was designed to have a radical effect on women's rights under customary law. One can confidently argue that the CEDAW and a growing global awareness of women's rights were humming in the background of the deliberations on the LAMA.

[24] *Zimbabwe's Initial Combined Report to the CEDAW Committee*, Zimbabwe, CEDAW/C/ZWE/1. But as Jeater notes, this was a distorted and inaccurate view of women's status. See for a more detailed exploration of the creation of these views of indigenous women's status, D. Jeater, *Law, Language and Science: The Invention of the Native Mind in Southern Rhodesia, 1890–1930* (Portsmouth: Heinemann, 2007) at 85. Jeater shows how a version of women's status was cobbled together by Native Commissioners (NCs) from experiences in Natal and from analogies to Old Testament versions of women's subordinate status and from an alien nineteenth-century European jurisprudence:

Zimbabweans regardless of sex or race, thus doing away with the assumed perpetual minority status of African women and progressively removing discrimination against women.[25] Women who were involved in its drafting carefully crafted the wording to provide a strategic base from which to tackle discriminatory practices in all areas of the law, including, as clearly stated in the Act, customary law.

The potential of the Legal Age of Majority Act to radically change the status of women was put to the test with the 1984 case of *Katekwe* v. *Muchabaiwa* 1984 (2) ZLR 112 (Supreme Court), in which the Supreme Court under Justice Enoch Dumbutshena, a noted proponent of the application of international human rights to embellish and develop a national human rights jurisprudence, determined that a father's claim to seduction damages was predicated on the minority status of women and was meant to redress the delict committed against him.[26] Thus a father no longer had a cause of action against the seducer of his major daughter. The

> The NCs believed that they understood much of what they heard because it appeared to have a resonance with things they already knew. For example, the idea that women were 'legal minors' reflected what whites *expected* to see. However, the concept of women's legal minority was part of a specifically European legal system, not really applicable to the local context. The indicators that the NCs used to demonstrate the minority of women would have applied equally to large numbers of men. On the other hand, they would not have applied to senior women, notably the Vatete (father's sister), in decision making about, for example, the distribution of lineage property. The whites didn't see the 'legal minority' of junior men or the legal 'majority' of senior women because they weren't looking for it and didn't ask the right questions. Their assertions about the legal minority of women had been inherited from the codes in Natal, which reflected an attempt to cram fundamentally different systems of power and jurisprudence into a European model that didn't fit.

[25] This conferring of full contractual status on African women on the attainment of majority at the age of eighteen had a mixed reception. Providing that issues related to marriage and the absence of the need for parental consent were not raised, majority status for women was not especially problematic. Suggestions that this new law removed the need for parental or a guardian's consent to the marriage of an African woman caused an outcry. This was soon connected to the issue of payment of both *lobola* (bridewealth) and seduction damages in relation to an African adult woman. For a general discussion of the significance of carefully shaping law reform messages, see A. S. Tsanga, *Taking Law to the People: Gender, Law Reform and Community Legal Education in Zimbabwe* (Harare: Weaver Press, 2003).

[26] Justice Dumbutshena extols the value of both international human rights instruments and the role of regional human rights adjudication bodies in an untitled presentation to the Second Judicial Colloquium on the Domestic Application of International Human Rights Norms, in Harare, 19–22 April, Commonwealth Secretariat, 1989.

daughter could claim such damages on her own behalf under general law. It seemed that progress could be achieved using this legislation, albeit on a case-by-case basis, towards the equality of women with men.

Moving forward in line with this positive interpretation, in 1985 Zimbabwe amended the Matrimonial Causes Act (now Chapter 5:13) to provide for an equitable distribution of matrimonial property upon divorce. This was achieved, at least on paper, by directing the courts to recognise domestic contributions (usually the wife's) to the wellbeing of the family, by making an award based on the value of domestic and caring duties. In practice, wives' contributions remain undervalued, because women tend to make their contributions in terms of the upkeep of the family, provision of food, and covering household and general expenses, while men are free to acquire immovable and movable assets in their own names. It is thus difficult for women to clearly establish the value of their contributions, as the man is usually the one with title deeds, vehicle papers and other documentary evidence of major expenditures, and women have little evidence of substantial contribution through provision of consumables.

6 Making progress: 1991–9 legislative progress and judicial equivocation

In 1996 the legislature amended section 23 of the Constitution to include gender as a ground on which discrimination could not be justified. For women, discrimination vis-à-vis men remained possible, albeit indirectly through the persistence of the claw-back clause section 23(3) that permitted continued discrimination in relation to adoption, marriage, burial, devolution of property on death, or other matters of personal law and customary law.[27] What this amounted to was a ban on discrimination against women and girls in the public weal but licence for its persistence in private arenas.

Despite the retention of the claw-back clause, movements were once again afoot to lay down new approaches to old problems. The Administration of Estates Act Amendment Act 6/97[28] introduced a form of gender-equal inheritance rights subject to the accommodation of the

[27] In the Constitutional Amendment in 2005 this was restyled to read 'personal law', but the effect remained the same and might have even broadened the application of the claw-back clause. So far this has not been judicially determined.

[28] Now incorporated into the Administration of Estates Act (Chapter 6:01).

recognition of polygynous unions. This ushered in a new era for women's and girls' inheritance rights.[29] In simple terms, intestate succession, which had previously been determined by the application of assumed customary law where the parties were African, and which treated the eldest son as the heir and person responsible for the maintenance of the family, was now regulated by legislation that sought to provide more equitably for all potential dependants and beneficiaries of an intestate estate.

