

SADC PROTOCOL ON GENDER AND DEVELOPMENT (2008)

RATIFICATION RESOURCE KIT



A dream coming true!

Three years after it was first signed in 2008, the SADC Protocol on Gender and Development is closer than ever to becoming a legally-binding document thanks to the hard work of activists, politicians and citizens across southern Africa. What does that mean for the women and men of the SADC region? The information contained here will look at how progress has taken place, where it has occurred and what are the next steps if the SADC Protocol is to finally come into force.

Protocols and civil society

Protocols are the cornerstones of the SADC regional integration agenda. They are legally binding on those state parties which have ratified them, providing a framework for accelerating and strengthening policy, legal and other measures in SADC Member States. They set regional norms and standards for enhancing qualitative, measurable and positive change in the lives of SADC citizens.

Civil society and citizens have a duty to shape the SADC development agenda and closely monitor its implementation. Article 23 (1) of the SADC Declaration and Treaty states that: "SADC shall seek to involve fully, the people of the Region and non governmental organisations in the process of regional integration". It also calls for cooperation and for member states to support people-led initiatives which contribute to the objectives set out in the SADC Treaty, especially around closer links between and among communities, associations and people in the SADC region.

Brief background

Gender activists played a lead role in influencing the development and adoption, on 17 August 2008, of the SADC Protocol on Gender and Development (Gender Protocol). In 2005, they undertook comprehensive regional research on sector-specific gender equality issues and gaps. Following the adoption of a Gender Protocol, gender activists came together between 2005 and 2008 to form cross-border and national alliances¹ to undertake a campaign to influence the content of the Protocol, as well as lobby for its adoption. The adoption of the Gender Protocol was one of the fastest in SADC Protocol history. Another example, the Protocol on the Facilitation of Movement of Persons, was drafted in 1995, signed in 2005 and has yet to be ratified.



What is at stake?

Signature of a Protocol by a SADC Member State signifies an initial endorsement of the Protocol. Article 41 requires that a two thirds majority should then ratify and deposit their Instruments of Ratification with the SADC Secretariat. Ratification is a formal act by which a Member State agrees to be legally bound by the terms of the Protocol. Ratification is a two step process. First the Member State signs the Protocol, and then it undertakes a national process based on its constitutional requirements and national laws, procedures and structures, before depositing its Instrument of Ratification with the SADC Secretariat.

COUNTRY	SIGNED	RATIFIED	DEPOSITED INSTRUMENTS
Angola	✓	✓	
Botswana			
DRC	✓	✓	
Lesotho	✓	✓	✓
Madagascar	✓		
Malawi	✓		
Mauritius			
Mozambique	✓	✓	✓
Namibia	✓	✓	✓
Seychelles	✓	✓	
South Africa	✓		
Swaziland	✓		
Tanzania	✓	✓	✓
Zambia	✓		
Zimbabwe	✓	✓	✓

The table shows that as of mid February 2011 13 SADC member states had signed and eight had ratified the Protocol. If nine (or two thirds of 13) ratify the Protocol, it will enter into force.

While only one more country is required to ratify the Protocol for it to come into force, it is important that all SADC countries deposit their instruments of ratification with the SADC Secretariat. This will signify that, as a region, SADC has committed not only to upscale its efforts to achieve gender equality, but it will be duty-bound to do so, and to report accordingly. This would set into motion a peer review process around achieving the 28 targets set out in the Gender Protocol and also provide a strong basis for effective monitoring and implementation by all stakeholders.

Key points on signing the Protocol

- Signing the Protocol is significant, but it does not mean the signatory government is legally bound to it.
- It does signify a willingness by the Member State to consider ratifying the Protocol and to undertake all the necessary consultative processes at national level to do so.

- In spite of the fact that signing the Protocol does not create a legally-binding agreement, a Member State is still obliged to respect the spirit and content of the Protocol by refraining from undertaking any acts that would undermine its purpose or objectives.



