



# CHAPTER 1

# Constitutional and legal rights

## Articles 4-11



Women in Angola protest against a law to make abortion completely illegal in the country on 18 March 2017. *Photo courtesy of News Deeply*

### KEY POINTS

- The Southern Africa Gender Protocol Alliance conducted a baseline Gender and Rights Assessment (GRA) of national Constitutions and Laws for the 2017 SADC Gender and Development Index (SGDI) for the first time. The regional average is 62%, ranging from Namibia (76%) to Swaziland (40%).
- The Government of Zimbabwe proposed mandatory sentences for rape in July 2017. Sixty years' imprisonment will be imposed on people convicted of raping children below the age of 12 and the disabled, and 40 years would be imposed in all other cases of rape. If adopted, these would be the highest prescribed mandatory sentences for rape in the SADC region.
- In July 2017, the Botswana Parliament rejected a motion for the country to craft a new Constitution to replace the 1966 independence one. The crafting of a new Constitution would have created the opportunity to align the Constitution to the Post-2015 SADC Gender Protocol that Botswana signed for the first time in May 2017.
- In Malawi, Parliament passed a Constitutional amendment in February 2017 to make 18 years the age of marriage in line with the Constitution.
- In Mozambique, the Government in 2016 unveiled a National Strategy to end child marriages by 2019.
- In 2017, Madagascar passed an amendment to its Nationality Law, making it possible for women to pass their nationality to their children. Previously, only men could pass their nationality to their children.
- Homosexuality is still criminalised in 12 of the SADC countries. Only DRC, Mozambique and South Africa have decriminalised homosexuality. The South African Constitution is the only one in the world to recognise sexual orientation as a right.

**62%**  
laws  
&  
consti-  
tutions

**76%**  
Namibia

**40%**  
Swaziland

## What the Protocol requires

Part Two of the SADC Protocol on Gender and Development concerns Constitutional and Legal Rights. This has eight articles, covering Constitutional Rights; Special Measures; Domestic Legis-

lation; Equality in access to justice; Marriage and Family Rights; Persons with Disability; Widows and Widowers Rights; The Girl and Boy Child.

**Table 1.1: The Revised Gender Protocol**

Former provisions	New provisions
N/A	ARTICLE 4: CONSTITUTIONAL RIGHTS 2. <u>State Parties shall develop and strengthen specific laws, policies and programmes to achieve gender equality and equity.</u>
ARTICLE 5: AFFIRMATIVE ACTION States Parties shall put in place affirmative action measures with particular reference to women in order to eliminate all barriers which prevent them from participating meaningfully in all spheres of life and create a conducive environment for such participation.	ARTICLE 5: SPECIAL MEASURES States Parties shall put in place <u>special measures</u> with particular reference to women in order to eliminate all barriers which prevent them from participating meaningfully in all spheres of life and create a conducive environment for such participation.
ARTICLE 8: MARRIAGE AND FAMILY RIGHTS 2. Legislation on marriage shall ensure that: a) no person under the age of 18 shall marry, unless otherwise specified by law which takes into account the best interests and welfare of the child.	ARTICLE 8: MARRIAGE AND FAMILY RIGHTS 2. Legislation on marriage shall ensure that: a) <u>no person under the age of 18 shall marry.</u>
ARTICLE 10: WIDOWS' AND WIDOWERS' RIGHTS 1. States Parties shall enact and enforce legislation to ensure that: (a) widows are not subjected to inhuman, humiliating or degrading treatment; (b) a widow automatically become the guardian and custodian of her children when her husband dies, unless otherwise determined by a competent court of law; (c) a widow shall have the right to continue to live in the matrimonial house after her husband's death; (d) a widow shall have access to employment and other opportunities to enable her to make a meaningful contribution to society; (e) a widow shall have the right to an equitable share in the inheritance of the property of her husband; (f) a widow shall have the right to remarry any person of her choice; and (g) a widow shall have protection against all forms of violence and discrimination based on her status.	ARTICLE 10: WIDOWS' AND WIDOWERS' RIGHTS 1. States Parties shall enact and enforce legislation to ensure that <u>widows and widowers:</u> (a) are not subjected to inhuman, humiliating or degrading treatment; (b) automatically become the guardians and custodians of <u>their</u> children when <u>their</u> husband/wife dies, unless otherwise determined by a competent court of law; (c) have the right to an equitable share in the inheritance of the property of <u>their</u> spouses; (d) have the right to remarry any person of <u>their</u> choice; and (e) have protection against all forms of violence and discrimination based on <u>their</u> status.
ARTICLE 11: THE GIRL AND BOY CHILD 1. States Parties shall adopt laws, policies and programmes to ensure the development and protection of the girl child by: (a) eliminating all forms of discrimination against the girl child in the family, community, institutions and at state levels; (b) ensuring girls have equal access to education and health care, and are not subjected to any treatment which causes them to develop a negative self-image; (c) ensuring that girls enjoy the same rights as boys and are protected from harmful cultural attitudes and practices in accordance with the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child; (d) protecting girls from economic exploitation, trafficking and all forms of violence including sexual abuse; and (e) ensuring that the girl children have equal access to information, education, services and facilities on sexual and reproductive health and rights. 2. State Parties shall put in place legislative and other measures to ensure that the boy child enjoys the same rights as the girl child under sub-Article 1.	ARTICLE 11: THE GIRL AND BOY CHILD 1. States Parties shall adopt laws, policies and programmes to ensure the development and protection of the <u>girl and the boy child</u> by: (a) eliminating all forms of discrimination against <u>them</u> in the family, community, institutions and at state levels; (b) ensuring that <u>they</u> have equal access to education and health care, and are not subjected to any treatment which causes them to develop a negative self-image; (c) ensuring that <u>they</u> enjoy the same rights and are protected from harmful cultural attitudes and practices in accordance with <u>international and regional instruments.</u> (d) protecting <u>them</u> from economic exploitation, trafficking and all forms of violence including sexual abuse; and (e) ensuring that <u>they</u> have equal access to information, education, services and facilities on sexual and reproductive health and rights. 2. <u>State Parties shall develop concrete measures to prevent and eliminate violence, harmful practices, early and forced child marriages, early pregnancies, genital mutilation and child labour as well as mitigate their impacts on girls' and boys' health, wellbeing, education, future opportunities and earnings.</u>