A wife or wives in polygynous unions could inherit from a deceased spouse's estate, to the extent of a joint one-third share, the senior wife receiving two shares from the wives' share, in either registered or unregistered polygynous unions. Surviving spouses could take over the former matrimonial home jointly where they occupied it jointly or separately when they occupied separate homes at the death of the husband.[30] Daughters were entitled to inherit on an equal basis to sons.[31]

Women's lobbies on the unfairness of inheritance rights and on abuses perpetrated by uncaring and uninvolved heirs in so-called customary law had led to research initiatives being taken up predominantly by the Women and Law in Southern Africa Research Trust (WLSA). This research revealed that customary law was far more nuanced and flexible than indicated by formal state and colonial versions of its content.[32] This research, and a comprehensive understanding of customary patterns of

[29] For a discussion of the previous situation and a critique of the way in which customary intestate succession was skewed against women and girls, see J. E. Stewart with K. Dengu-Zvobgo, B. Donzwa, J. Kazembe, E. Gwaunza and W. Ncube, *Inheritance in Zimbabwe: Law, Customs and Practice* (Harare: Women and Law in Southern Africa Research Trust (WLSA), 1994, 2nd edn 1995); J. E. Stewart, 'Why I can't teach customary law' in J. Eekelaar and T. Nhlapo (eds.), *The Changing Family: Family Forms and Family Law* (Oxford: Hart Publishing, 1998).

[30] In all monogamous customary law unions, regardless of the legal regime governing the marriage, the Deceased Estates Succession Act (Chapter 6:02) applies, where males and females, be they spouses or children, are treated on an equal basis.

[31] A description of how the law reform process was influenced by the research is discussed in J. Stewart and A. Tsanga, 'The widow's and female child's portion: the twisted path to partial equality for widows and daughters under customary law in Zimbabwe' in A. Hellum, J. E. Stewart, A. Tsanga and S. S. Ali (eds.), *Human Rights, Plural Legalities and Gendered Realities: Paths Are Made by Walking* (Harare: Weaver Press, 2007) 407–36 at 413.

[32] This legislation made the Supreme Court's decision in *Magaya* v. *Magaya* 1999 (1) ZLR 210, discussed below, most surprising. One unfortunate outcome of the *Magaya* judgment has been to confuse lay understanding of the new legislation. It is frequently believed that *Magaya* overturned the new law; it did not. The facts of the case had arisen before the new law came into effect so the previous assumed legal position of African women was relied on.

inheritance and their attendant obligations, was critical in negotiating the final stages of the inheritance law reform. Although women's rights were not directly invoked in this process, they were the background influence that helped drive women lawyers' determination to obtain reform. Based on research and strategic argumentation, formal recognition of women's and all children's rights to inherit from their deceased parents estates was recognised. The key move, when patriarchal and patrilineal arguments were holding sway and likely to derail the reform process, was the capacity of one of the WLSA researchers to ask the then-President of the Council of Chiefs, Chief Mangwende, to explain the purpose behind customary patterns of inheritance. To the great relief of all the women present, he replied that it was to care for and sustain the family of the deceased and that there was no estate until the surviving spouse or spouses died. This led to the Council of Chiefs' acceptance, in principle, of the reform, and the legislation passed through Parliament.

After this progressive legislation came into effect on 1 November 1997, a narrow interpretation of the claw-back provision in section 23(3) of the Constitution in *Magaya* v. *Magaya* 1999 (1) ZLR 100 (S) produced an international and national outcry. The Zimbabwe Supreme Court found that customary law purportedly denied a woman the right to inherit from her deceased father's estate on intestacy. The Court found that customary law was not subject to the operation of the equality provisions in section 23. This was found despite arguments urging the application of non-discrimination principles derived from international instruments including the CEDAW.

The *Magaya* decision gave rise to a fervent invocation of the CEDAW in Parliament in a debate on 18 May 1999. Miss Zindi MP noted that Zimbabwe had ratified the CEDAW and adopted the African Charter on Human and People's Rights (AU Charter). She drew attention to Articles 1, 2, 3, 5, 13, 15 and 16 of the CEDAW and commented:

> Zimbabwe has a duty to ensure and end the discrimination against women in all areas, including law, culture and the family.

She observed that the *Magaya* decision was:

> [a] stark violation of aforementioned international treaties which cannot be part of Zimbabwean laws until Zimbabwe passes a specific act which would make [the] CEDAW part of domestic law in terms of s111B of the Constitution.

She especially noted that Parliament had passed the LAMA:

> But at this moment we are seeing a situation of reversal by our Supreme Court.

She made a general plea for the improvement of the situation of women and girls noting that:

> The AU Charter [sic] Zimbabwe a duty to promote women's rights and *positive* African values [emphasis added].

Still no action was taken to reform section 23(3), and without constitutional reform progressive legislation remains in peril, but further reversals of progressive laws have not taken place.

Implementation of the new inheritance law remains fragmented despite a nationwide campaign to disseminate its contents and its potential to improve the inheritance rights of women and girls.[33]

The Prevention of Discrimination Act, Chapter 8:16 was enacted in 1998 (Act 19/1998). It largely deals with the prohibition of discrimination in the public and commercial arenas and should serve to support the non-discrimination provisions in section 23(1)(a) and (2) of the Constitution.[34] The Act, as with its predecessors, tackles the often-vexatious problem of constitutions only expressly dealing with the prohibition of discrimination in vertical terms, as it directly addresses the often more pernicious problems of horizontal discrimination, and targets discriminatory practices by both real and juristic persons. Measures, albeit limited, were now in place to address many aspects of discrimination in Zimbabwe. However, the legislation is not particularly well known and is used predominantly in relation to racial discrimination. Its potential to deal realistically with gendered discrimination in relation to finance, business and property acquisition is constrained because commercial and financial entities require the individual to have collateral and business plans, as well pre-existing secure and provable employment and a track record. This presents problems for many women.

