

# 7 Gender Equality and Women's Rights under the 2013 Zimbabwean Constitution

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## 1 Introduction

The promulgation of the 2013 Constitution in Zimbabwe heralded the dawn of a new era with regards to gender equality. It was that flicker of hope for many who had been lobbying for reform in the area of gender equality. This Constitution clearly espouses values and principles of gender equality, a welcome gesture moving away from the Lancaster House Constitution which had retrogressive provisions that allowed discrimination in areas governed by personal law. One of the key values clearly stipulated in the current constitution is that the Constitution is the supreme law of the land and any law that is inconsistent with it is void to the extent of the inconsistency. This is referred to as constitutional supremacy, meaning that the Constitution takes precedence over all other laws. Supremacy of the Constitution is provided for in section 3(1)(a) as the first founding value or principle on which Zimbabwe is founded. In addition, section 2(1) specifically states that “[t]his Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency”. Section 2(2) goes on to specify who is bound by the Constitution and it states: “The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them.” The effect of this wording is that constitutional obligations are binding on every person and not just organs of state.

Section 3(g) clearly articulates that gender equality is one of the values of Zimbabwe, an indication that it holds a special place in the Constitution as well as the country. To further rubber stamp its commitment to gender equality, section 17 of the Constitution identifies gender balance as a national objective which must guide the state at every level in the formulation and implementation of laws and policies. Section 56(1) provides that all persons are equal before the law and have the right to equal protection and benefit of the law. Further, in its pursuit to promote gender equality, the Constitution in section 246 (a) provides for the establishment of an institutional mechanism whose function is to monitor issues concerning gender equality to ensure gender equality as provided in this constitution.

From 1980 the Zimbabwean legislative and policy framework has been greatly influenced by multi-layered processes at the international, regional and national

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levels. The attainment of independence in Zimbabwe saw the birth of a new Constitution<sup>1</sup> enshrined with a Declaration of Rights. There was an anti-discrimination clause enshrined in section 23 of the old Constitution which prohibited discrimination on the basis of sex, gender, creed, race, tribe, place of origin, political opinions and colour. This section was later amended to include gender and marital status.<sup>2</sup> The section was criticised for being in the nature of a 'claw back' clause which permitted discrimination in the matters of personal and customary law.<sup>3</sup> The net effect of this provision was that in relation to issues like divorce, inheritance and marriage, where customary law is deemed applicable, customary law was given precedence over general law.<sup>4</sup>

Indeed, Zimbabwe has taken positive steps towards the emancipation and empowerment of women.<sup>5</sup> The government has also shown some commitment in changing the plight of women.<sup>6</sup> Women have been recognised as an oppressed group and made a target of government policies. The government's achievements to transform women's status have been partially realised through landmark legal reforms and socio-cultural development. The country witnessed the passing of legislation such as the Legal Age of Majority Act in 1982 and many other positive statutes,<sup>7</sup> such as the Domestic Violence Act (Chapter 5:16). Zimbabwe was then one of six Southern African countries to have such specific legislation on domestic violence.<sup>8</sup> However, until the promulgation of the 2013 Constitution, the 'famous' claw back clause was a discomfort for most women in Zimbabwe as it allowed discrimination in matters pertaining to personal law and customary law. Given the way that patriarchy treats women like minors, this provision stripped women of any rights that they might have been perceived to have had.

This chapter explores how women's rights are secured in Zimbabwe and draws upon legislation at local, regional and international level. The chapter is located within equality and non-discrimination and the broader human rights discourse. The

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<sup>1</sup> This Constitution was published in 1979, as provided by the Statutory Instrument 1979/1600 of the United Kingdom; amended twice in 1981; in 1983; 1984; 1985; twice in 1987; twice in 1989; twice in 1990; twice in 1993; in 1996; 1998; 2000; 2005; 2007; 2009 and 2013.

<sup>2</sup> This was introduced in 1996 through Amendment No. 14.

<sup>3</sup> Section 23(3)(a)(b) of the 1979 Constitution.

<sup>4</sup> C. Damiso and J. E. Stewart, 'Zimbabwe and CEDAW Compliance: Pursuing Women's Equality in Fits and Starts', in A. Hellum and H. S. Aasen (eds.), *Women's Rights CEDAW in International, Regional and National Law* (Cambridge University Press, Cambridge 2013) pp. 454–481.

<sup>5</sup> P. Mungwini, 'Forward to the Past: Dilemmas of Rural Women Empowerment in Zimbabwe', 11:2 *African Sociological Review* (2007) pp. 124–133, at p. 124.

<sup>6</sup> E. Batezat and M. Mwalo, *Women in Zimbabwe* (SAPES Trust, Harare, 1989) p. 4.