As reflected in Table 1.1, the Post 2015 SADC Gender Protocol has been strengthened to:

- Include a provision to develop and strengthen specific laws, policies and programmes to achieve gender equality and equity.
- Change “affirmative action” to “special measures”. Ministers made this change to accommodate reservations by Mauritius. However, the country still has not signed the Protocol, as it then raised an objection to the age of marriage being set at 18 years of age.
- Protect the rights of *both* widows and widowers against abuse, discrimination and promotes equitable share of inheritance.
- Protect the rights of *both* the girl and the boy child against exploitation, and promotes their equal access to health and education opportunities.
- Provide for the development of concrete measures against harmful practices that include child marriages to protect the girl and boy children's wellbeing, health, education and future opportunities.

## Key trends

**Table 1.2: Trends in Constitution and Legal Rights 2009, 2015 and 2017**

Parameters	Target 2030	Baseline 2009	Progress 2015	Progress 2017	Variance (Progress - target)
<b>GENDER AND RIGHTS ASSESSMENT OF CONSTITUTIONS AND LAWS</b>					
Highest	100%			Namibia (76%)	-24%
Lowest	100%			Swaziland (40%)	-60%
Number of Countries that undertake constitutional reforms and review processes to align with the SADC Protocol on Gender and Development	15 countries	0	11 <i>8 complete</i> (Angola, DRC, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, Zimbabwe) <i>3 in process</i> (Malawi, Tanzania, Zambia)	11 <i>9 complete</i> (Angola, DRC, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, Zambia, Zimbabwe) <i>2 in process</i> (Malawi, Tanzania)	-4
Number of countries that provide for non-discrimination on the basis of sex and others	15 countries	14 (Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe)	15 (Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe)	15 (Angola, Botswana, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe)	0
Number of countries Constitutions that provide for the promotion of gender equality	15 country Constitutions	7 (Angola, DRC, Lesotho, Malawi, Mozambique, South Africa, Swaziland)	12 (Angola, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zimbabwe)	13 (Angola, DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe)	-2 (Botswana, Seychelles)
Number of countries that have no claw back clauses	15 countries	7 (Angola, DRC, Madagascar, Mozambique, Namibia, Seychelles, South Africa)	10 (Angola, DRC, Madagascar, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, Zimbabwe)	10 (Angola, DRC, Madagascar, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, Zimbabwe)	-5 (Botswana, Lesotho, Malawi, Mauritius, Swaziland)
Number of countries that address the contradictions between the Constitution, laws and practices	15 countries	4 (Namibia, South Africa, Swaziland, Tanzania)	12 (Angola, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe)	12 (Angola, Lesotho, Madagascar, Malawi, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe)	-3 (Botswana, DRC, Mauritius)
Number of countries that provide for special measures in their Constitutions	15 countries	9 (DRC, Lesotho, Malawi, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zimbabwe)	13 (DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe)	13 (DRC, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, Zimbabwe)	-2 (Angola, Botswana)
Number of countries that have decriminalised LGBTI	15 countries	0	3 (DRC, Mozambique, South Africa)	3 (DRC, Mozambique, South Africa)	-12