The 1999–2000 constitutional reform process provided an opportunity for comprehensive reform. During the drafting phase, an attempt was made to expunge section 111B and replace it with automatic incorporation

[33] The campaign was carefully crafted and at a nationwide level. Unfortunately, it came to a premature end with objections from the then-Minister of Information about a logo indicating the involvement of the British Development Agency, DFID. DFID had provided GBP 880,000 and would have provided a further GBP 440,000 for the continuation of the campaign. However, the latter sum was withdrawn during the political wrangle that ensued.

[34] This Act consolidates the provisions of earlier anti-discriminatory legislation such as the Immovable Property (Prevention of Discrimination) Act and the Public Premises (Prevention of Discrimination) Act. In addition, the Act also provides for the right of an aggrieved person to damages.

of signed international instruments into domestic law – it was removed by the oversight committee before that Constitution reached its final draft.[35] Unfettered equality clauses, reflecting the values contained in the CEDAW and other international human rights instruments, were included. In the run-up to the referendum on the Constitution, the failure on the part of feminist lobbyists to understand the formulation of rights clauses helped to fuel campaigns to reject the Constitution because they believed that women's rights were inadequately formulated. This, coupled with weak framing of socio-economic rights as mere objectives, was seen as inadequate appreciation of and attention to women's rights and entitlements.

The rejection of the draft Constitution was hailed as a political triumph for women, but significant rights for women that might have resulted from an affirmative vote, even if it was not the full package sought, were lost. The rejection of the draft Constitution cannot be attributed to any one set of factors,[36] but the heightened and perhaps exaggerated expectations of women certainly had an effect on women's and especially non-law-oriented women's organisations' understanding of what could be covered in a Constitution.[37] The ensuing strong female lobby for the rejection of the draft further fuelled women's dissatisfaction and was probably part of the draft Constitution's ultimate demise. We have no knowledge of how individuals actually voted or why. There are suggestions that the referendum vote was not on the Constitution but on the continuing rule of President Robert Mugabe.

7 More incremental change: 2000–8

This was a period when women's organisations such as Women of Zimbabwe Arise (WOZA), Zimbabwe Women Lawyers' Association (ZWLA) and the Women's Coalition protested against the ongoing curbing of general political rights and the rapidly declining socio-economic situation in the country. WOZA, which protested openly and peacefully, had its key members arrested and held under insanitary and crowded

[35] Personal recollection, Julie Stewart.

[36] It was a straight yes or no vote on the whole draft.

[37] In their deliberations on whether or not to participate in the 2009 constitutional process, and informed by the opportunities for beneficial reform for women through the rejection of the 2000 draft Constitution, ZWLA membership on 3 April 2009, at a meeting at the Crowne Plaza Hotel, Harare, decided that despite the shortcomings of the proposed process:

conditions in police cells, and some WOZA members were spirited away to hidden sites by police.

In response to the protests and the failure of the constitutional reform process, there was increasing repression of civil society by the ZANU (PF) government. Repressive laws on the media and public protest were introduced to legitimise the repression. These were the Public Order and Security Act (POSA) Chapter 11:17 and the Access to Information and Protection of Privacy Act (AIPPA) Chapter 10.27. The law was also used to prevent rallies by the MDC in the run-up to elections. AIPPA was used to close down the only independent daily newspaper and other publications critical of the Mugabe regime.[38] Yet this was a period in which women's rights were further developed, even though the claw-back clause remained firmly in place. In 2000, following the failure of the constitutional reform process, the fast-track land-grab process was launched. In theory, both men and women were supposed to be equal beneficiaries of this process, but, as discussed earlier, this has not, even with constitutional reform, generally benefited women.

The seventeenth Amendment to the Constitution in 2005 expanded the grounds upon which discrimination is prohibited by adding sex, marital status and physical disability. The addition of sex to complement gender as grounds for non-discrimination is significant. Women may be discriminated against based on their ascribed gender roles and the gendered cultural beliefs of what it means to be either male or female. But further, they may be indirectly discriminated against because of failure to appreciate the importance of dealing with sex-based issues such as menstruation, childbirth and breastfeeding, which are exclusively female in nature. Marital status is also particularly important for addressing discrimination of women as some of the disadvantages that women encounter are linked to their marital status. In relation to land, married women may be treated as appendages to their husbands while single women may be discriminated against on the basis that they are not 'traditionally' entitled to access land in their own right.

Amendment No. 17 also introduced provisions to exempt from the general prohibition of discrimination the implementation of affirmative action programmes for the protection and advancement of persons or

> [e]ven though they knew that the process was flawed they would nevertheless strive to ensure their input is taken up … to ensure women at least got some benefit from the process. The catchphrase was really 'half a loaf is better than none'.

[38] Although two independent weeklies, the *Standard* and the *Zimbabwe Independent*, remained in print.

classes of persons who have been previously disadvantaged by unfair discrimination. Here again, the CEDAW probably informed the legislative process, but not openly.

8 Beyond legislation: the role of the courts in promoting women's rights

Since 1980 the judiciary has taken a start–stop, sometimes a backtracking approach to women's rights. The judiciary at all levels was under attack from the executive. The Chief Justice, Justice Gubbay, was in effect sacked and replaced with a ZANU (PF) sympathiser. Other judges perceived to be averse to manipulation of judicial processes and the impunity of those in power were harassed into resigning.[39] Despite attacks on the judiciary, women's rights have continued to be quite favourably treated. Thus, it can be argued that, with some deviations, there has been slow progress towards a 'women'-sensitive jurisprudence.