Tomaz Augusto Salomao,
SADC Executive Secretary

Protocol country checklist

- ✓ Are relevant stakeholders at national level sufficiently informed of the government's position regarding signing of the Protocol?
- ✓ What research, information and data are available to support relevant authorities, in particular the ministries of gender/justice, to motivate relevant authorities to sign the Protocol?
- ✓ Are key stakeholders being engaged to help pave the way for signing of the Protocol? These include the offices of the president, ministries of gender, gender departments in relevant ministries, ministries of justice and foreign affairs, relevant cabinet committees, and individual MPs who can champion the process, influential gender coalitions and activists.
- ✓ Is there a good communication and information strategy, including within the media, to inform all citizens of government's next steps in signing the Protocol?
- ✓ Is there close liaison and engagement with relevant structures in the SADC Secretariat (SADC Gender Unit), which has authority to support and motivate the agenda at Council and Summit level, as appropriate?
- ✓ Are other influential regional players (SADC Parliamentary Forum, SADC Council of NGOs, and the Southern Africa Gender Protocol Alliance) sufficiently briefed to support lobbying and advocacy for moving the Protocol forward in relevant governments? Support can be provided through direct representation, petitions and media profiling.

Gender activists in countries that have not yet signed the Gender Protocol, namely Botswana and Mauritius, have the uphill task of ensuring that their governments not only take this step, but also ratify it.

Botswana and Mauritius are the least likely to deposit their Instruments of Ratification due to the fact that they have not yet signed the Protocol, a condition precedent for ratification of the Protocol. The challenge in Botswana lies in the fact that the government considers the Gender Protocol too prescriptive and potentially difficult to implement due to demands on resources. Gender activists in Botswana, led by the Botswana Council of NGOs (BOCONGO) Gender Sector and the Southern Africa Gender Protocol Alliance focal point, among others, have engaged

government at various levels in order to seek commitment to further action. Opportunities to push the envelope lie in tactical work to identify champions who can further the agenda and engage directly with key government players so Botswana can potentially sign and ratify the Gender Protocol by the next SADC Heads of State Summit in August 2011.

Gender activists in Mauritius face the problem of a perceived conflict between the provisions of the Gender Protocol (Article 5) which require positive discrimination through affirmative action, and the non-discriminatory provisions of the Constitution of Mauritius. Discussions have been held with the Attorney General and the Ministry of Gender Equality, Child Development and Family Welfare to determine the way forward in order to align the constitutional guarantees with the provisions of the Protocol. The challenge lies in the fact that there is no room for signing the Protocol with reservations, as is often the case with other international human rights instruments. This option would have ensured that there is progress with respect to domesticating and implementing other provisions of the Protocol, whilst Mauritius seeks to address the issue of positive discrimination. There is potential for legal action to determine the correct interpretation of the non-discriminatory clause, however, this could be a long, costly and complex route, and may not be the preferred option of gender activists who are hoping that signing and ratification will happen soon.



GL Zimbabwe local government facilitator, Priscilla Maposa speaks to community members about the SADC Protocol on Gender and Development.
Photo: Colleen Lowe Morna

Key points on ratification

- The ratification of the Gender Protocol is a government-led process.
- The role of civil society in the ratification process is to influence the relevant authorities and structures through engagement; provision of financial and human resources; provision of information and evidence-based research; drafting of opinions so that relevant authorities can make informed decisions; and raising awareness with the general

public (and women in particular) around the entire process.

- The procedures for ratification are dependent on national constitutional provisions, laws and related procedures.

Case study - Zimbabwe's road to ratification



Zimbabwe has a National Gender Policy (NGP). The Ministry of Women Affairs, Gender and Community Development (MWGCD) Strategic Plan (2009-2014) outlines plans to review the NGP, and articulates specific goals, including the elimination of gender disparities in all sectors by 2012, and increasing the number of women in all mainstream economic activities from 0.2% to 40% by December 2012, amongst others².