**SGDI**  
first

**62%**  
in 2017

**CSC**  
has  
remained  
the same at

**66%**  
in 2015  
and 2017

Only  
**3**  
 countries  
 in  
**SADC**  
 have  
 legalised  
 or  
 partially  
 legalised  
 abortion

Parameters	Target 2030	Baseline 2009	Progress 2015	Progress 2017	Variance (Progress - target)
Marriage age for girls and boys is a minimum of 18 in 15 countries	18 years	8 (Angola, Botswana, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, South Africa)	9 (Angola, Botswana, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa)	14 (Angola, Botswana, DRC, Madagascar, Malawi, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia, Zimbabwe)	-1 (Mauritius)
Marital rape is a crime in 15 countries	15 countries	0	5 (Lesotho, Namibia, South Africa, Swaziland and Zimbabwe)	5 (Lesotho, Namibia, South Africa, Swaziland and Zimbabwe)	-10
15 countries decriminalise sex work	15 countries	0	0	0 (Although Zimbabwe made a ruling to decriminalise loitering, which has effectively been interpreted to mean allowing sex work)	-15 (All)
15 countries legalise abortion		2 (South Africa, Zambia)	3 (Mozambique, South Africa, Zambia)	3 (Mozambique, South Africa, Zambia)	-12 countries
<b>SCORES</b>					
SGDI	100%	N/A	N/A	62%	-38%
Citizen Score Card (CSC) 100%	100%	60%	66%	66%	-34%

Source: Gender Links, 2017.

Table 1.2 shows that:

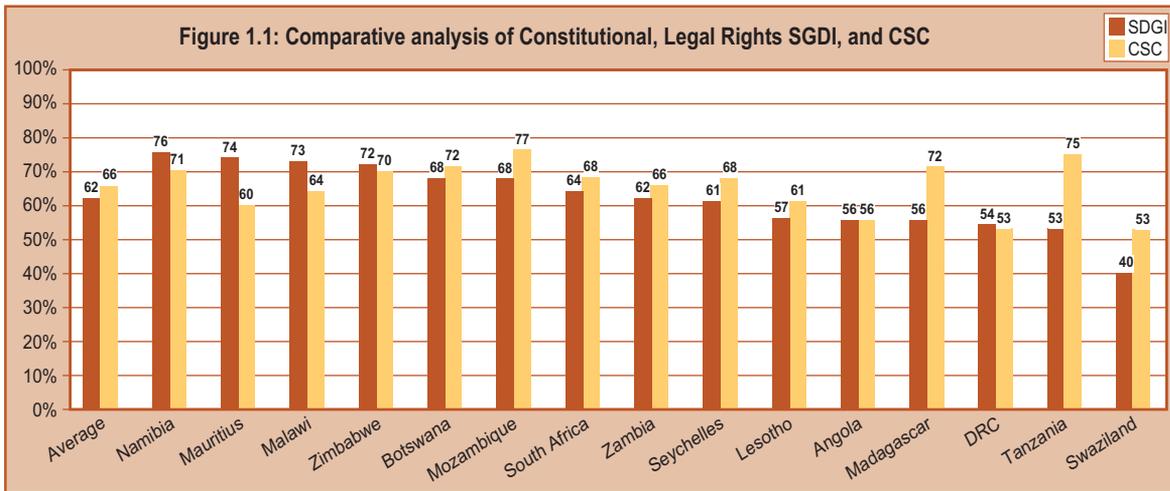
- No country has achieved a gender responsive Constitution and Legal framework. The gender and rights assessment by gender and legal experts from each country highlights that Namibia (76%) has the highest score on gender and rights while Swaziland is the lowest at 40%.
- Eleven countries (Angola, DRC, Madagascar, Mauritius, Mozambique, Namibia, Seychelles, Zambia, Zimbabwe, Malawi, and Tanzania) have aligned their Constitutions with the SADC Gender Protocol or are in the process of doing so.
- All 15 SADC countries provide for non-discrimination on the grounds of sex although most countries do not protect the rights of LGBTIQ persons - only three countries have decriminalised homosexuality (DRC, Mozambique, and South Africa).
- Five countries (Botswana, Lesotho, Malawi, Mauritius, and Swaziland) still have claw back clauses on gender in their Constitutions and laws.
- Thirteen countries provide for special measures to promote gender equality except Angola and Botswana.
- Most countries have set the legal age of marriage at 18 years except for Mauritius which has reser-

vations on setting the marriage age at 18 years due to religious reasons.