It has been difficult to track the direct influence of the CEDAW and other international instruments on the development of women's rights jurisprudence, as there has been reluctance on the part of the Supreme Court to invoke international and regional human rights instruments to achieve equality between individuals. Rather, it seems the principles in these instruments are employed without direct acknowledgement, reliance being placed on local laws and local constitutional provisions to achieve formal equality. This is a strategic approach, as it avoids a direct confrontation with politicians, especially those from the formerly totally dominant ZANU (PF) on issues of national sovereignty.[40]

[39] A. Hellum, B. Derman, G. Feltoe, E. Sithole, J. Stewart and A. Tsanga, 'Rights claiming and rights making in Zimbabwe: a study of three human rights NGOs' in B. A. Andreassen and G. Crawford (eds.). *Human Rights, Power and Non-Governmental Action: Comparative Analyses of Rights-Based Approaches and Civic Struggles in Development Contexts* (London: Routledge, 2012).

[40] Some years ago, I (Julie Stewart) attended a seminar for judges run by the International Association of Women Judges, Justice for Equality Project. The judges present, all of whom were from Zimbabwe, while appreciating the value of the international instruments, were determined to find ways in which local laws could be harnessed for change. This was somewhat to the distress of the organisers and at one point I needed to intervene and point out that how the outcome was achieved was not the issue, provided that the desired sex and gender-based equality was achieved (personal recollection). Yet it was clear that the international instruments were nonetheless a source of inspiration in this quest.

9 Pursuing equality through judicial activism

The period prior to the signing and ratification of the CEDAW was one of the most productive in terms of women's rights within the courts. Following the 1984 case of *Katekwe* v. *Muchabaiwa*, 1987 saw the significant case of *Chihowa* v. *Mangwende* 1987 (1) ZLR 228 (S), in which, relying on the Legal Age of Majority Act, a daughter's right to inherit from her father's intestate estate under customary law was established by the Supreme Court under Chief Justice Dumbutshena. In terms of the development of a jurisprudence of equality in intestate succession under customary law, this was the judicial highpoint.[41] Thereafter the Supreme Court over a period of twelve years under different leadership persistently reduced the rights of female children to inherit from their deceased fathers under customary law. Widows were given no recognition in terms of inheritance rights under customary law in *Chihowa* v. *Mangwende* but had, fortunately, in 1978 been given the right to maintenance from a deceased estate in terms of the Deceased Person's Family Maintenance Act (Chapter 6:03) and this included widows in both registered and unregistered polygynous marriages.[42] Regrettably, this has been a largely underutilised piece of legislation. Notable among its provisions is section 7, which requires that in determining maintenance rights from a deceased's estate, consideration is given to the contribution of surviving spouses in a manner similar to section 7 of the Matrimonial Causes Act.[43]

10 Going both ways at once – judicial contradictions

While the earlier gains around inheritance rights were being slowly eroded by a differently composed Supreme Court, the very same Court

[41] Neither *Katekwe* v. *Muchabaiwa* or *Chihowa* v. *Mangwende* make any reference to the CEDAW or any other international instrument, but the decisions relying on the Legal Age of Majority Act reflect in very strong terms the non-discrimination principles laid out in the CEDAW Article 2.

[42] For a discussion of how research into the customary law of inheritance at an earlier date might have helped the position of widows, see Stewart and Tsanga, 'The widow's and female child's portion'.

[43] In 1997 the legislature passed the groundbreaking Amendment Act to the Administration of Estates Act, which gave surviving spouses rights to inherit from their deceased spouses' estates, even where the estate would have been previously governed by customary law. The history and research behind this reform process are documented in Stewart and Tsanga, 'The widow's and female child's portion', but, as recorded earlier in this chapter, in 1999 the retrogressive decision in *Magaya* v. *Magaya* had muddied the waters of the public's general understanding of inheritance rights.

was pushing the boundaries of women's rights in other areas. Admittedly, these later cases did not touch directly on customary law arenas, the litigants being non-African female Zimbabwe citizens, but the potential for the extension of the decisions to African female citizens was clear.

In 1994 the Supreme Court in *Rattigan & Others* v. *Chief Immigration Officer & Others* 1994 (2) ZLR 54 (SC) used the right of freedom of movement to circumvent patently discriminatory provisions in the Immigration Act Chapter 4:02, based on culture, sex and gender.[44] In the *Rattigan* case, the foreign husband of a Zimbabwean woman was denied a permit to stay permanently in Zimbabwe on the grounds that while the law recognised the right of a foreign wife of a Zimbabwean man to permanent residence in Zimbabwe, the same right was not accorded to the foreign husband of a citizen wife. In the absence of constitutional provisions guaranteeing the right to freedom from sex and gender discrimination, the Supreme Court ruled that the denial of permanent residence to the foreign husband amounted to a violation of the citizen wife's right of freedom of movement, which was guaranteed in section 22 of the Constitution for all Zimbabweans regardless of sex. Parliament attempted to reverse this position by amending section 22 of the Constitution to provide that marriage to a citizen would not prevent a foreigner, regardless of sex, from being denied a permanent residence permit. But in *Kohlhaas* v. *Chief Immigration Officer & Another* 1997 (2) ZLR 441 the Supreme Court, using section 22 of the Constitution regarding freedom of movement for Zimbabwean citizens, circumvented the attempt by the legislature to confer an unfettered power for aliens to be expelled from Zimbabwe. The Supreme Court found that the wife's rights as enunciated in the *Rattigan* decision to choose to reside in Zimbabwe with her 'alien' spouse had not been affected by Constitutional Amendment 14.[45]

It was not only the Supreme Court that was active. The High Court abolished the marital rape exemption in *H* v. *H* 1999 (2) ZLR 358. The import of the decision was adopted by the legislature in the Sexual Offences Act, which was subsequently incorporated into the Criminal Law (Codification

[44] No reference was made to the CEDAW in the *Rattigan* case, but there was supportive reference to a number of human rights instruments in bolstering the approach of the Court, namely Article 7 of the International Covenant on Civil and Political Rights and Article 8 of the European Convention on Human Rights. So there was preparedness to consider such instruments in the legal argument.