The step-by-step ratification process was as follows³:

1. After signature of the Protocol, the MWGCD prepared a Memorandum of Understanding (MOU) to the Cabinet Committee on Legislation (CCL). The MWGCD had to justify why the government of Zimbabwe should proceed to ratify the Protocol, first by citing the constitutional requirements, and second by highlighting the level of progress of the country in meeting the commitments outlined in the Protocol.
2. The MOU was presented by the Minister of WGCD, debated by the CCL, and defended by the Minister as appropriate.
3. After the CCL was satisfied, the MOU was passed and moved on to discussion at Cabinet level.
4. After Cabinet approval, the Minister of WGCD moved a motion in Parliament on the ratification of the Protocol. The motion was debated in both the Lower and Upper Houses. There were no objections in either House and it was passed. Some Members of Parliament and Senators championed the motion, including some male Chiefs in Senate.
5. After the motion was passed the MWGCD prepared a Cabinet Minute on the passing of the motion to ratify the Protocol. This Cabinet Minute was motivating the President of Zimbabwe to ratify the Protocol through signing the relevant Instrument of Ratification.
6. After the Instrument of Ratification was signed, the Ministry of Foreign Affairs deposited the Instrument of Ratification with the SADC Secretariat.

Several important points were made by the Director of Gender in the MWGCD regarding the manner in which the ratification process was expedited:

1. The work undertaken prior to the signing of the Protocol paved the way for the speedy ratification of the Protocol, namely:

- In-country meetings, some held with civil society, to brief relevant stakeholders, and high level officials, some who became key leaders in the discussion of Zimbabwe's position at relevant regional meetings.
- Targeting policy-makers so that they were sufficiently briefed on the content and process of the development and subsequent adoption of the Protocol.
- Targeting MPs and Senators to inform them on the content and process of development and subsequent adoption of the Protocol.
- A proactive Minister of Justice who championed the process at every stage

2. The context and environment provided space for expediting signature and ratification of the Protocol, including political will at the highest level.

3. The MWGCD took the lead, and the relevant Minister proved pivotal by engaging with the relevant authorities immediately after signing of the Protocol for the ratification to be expedited.

4. The support and complementary role of civil society such as the Zimbabwe Women Coalition, including the provision of resources, awareness-raising, and provision of relevant information and technical backstopping.

It is necessary that the country now takes the next step to ensure effective domestication and implementation of the Protocol.

Who will be next?



There are mixed signals as to which countries may ratify the Protocol next. South Africa seems to be taking the lead and is in the advanced stages of its national consultative process. It has a strong constitutional foundation to guarantee gender equality, and addressing contradictions between the Constitution, laws and practices. It ranks first in terms of women's representation in national government and has done considerably well in representation of women in local government. South Africa has also recently set up new national gender machinery in the form of a Ministry of Women, Children and People with Disabilities (formerly Office of the Status of Women). The Gender Protocol was also adopted in the country in 2008, and the South African representatives played a pivotal role in its adoption. Therefore, there are no obvious obstacles to the country's move to ratify the Protocol.

The other country likely to expedite its ratification process is Zambia, in spite of some problematic constitutional provisions (claw back clause, no affirmative action provision), and low representation of women in its national legislature and local government.



However, Zambia has been undergoing a constitutional review process and the National Constitution Conference tasked with spearheading the process has benefitted from input by gender activists, highlighting some of the gaps and how these can be closed. There are thus strong indications that a gender sensitive constitution will be adopted and the provisions of the Gender Protocol are highly influencing the direction of the debates on this topic⁴.

Zambia has a proactive women's movement led by the NGO Coordinating Committee, Women and Law in Southern Africa and Women for Change, among others, and they are influencing government's move towards ratification of the Protocol.

Strategies for Civil Society Activism

While most countries are past the signing and adoption stage, experience has shown that pre- and post-signing work undertaken is important in the long term, and the momentum for ratification is built on this foundation. This includes:

- ✓ Relationships built with relevant authorities, particularly at high levels of government in the key ministries (justice, gender, foreign affairs).
- ✓ Linkages and awareness-raising with MPs and Senators, where relevant; they will play a pivotal role at the ratification stage.
- ✓ Close liaison with the SADC Secretariat, through the Gender Unit, to be fully informed of any high level actions being undertaken, schedule of relevant meetings and the agenda.
- ✓ Citizen mobilisation, so that there is pressure "from below", to ensure that as each stage unfolds, citizens are on hand to influence and engage the process where opportunities exist.
- ✓ Priming and sensitising key policymakers and other decision-makers that have a direct influence on the signing and ratification of the Protocol.
- ✓ Strong media and communication strategies to keep the Gender Protocol on the radar.