<sup>7</sup> Zimbabwe made significant strides in amending and enacting legislation and enacted 17 pieces of legislation to advance the gender equality and equity objective. These include: Matrimonial Causes Act (1985); Maintenance Act (1999); Administration of Estates Amendment Act (1997); Sexual Offences Act (2001); Education Act (2004); Labour Act (Chapter 28:01); Criminal Law Codification and Reform Act (2006); and Domestic Violence Act (2007). The 2004 Public Sector Gender Policy put in place Gender Focal Points in all ministries and parastatals, and in 2012 dialogue was initiated to set up a Gender Commission, and this Commission is provided for in the new Constitution in terms of section 245.

<sup>8</sup> M. Nyoni and T. Dzinoreva, 'The Media and Domestic Violence in Zimbabwe', 12:1 *Journal of Sustainable development in Africa* (2010) pp. 249–257, at p. 250.

chapter outlines the major areas that are of significance to women. The critical areas of the chapter include laying the foundations for gender equality and non-discrimination, understanding the nexus between gender equality, women's rights and feminism and a comparative analysis of gender equality provisions under the old and the new Constitution. In doing so, the chapter examines the right to equality and non-discrimination as important principles that should be observed in a society that strives for the promotion and protection of constitutional and human rights. It further examines how the country is fairing in advancing gender equality post the promulgation of the current constitution.

## **2 Understanding the Nexus between Gender Equality, Women's Rights and Feminism**

The concept of women's rights is difficult to understand without first seeking to appreciate how it is informed by its correlative concepts of gender equality and feminism. A proper understanding of the relationship that exists amongst the three will adequately place the women's rights movement in both its historical and modern contexts, revealing the continuing evolution that the concept enjoys.

### **2.1 Gender Equality**

Gender is understood to be socially constructed identities which attribute roles for men and women.<sup>9</sup> The meaning placed by society on the biological differences between men and women creates imbalanced power relations, meaning that men will reserve rights that empower them and disenfranchise women. Gender equality refers to the enjoyment of equal rights, opportunities and treatment by men and women and by boys and girls in all spheres of life. It asserts that people's rights, responsibilities, social status and access to resources should not depend on whether they are born male or female.<sup>10</sup> Rather, it entails that men and women are free to make life decisions without limitations placed on them by stereotypes and prejudice.

Various legal documents provide for equality between men and women with the oldest of these being the Universal Declaration of Human Rights (UDHR).<sup>11</sup> The current Sustainable Development Goals (SDGs) have SDG5 dedicated to achieving gender equality and empowering all women and girls. Most Governments are making concerted efforts to achieve gender equality including Zimbabwe. What is to be seen is whether commitments that are made are followed through with tangible actions towards attaining gender equality.

Gender equity represents a further step in the gender debate. It can be argued that it is a response to the inadequacies of the gender equality regime in that it seeks to

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<sup>9</sup> OHCHR, *Women's Rights are Human Rights*, HR/PUB/14/2, p. 36, available at <<http://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf>>.

<sup>10</sup> International Labour Office Geneva, *ABC of Women Workers' Rights and Gender Equality*, available at <[http://www.ilo.org/wcmsp5/groups/public/---dgreports/--gender/documents/publication/wcms\\_087314.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/--gender/documents/publication/wcms_087314.pdf)>.

<sup>11</sup> In addition to the UDHR, see the ICCPR, ICESCR and Constitution of Zimbabwe.

redress past imbalances which have disadvantaged women and favoured men. Gender equity means fairness of treatment for women and men, according to their respective needs and realities. This may include equal treatment or treatment that is different but which is considered equivalent in terms of rights, benefits, obligations and opportunities.<sup>12</sup> Ultimately, 'gender equity' and 'gender equality' move away from a women in development attitude to encompass a gender and development approach and understanding. Gender and development recognises that gender inequity is not an issue that exclusively disadvantages women but is relevant to people of all gender identities and sexualities.<sup>13</sup>

## 2.2 Women's Rights

There is a popular saying amongst the women's rights discourse that says 'women's rights are human rights', which drives the equality agenda. This is inherent in the principle of equality between men and women in that they can be conferred on women no different than they can be conferred on men regardless of social, cultural or religious background. Women's rights are the economic, social and cultural freedoms to which all people are entitled.<sup>14</sup> Equality and non-discrimination between men and women is a fundamental tenet of human rights law. Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) prohibit discrimination on the basis of sex,<sup>15</sup> and ensure equal protection of the law.<sup>16</sup> Discrimination of women takes many forms: for example, *de jure* discrimination where laws directly distinguish between certain groups such as where women were prohibited from inheriting,<sup>17</sup> and *de facto* discrimination where a law or policy is seemingly gender-neutral but has detrimental effects on women.<sup>18</sup>

The overarching principle of women's rights is that women as well as men ought to be free to develop their "personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices".<sup>19</sup> This is possible because human rights which were first provided for in the UDHR are to be applied without distinction as to sex.<sup>20</sup> There was considerable discussion in the drafting of the UDHR as to the use of the term 'all men' rather than

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<sup>12</sup> ILO Geneva, *supra* note 10, p.48.