[45] Once again, there is no direct reference to international instruments in the judgment, but it would be difficult to refute that the spirit of equality influenced the determination of the Court.

and Reform) Act (Chapter 9:23). Legislation criminalising deliberate HIV/AIDS infection put Zimbabwe at the forefront of reform initiatives in the region, but the laws are rarely used for a variety of reasons, not least among them proof of the source infection. From a women's perspective there is a very real possibility that, although not the original source of the infection within a relationship, the female partner may be the first to discover that she is HIV positive or has AIDS because of antenatal testing during pregnancy. In relation to both these reforms, the 2012 CEDAW State Report indicates that the CEDAW was a stimulus for this reform.[46]

The most recent case where CEDAW compliance arguments were raised is the case of *Margaret Dongo* v. *Registrar General* SC 6/10 (Zimbabwe), where a mother applied for a passport for her minor son but the Registrar General required the consent of the father to be given before issuing the passport. The mother, a politician and women's rights activist, with the assistance of ZWLA, challenged the requirement of the father's consent as guardian. She also challenged the status of the father as the sole guardian of the child. The Court avoided engaging with the human rights arguments raised by the mother. Once again, the matter was determined by creative interpretation of the existing law and it was held that, as obtaining a passport is not an act that changes the status of a child or its relationships, either parent or any other interested individual, such as a grandparent or custodian, could apply for a passport for a minor child.

11 Constitutional reform again? 2008 and onwards

In compliance with the GPA, Zimbabwe is pursuing another attempt at constitutional reform.[47] The constitutional reform process is supposed to be transparent, open, and sex and gender balanced. As discussed earlier, it is impossible to obtain any firm details on the findings from the outreach to the people. Thus political parties, predominantly ZANU (PF), very publicly asserted that clauses they did not like did not reflect the views of the people. Eventually a final draft was settled upon and it now awaits transformation from a constitutional bill into a new national enforceable constitution.

At early public meetings of civil society stakeholders it was indicated that women would constitute 52 per cent of those involved in all stages

[46] Second to Fifth Periodic (combined) Report of Zimbabwe, CEDAW/C/ZWE/2–5.

[47] Constitutional reform processes do create opportunities for national awareness of human rights, governance issues and in particular women's rights; perhaps they also raise expectations to unrealistic levels, as was the case for women's rights in the 1999–2000 constitutional reform exercise.

of the constitutional reform process.[48] By the time of the selection of the various thematic committees and outreach teams, the categories of civil society organisations, political parties, religious and other bodies made it abundantly clear that women would at best form less than 20 per cent of those directly involved with the process of engaging with the people and in deliberating on the new Constitution.[49] In the early stages, cognisant of the opportunity that the new Constitution-making process offered to women, the Women's Coalition organised its own national constitutional meetings drawing on women from all over the country, from rural and urban locations, and from multiple professional and labour realms.[50] Women's organisations mobilised around identifying essential provisions for the advancement and protection of women's rights, and drafts of appropriate clauses were prepared.[51] The CEDAW and the regional instruments were crucial in deciding literally what the bottom line would be in terms of women's demands. The problems lay around channelling these needs into the various thematic committees.[52]

[48] Verbal statement – Hon. Paul Mangwana, Joint Chair of the Parliamentary Select Committee presentation at the Crisis Coalition Constitutional Workshop, 3 June 2009, Crowne Plaza Hotel, Harare:

> In the pursuit of the due and proper representation and recognition of women's and the girl child's inherent rights through the development of and lobbying for a new Zimbabwe Constitution, special note is made of the Parliamentary Select Committee's recognition that the constitution making process must reflect and involve in all activities, all committees, all stages and at all levels the national demographic reality and thus that the majority of participants namely 52 per cent must be women.

[49] As early as 15 July 2009, the Women's Coalition was expressing concern over the logistics of the First Stakeholders Meeting and the chaos that surrounded Coalition meetings. See http://kubatana.net/html/archive/women/090715wcoz.asp?sector=WOMEN&year=2009&range_start=31 (last accessed 16 August 2012).

[50] N. Mushonga, 'Advocacy and lobbying for policy change in Zimbabwe: women's lobbying for a gender-sensitive Constitution', 2011. Available at: www.thephilanthropist.ca/index.php/phil/article/download/889/752 (last accessed 16 August 2012).

[51] E. Sithole, *A Critical Assessment of the Sex and Gender Components for Inclusion in the Proposed New Constitution for Zimbabwe*, Occasional Paper, SEARCWL, UZ (Harare, 2009).

[52] See zwla.co.zw/index.php?option=com_content&view=article&id=65:zimbabwean-women&catid=35:news-and-media&Itemid=63 (last accessed 16 February 2013) for a copy of the Charter. Constitutional reformers or others interested in women's rights have clear pointers from women on the rights they require as citizens. A shortened version of the Charter is available at www.undp.org.np/constitutionbuilding (last accessed 16 August 2012).