- Marital rape is criminalised in five SADC countries (Lesotho, Namibia, South Africa, Swaziland and Zimbabwe).
- Only three SADC countries have legalised abortion (Mozambique, South Africa, and Zambia).

### Scores - SGDI and CSC

The SADC Gender and Development Index (SGDI) is a composite empirical measure of progress. In the case of Constitutional and Legal Rights, this is based on the Gender and Rights assessment of Laws and Constitutions. This is the first time that the SGDI includes an indicator on Constitutional and Legal Rights. Progress against the baseline score of 62% will be tracked going forward. The Citizen Score Card (CSC) is a measure of how citizens (women and men) rate their governments' efforts to provide accessible and quality services. This score has also been expanded to take account of the new additions in the Post 2015 era. The CSC score is at 66% in 2017 is lower than the 2016 score (71%). Changes in this sector are often a case of one step forward; two steps backwards. Progress is slow.

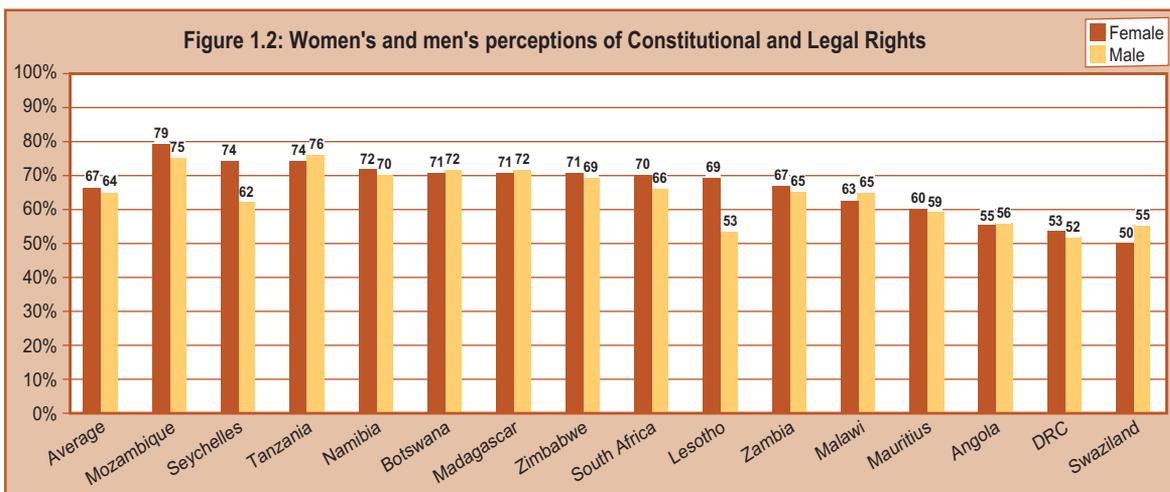


**SDGI**  
**62%**

**CSC**  
**66%**

Figure 1.1 compares the SGDI and CSC scores for 2017. It shows that overall at 62% for the SGDI and 66% for the CSC, these scores (based on empirical data and perceptions respectively) are quite close. Variance is calculated as the difference between the SGDI and CSC. Mauritius has the

highest positive variance (i.e. people who are more sceptical than what the numbers tell us). Tanzania and Madagascar had the highest negative variances, i.e. where citizens are more optimistic than what the facts on the ground tell us.



**67%**  
scored  
higher  
than

**64%**

Figure 1.2 provides sex disaggregated data on the CSC for the sector for 2017. On average (67%), women had slightly higher scores than men (64%). Since this is the sector that determines the policy and legal framework for gender equality, it is a positive sign that women are overall even more optimistic than men about the progress achieved.

This is especially so in Lesotho and Seychelles, which have the highest variance between women and men. In Swaziland, women (50%) are slightly less optimistic than men (55%). The same is true in Tanzania, Botswana, Madagascar, Malawi and Angola, but only by slim margins.