Influencing the Ratification Processes

What to do?

Since ratification is a government-led process, the strategic role of activists is to influence the relevant structures, systems and processes so that ratification is expedited. Bear in mind the two key levels: Cabinet and the Legislature.

At Cabinet level the following can be done:

- ✓ Research and collate information that presents a strong case to the authorities on the country's progress and alignment with the Gender Protocol commitments. This is required at this level so that Cabinet is convinced the country is ready to ratify the Protocol, and challenges of implementation

are surmountable. This information will form the basis for engagement with ministries and cabinet committees where appropriate.

- ✓ Engage formally and informally with the relevant cabinet ministers/committees where possible, and provide them with information that will strengthen the case for ratification.

At legislature level:

- ✓ Sensitise parliamentarians through provision of relevant information, showing evidence that the country is ready to ratify the Protocol; a useful strategy is direct engagement with relevant committees.
- ✓ Identify champions to support the relevant ministry when the motion is presented for debate and approval in Parliament.

As civil society, a careful plan and organised interventions are crucial; disorganisation and lack of correct information can destroy the influential role gender activists can play. This includes:

- ✓ A lobbying and advocacy plan.
Identifying role players and defining roles and responsibilities.
- ✓ Developing a good coordination mechanism.
- ✓ Clear feedback processes and conflict management mechanisms.
- ✓ A clear information and communication strategy, including consistent messages.

The SADC Secretariat, through the Gender Unit, also plays an influential role in persuading Member States to ratify the Protocol. Periodic liaison with the Secretariat on developments towards this end is necessary.



Flashback: consultative conference in Gaborone, Botswana on the Protocol before its adoption. Photo: Colleen Lowe Morna

Who to engage and influence?

1. *The ministries of justice, gender/women and foreign affairs:* All will participate in key SADC meetings and hopefully play a role in eventual depositing of the Instrument of Ratification with the SADC Secretariat.

2. *Cabinet and the office of the president:* Are responsible for approval of the relevant motivations for ratification.
3. *The legislature:* Is critical in passing the necessary motion approving the ratification of the Protocol.
4. *Gender activists, academics, private sector players:* These people are in key positions to influence change and create the critical mass required to apply pressure at all levels of engagement.
5. *Regional and international partners:* Are in a position to support the process through mobilising resources.
6. *Media:* A platform must be created for voices and views to continuously be heard. This lobbying approach can yield significant results.

Effect of ratification

Monism vs Dualism

The effect of ratification of a Protocol as regards its immediate enforceability at the national level is dependent on whether a state has a monist or dualist legal system, in line with constitutional provisions.

A **monist** state is characterised by the following:

- ✓ No distinction between domestic, regional and international legal systems, thus ratification of regional and international treaties and other legal instruments means they become part of the domestic law.
- ✓ International law does not need to be made part of domestic law because the act of ratifying it makes it part of national law.
- ✓ International law can be applied directly by the justice delivery system, and can also be invoked by the country's citizens.
- ✓ Domestic law does not take priority over international law, and any conflicts must be addressed to ensure that international norms and standards apply.
- ✓ Monism has the advantage that it circumvents a situation where a government may either be negligent or unwilling to domesticate a law.

A **dualist** state is characterised by the following:

- ✓ A distinction between national and international law, thus requiring that international law be made part of national law before it is enforced.
- ✓ If the state ratifies a treaty or protocol but does not take steps to domesticate it either by adapting the law to align it, or through an act of parliament recognising it, then it is not part of the national law

and it cannot be applied. If there are national laws that contradict the content of regional and international legal norms, they remain in force.