Paradoxically, all the drafts had positive content for women's rights despite the low level of female representation in the bodies that controlled the ongoing Constitution-making process. One unexpected source of support for women's rights are the traditional leaders, who have asserted that they are in a general equality-based alliance with the women's movement. Precisely which clauses in the draft they support is not apparent, but unqualified support for equality for all and in all levels of governance has been promised. Chief Charumbira, President of the Council of Chiefs and a member of the Zimbabwean Senate, made this very clear in a public statement at the launch of G20,[53] on 13 April 2012 in Harare. This approach is not as surprising as one might think. In rural areas where traditional leaders preside, women constitute the largest active constituency, and the traditional leaders are well aware of the latent power of women. An alliance with women also places them in a neutral position between the political parties vying for support. There is also no doubt concern on the part of the Chiefs that they may become irrelevant. Perhaps one ought not to look at this from an entirely cynical perspective as Chiefs in some areas are responding positively and creatively to human rights initiatives and recognising the rights and entitlements of women.[54]

12 Working from the outside in

Zimbabwe has a reputation for signing up to human rights instruments but not pursuing their full implementation or domestication into national law. But from the perspective of women's organisations, this habit is a useful lobbying point. Women's organisations then openly question why the government signs and ignores the human rights obligations contained in the various instruments. In 2003 Zimbabwe signed and subsequently ratified in 2008 the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Protocol)

[53] The G20 (Group of 20) is an initiative of the Women's Parliamentary Caucus and the Women's Coalition. Although the G20 had been functional for around fifteen months, a decision was made to officially launch it in April 2012, drawing attention to the women's ongoing scrutiny and vested interests in the constitutional draft that will hopefully emerge. Twenty women with political, legal, civil society and other strategic connections are monitoring the constitutional process, ready to intervene when women's rights need to be protected or asserted in the formulation of the draft Constitution.

[54] A. Matsvayi, 'The role of Chiefs in women's' access to justice: a case study of Chief Makoni, Chief Seke and Chief Chimoyo in Zimbabwe', Masters in Women's Law (MWL) Dissertation (2012), SEARCWL, UZ – forthcoming on www.searcwl.ac.zw (last accessed 25 February 2013).

following a vigorous campaign mounted by women's human rights and legally oriented NGOs. Domestication of this instrument as required by section 111B of the Constitution is yet to take place. A sub-regional document, the Southern African Development Community (SADC) Protocol on Gender and Development (SADC Protocol) was signed, and was ratified on 29 June 2010. Domestication has not as yet taken place. For a more thorough analysis of the formulation and role of the regional and sub-regional instruments in the formulation and pursuit of women's rights, see Musembi's chapter in this volume. Suffice it to say that in the Zimbabwe context, these instruments are used as lobbying tools in conjunction with the CEDAW, and their provisions are used to bolster human rights arguments put to both government and Parliamentarians by various women's groups such as ZWLA, Women in Parliament Support Unit and MUSASA Project.[55]

13 Reporting: fruitful opportunities for prompting change

Since signing the CEDAW in 1991, Zimbabwe has submitted two reports to the CEDAW Committee. The initial report was considered in 1998 and the combined reports for the period between 1998 and 2011 were considered in 2012. In the 2012 report the Minister of Women's Affairs, Gender and Community Development, Dr Olivia Muchena, under whose name the report is published, states that the report was prepared with the participation and support of Civil Society Organisations (CSOs).[56] CSOs are included in the process partly because of their specialist knowledge and skills but also in an attempt to pre-empt a shadow report. However, despite inclusion in the earlier process, ZWLA and the Women's Coalition spearheaded the production of a shadow report in 2011–12, determined to present the other side of the picture.

Producing the periodic reports seems to send government and, to be fair, other bodies into a frenzy of activity. In late 2011, as the time for

[55] MUSASA Project, an NGO that uses the Shona name of a shady sheltering tree for its title, provides legal assistance, counselling and safe houses for women victims of domestic violence.

[56] The preparation of reports to the CEDAW Committee is coordinated by the Inter-ministerial Committee on Human Rights and Humanitarian Law, which is housed in the Ministry of Justice and Legal Affairs and chaired by the Permanent Secretary of that Ministry. The Committee is composed of senior government officers from the Ministries whose portfolios have a human rights component including the following Ministries: Home Affairs, Justice and Legal Affairs, Labour and Social Welfare, Health, Education and Women's Affairs.

the Zimbabwe CEDAW review in February 2012 drew near, civil society bodies found themselves carrying out consultations, research and workshops to produce a comprehensive shadow report. Running parallel with this was a sudden flurry of activity from the Ministry of Women's Affairs, Gender and Community Development to review the National Gender Policy of 2004, which had lain largely dormant for the previous seven years. The target for completing this review and having a new national gender policy was the end of January 2012.[57] Nothing official has emerged as yet in relation to a new policy. Even if a cynical view is taken of the sudden need to review the gender policy, it is indicative of the concern on the part of the government to appear to be responsive to the CEDAW and its imperatives. The careful framing and shaping of state reports demonstrate that the government wants to appear in the best possible light and to be seen as moving towards equal rights for women.

The formulation of Perodic Reports on human rights compliance across a variety of instruments have an interesting similarity: they all carefully outline the positive areas of progress but omit, avoid direct acknowledgement or carefully squirrel areas of non-compliance away in 'back' pages of reports.[58] On the positive side, periodic reporting exercises create opportunities to raise women-specific issues and to press for legal and constitutional reform.

Zimbabwe professes, in the words of Dr Olivia N. Muchena, the Minister of Gender , Women's Affairs and Community Development,[59] as recorded in its 2012 combined report to the CEDAW Committee,[60] to:

> reaffirm its commitment to the implementation of the provisions of this important Convention. CEDAW continues to guide the priorities for gender mainstreaming and promotion of women's rights in Zimbabwe.

[57] Workshop conducted on 6 October 2011 in Harare under the auspices of the Ministry of Women's Affairs, Gender and Community Development to review, revise and begin the reformulation of the National Gender Policy.

[58] See the recent *Zimbabwe Universal Review Report to the United Nations Human Rights Council*, available at: www.ohchr.org/EN/HRBodies/UPR/PAGES/ZWSession12.aspx (last accessed 16 August 2012).

[59] This is more or less the same Ministry but it has regular changes of name.

[60] Combines second to fifth reports. The initial report was made in 1998 and women's NGOs, predominantly led by Zimbabwe Women Lawyers (ZWLA), compiled a shadow report. The official report purports to have been a joint production between the Ministry of Gender, Women's Affairs and Community Development and civil society organisations that are co-opted into a discussion process. However, the views and evidence provided by civil society organisations and NGOs are not always reflected in the final state report.

The introduction to the report records that Zimbabwe amended the Constitution in 2005 to:

> include among other things, prohibition of discrimination on the grounds of sex or marital status, as well as providing for the implementation of affirmative action programmes.

What the introduction fails to point out is that the claw-back clauses in section 23 of the Constitution, which continue to allow discrimination on the grounds of personal law and customary law, remain firmly in place and that the potential for the revival of a *Magaya* v. *Magaya*-like approach to women's rights in these areas remains an ever-present threat.

In its first report to the CEDAW Committee reviewed in 1998, Zimbabwe was commended for its broad-based non-discrimination clause. Unfortunately the Committee had not identified the claw-back provisions that lay buried in section 23(3) of the Constitution.[61] Dr Amy Tsanga has described how the engagement took place with both the state representatives and the shadow report team.[62] Despite the problems of section 23(3) of the Constitution being raised both in the written and the verbal engagements by the shadow report team, the government 'got away' on that occasion with fragmented presentation of the actual legal situation.[63]

In the 2012 government report, the claw-back clause was squirreled away on page 11 and could have remained buried for the less than diligent reader. However, the shadow report prepared by women in CSOs and NGOs, under the auspices of ZWLA, highlighted the presence of the claw-back clause as the very first item in the Executive Summary on page 5 of the shadow report. The presence and effect of the claw-back clause

[61] The CEDAW Committee in its Concluding Observations 132 commented: 'The Committee notes with satisfaction that the Constitution has been amended to prohibit any act of discrimination on the basis of sex.' The Committee failed to note that section 23(3) was still in place. The Committee did raise in Concluding Observations 138 its concern at the continuing influence of customary law and practices, but this was related to social and economic issues not to the content of the law.

[62] Dr Amy Tsanga represented the Zimbabwe Women Lawyers's Association. She had just joined the staff of the Faculty of Law at the University of Zimbabwe. She is now lecturing at the Southern and Eastern African Regional Centre for Women's Law. Her experiences in 1997 informed the shadow reporting process in 2011–12.

[63] This terminology is deliberate as the construction of the state report appeared to be calculated to mask the presence of the claw-back clauses. For an entertaining and instructive analysis of the 1998 reporting exercise, see A. Tsanga, 'The UN Convention on the Elimination of Discrimination against Women (CEDAW) Committee action: notes of a fringe observer', *Legal Forum* 10:1 (1998) 41–8.

was reiterated at every possible opportunity throughout the report.[64] The adverse effects of the claw-back clauses are raised prominently throughout the shadow report and were central in the presentations made by the shadow reporting team in their engagement with CEDAW Committee members in Geneva.[65]

Scrutiny of both the state report and the shadow report in 1998 indicates that although the shadow report raised the problems with the claw-back clause, this was not taken up by the Committee. Admittedly, the problems created by section 23(3) were treated in a somewhat muted manner in the shadow report, and the opportunities for dialogue between the Committee and the proponents of the shadow report were not at that time formalised. Dr Amy Tsanga – who was part of the shadow reporting process and was present when the state report was presented to the Committee – points out that in 1998 the NGO observers had to grab any available opportunities to engage Committee members on critical issues. This required both guile and bravado:

> Of course the fringe observers, now turned lobbyist and activist, also learn not to be a pain. Timing is important. A Committee member who has sat through the proceedings may indeed make a bee-line for the 'ladies' to use a euphemism and may not be in the frame of mind for winding dialogue or being besieged by a group of over-zealous observers dying to exercise their vocal chords after hours of silence. Fortunately most members of the Committee take the initiative in seeking out the NGO representatives for clarification.[66]

[64] Available at: www2.ohchr.org/english/bodies/cedaw/docs/ngos/ZCS_Zimbabwe51.pdf (last accessed 16 August 2012).

[65] It is clear from the Committee's Concluding Observations that it was alive to the existence of the claw-back clause from the Concluding Observation that:

> While noting that Section 23 of the Constitution of the State party prohibits discrimination on the basis of race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status or physical disability, the Committee expresses its concern at the absence of a specific prohibition of discrimination against women as defined in article 1 of the Convention. The Committee is also concerned that Section 23(3) of the State Party's Constitution represents a 'claw back clause', which allows for the application of discriminatory customary law in respect of personal laws. The Committee notes the State party's willingness expressed in the report and during the dialogue to review its Constitution; however, it remains concerned at the fact that no action has been taken to repeal the discriminatory provisions from the Constitution, even as the constitutional review process is awaited.

See www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-ZWE-CO-2–5.pdf (last accessed 16 August 2012).