- ✓ Unless it has been domesticated, a protocol or treaty cannot be directly applied by the national judicial system or influence policy direction.
- ✓ The disadvantage of the dualist system is that if a state delays, or is reluctant to translate regional or international law into its domestic law, the judicial system or citizens cannot apply the legal norms and standards contained in them.

Most SADC countries are dualist states, and it has been noted that even though most have a good ratification record, for example all SADC countries have ratified CEDAW, they have a poor record of formally domesticating regional and international laws.

Domestication and implementation

After ratification of the Protocol the principles, objectives, norms and standards have to be made part of domestic legislation, policies and programming:

- ✓ Domestication is a formal process, in most cases through an Act of Parliament, to make the Protocol a part of national laws, policies and programmes.
- ✓ Implementation requires action to translate the commitments in the Protocol into gender-sensitive policies, programmes and laws. Most SADC countries choose to take a phased approach in doing this. Examples include law reform, policy review, and national strategy development.
- ✓ All SADC countries are complying with some provisions of the Gender Protocol, either through a progressive legislative framework, national strategy or strong and progressive policy. The “value addition” of ratifying protocols is that they provide an added impetus for SADC Member States to undertake more focused, comprehensive and systematic work to bridge gaps in a sector, based on agreed norms and minimum standards set. Protocols further bind Member States to step-up efforts to address gaps, since they will be required to provide periodic progress reports.
- ✓ Civil society can play a critical role in the Protocol domestication processes, through influencing decisions to ensure compliance, raising awareness amongst citizens in order that they demand accountability from decision makers, and close monitoring to highlight existing gaps, opportunities and progress being made. An example is the work being done through the Southern Africa Gender Protocol Alliance, including the Citizen Score Card which measures a country's level of compliance.
- ✓ A comprehensive monitoring and evaluation framework is necessary to ensure tracking of progress and evaluation of impact.

Failure to comply/fulfil commitments

Sanctions

As in other regional and international legal systems, failure by a State Party to adhere to the commitments in human rights instruments, for example CEDAW, does not attract serious censure from the CEDAW Committee responsible for monitoring of its implementation. However, Article 33 of the SADC Treaty provides for sanctions to be imposed on a SADC Member State if it continuously fails to fulfil obligations without good reason or if implementation of policies undermines the principles and objectives of SADC. The sanctions system has yet to be tested to its fullest extent.

The imposition of sanctions is particularly important in the context of the implementation of the SADC Gender Protocol, which has 28 targets that must be met by 2015. What happens if State Parties fail to meet those targets? Gender activists must remain vigilant if any life-changing progress is to be achieved for women.

Litigation - SADC Tribunal

The SADC Tribunal was established in 1992 to be an adjudicating body made up of ten members with the power to interpret and make legally-binding decisions on the provisions of the Treaty and related legal instruments. Essentially, the Tribunal is there to ensure SADC Member States do not fall foul of SADC law, which comprises the Treaty, all Protocols that have been ratified and are in force, principles, communiqués, and other instruments.

There are two ways in which a case can be brought before a Tribunal, either by application or by agreement; most cases are brought by way of application. The Tribunal applies SADC law and international law as a standard, and it has the power to overturn the decision of a domestic court in the event that it violates SADC and international law. The Tribunal provides a window of opportunity for SADC citizens to ensure that SADC Member States promote and protect their rights, and guard against violations and impunity.

¹ This was done through the Southern Africa Gender Protocol Alliance, a coalition of more than 40 members across the region with 15 national focal points in all SADC countries. It is coordinated by Gender Links, a regional gender equality organisation.
² Government of Zimbabwe (2009:4) The Ministry of Women Affairs, Gender and Community Development January 2009 - December 2014 Strategic Plan
³ Information provided by the Director of Gender, Ministry of Women Affairs, Gender and Community Development of Zimbabwe, in an interview held on 31 January 2011.
⁴ As highlighted by Matrine Bhuku-Chuulu, Regional Director of Women and Law in Southern Africa (WLSA), in The SADC Gender Protocol 2010 Barometer (2010:28), Southern African Gender Protocol Alliance.