[66] Tsanga, 'Notes of a fringe observer'.

The recognition of the adverse impact of the claw-back clauses in the 2012 review process reveals the extent to which the role of the Committee and their direct, albeit brief, engagement with the proponents of the shadow reports has altered the impact of the reporting processes on States Parties. In addition, the shadow reporting team who attended the Committee sessions were alert to the intervention opportunities that were now available in a way that was not possible in 1998. The use of Facebook, emails and cellphones during the review of the Zimbabwe State Report in February 2012 transformed a remote and distant activity into one with a sense of immediacy for those following the process in Zimbabwe. Adding to the efficacy of this engagement were the contributions and clarifications that could be made on the day even from 10,000 kilometres away. The Zimbabwe Women Lawyers' Association in conjunction with the Women's Coalition ran a full-day online communication process with those from among their number who were in Geneva. During the day, answers to queries on information contained in the state report on the government's financial provisions and implementation in relation to key areas of interventions stated to have been carried out in favour of women were sought. For example, there was a query on the number of shelters provided by the government for victims of domestic violence. An answer was immediately provided by the main NGO working in this area, MUSASA Project, indicating that the government had not provided the requisite number of shelters and that where there were shelters, these were run by NGOs. In Paragraph 23 of the Concluding Observations of the Committee it is observed that:

> While noting the adoption of the new Domestic Violence Act the committee expresses its concern at the high level of violence against women in the state Party … the State Party has not availed the required monetary and human resources to implement the provisions of the Domestic Violence, especially the effective setting up of the Domestic Violence Council.[67]

Further the Committee stated that it is:

> again concerned that only one shelter for women victims of violence has been established by the State Party in the country (the other two shelters were established by NGOs).[68]

[67] www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-ZWE-CO-2–5.pdf (last accessed 16 August 2012).

[68] *Concluding Observations 24 and 44 of the CEDAW Committee on the Zimbabwe State Report 2012*, available at: www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-ZWE-CO-2–5.pdf (last accessed 16 August 2012).

The 2012 state report to the CEDAW Committee refers to the banning of harmful cultural practices in the Domestic Violence Act Chapter 5:16 and the Criminal Law (Codification and Reform) Act Chapter 9:23. The Committee, through the shadow report, was informed that implementation remains a problem. The Committee's Concluding Observations draw specific attention to harmful cultural practices and the need for measures to be accelerated to curb them. Of special note is that although Zimbabwe is only required to report again in 2016 on measures to address harmful customary practices and domestic violence, an interim report on progress is required in 2014.

14 Making nothing look like something: why now?

Compliance with the CEDAW and the regional instruments would appear to be a matter of concern for the Ministry of Women's Affairs,[69] as indicated by the release of a draft of the National Women's Council and Elimination of Discrimination Against Women Bill, 2012 (third draft dated 6 July 2012) during the last stages of the constitutional review process. The release of the Bill is puzzling because there is a Gender Commission proposed in the new Constitution, and there would be significant overlaps between the two bodies. More specifically the draft Constitution seeks to remove all forms of discrimination against women, and mandates and would facilitate wholescale legislative reforms giving effect to sex and gender equality in the law. The proposed Bill, which is being dealt with in the same general timeframe despite purporting to:

> [i]ncorporate certain regional, continental and international instruments bearing on women's rights into the domestic law of Zimbabwe,[70]

only incorporates those provisions that would not conflict with section 23(3) of the current Constitution.

Is this a response to the CEDAW Committee's observations? The draft Women's Council Bill appears, like the National Gender Policies and the state reports to the CEDAW Committee, to be attempting to create a veneer of compliance without articulating or tackling the deep-seated

[69] The Minister being Dr Olivia Muchena, from ZANU (PF).

[70] According to the Preamble, the draft further seeks to put in place a National Women's Council that would investigate issues of discrimination against women, making recommendations on the removal of barriers to the attainment of full equality by women, but this lies beyond the scope of this chapter.

legal and constitutional roots of discrimination against women. Why the urgency with far-reaching reforms potentially coming to fruition in the near future?

15 By way of not concluding

A conclusion seems inappropriate for this chapter as so much is pending. Zimbabwe could be on the path to a fairer, more equal and equitable future for all. However, paper provisions alone will not achieve this; political will in large amounts, active implementation strategies and cooperation across all sectors in the country will be required. Continued pressure from bodies such as the CEDAW Committee will be important in producing both new legislation and implementation of the provisions in the proposed Constitution if it comes into force. Despite the stop–start process of developing a new Constitution, there does seem to be room for optimism, and perhaps new allies have been made along the way. We can but wait and see.

Addendum: On 22 May 2013, after this chapter was finalized, Zimbabwe acquired the new Constitution which is discussed in this chapter. Despite latent fears that it might be altered or adulterated during its passage through Parliament it cleared the final hurdles unscathed. In a public signing ceremony President Robert Mugabe signified his assent. Immediately thereafter the Constitution was published in the Government Gazette.

The transition period between the old and new orders will be protracted as only some of the provisions of the new Constitution came into effect immediately. In relation to this chapter the important provisions that are already in effect are the Declaration of Rights, the provisions on citizenship and the composition of Parliament. Section 23(3), the claw-back clause which exempted personal law and customary law from being subject to section 23(2), the non-discrimination clause of the old Constitution, was swept away. Readers will recall that section 23(3) received trenchant criticism throughout the chapter.

Law reform will be required to bring many areas of current law into line with the new Constitution but many of the laws discussed in the chapter which were at risk of restricted application to women have been broken free of their fetters, as at least on paper have women. Implementation will be a long, hard road but the way is now open.