<sup>13</sup> Council for International Development, *Fact Sheet 6*, 2012, p. 1, available at <<http://www.cid.org.nz/assets/CID-Resources/Fact-Sheets/FS6.-2014-format.-Gender.pdf>>.

<sup>14</sup> Concern Worldwide, *Women's Rights, How Can We Ensure That All Women Have Equal Access to Their Rights?: Focus on Pakistan*, p. 1, available at <<http://gcc.concernusa.org/content/uploads/2014/08/Womens-Rights.pdf>>.

<sup>15</sup> Article 1 ICCPR, Article 2 ICESCR.

<sup>16</sup> Article 26 ICCPR.

<sup>17</sup> See *Magaya v. Magaya*, SC 210/98.

<sup>18</sup> OHCHR, *supra* note 9, p. 30. See also E. Grant, 'Dignity and Equality', *7 Human Rights Law Review* (2007) p. 300.

<sup>19</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 (2010) on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, para. 22.

<sup>20</sup> Article 2 UDHR.

a gender-neutral term.<sup>21</sup> Eventually the terms ‘everyone’ and ‘all human beings’ were used to show that the rights contained within the UDHR were to apply to all persons, men and women included. The universality of rights therefore dictates that women’s rights are also human rights in that they are indivisible in nature. However, cultural and religious extremism has often been the reason states have sought to renege on their commitments in this regard.<sup>22</sup>

### 2.3 Feminism

It is difficult to arrive at a single definition of feminism because of its various nuances and varied understandings of it proffered in many quarters. This is because it is not a unitary concept but a diverse multifaceted group of ideas.<sup>23</sup> Rosalind Delmar does attempt to provide the following baseline definition: “Many would agree that at the very least a feminist is someone who holds that women suffer discrimination because of their sex, that they have specific needs which remain negated and unsatisfied, and that the satisfaction of these needs would require a radical change (some would say a revolution even) in the social, political and economic order.”<sup>24</sup>

### 2.4 The Nexus

Looking at the three concepts combined it is apparent that they share common theoretical grounding in that they are all premised on the notion that women have been disadvantaged historically. Further, they acknowledge that there is a need to redress the social, economic and political advantages that men have previously enjoyed in a manner that disadvantaged women on the one hand and sustained the status quo which regards women as second class citizens on the other hand.

## 3 Gender Equality and Human Rights

The global push for gender equality is clearly set out in Sustainable Development Goals (SDGs) in Goal 5 which aims at promoting gender equality and empowering women.<sup>25</sup> SDGs take after the Millennium Development Goals (MDGs) which lapsed in 2015. The SDGs have been hailed for providing a better framework than the MDGs as they draw attention to all the key structural constraints that deprive women of their enjoyment of their rights. There is however still an outcry for the lack of robust accountability mechanisms that support the realisation of these SDGs. This has become a sore point as it appears as though most Governments ascribe to the SDGs but lack the political will to ensure it becomes a reality to women. Gender equality is an underpinning concept to the human rights discourse. It is important to note that

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<sup>21</sup> J. Morsink, ‘Women’s Rights in the Universal Declaration’, 13:2 *Human Rights Quarterly* (May 1991).

<sup>22</sup> OHCHR, *supra* note 9, p. 27.

<sup>23</sup> J. Freedman, *Concepts in the Social Sciences: Feminism* (Open University Press, Buckingham, 2001)

<sup>24</sup> R. Delmar, ‘What is feminism?’, in J. Mitchell and A. Oakley (eds.), *What is Feminism?* (Basil Blackwell, Oxford, 1986) pp. 8–32, at p. 8.

<sup>25</sup> See <<http://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality>>.

this was not always the case; it took decades of dedicated and passionate advocacy for gendered diversities to be considered relevant in the human rights trajectory. This recognition gave birth to a number of legal and normative instruments at international and regional levels. These instruments include but are not limited to the Convention on the Elimination of Discrimination against Women (CEDAW) of 1979, the Beijing Platform for Action (BPFA) of 1995 and the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa of 1995. All these and others are explained in detail below, but it suffices to mention that they have all been an important advance in the protection and the promotion of women's rights.

#### **4 Substantive Equality and the Birth of a Robust Approach to Equality**

CEDAW was adopted in 1979 and entered into force on 3 September 1981.<sup>26</sup> It sought to transform the ideals contained in the UDHR into a legally binding instrument aimed at the achievement of women's equality with men<sup>27</sup>. CEDAW constitutes a bill of rights for women and girls by incorporating universality and indivisibility of rights.<sup>28</sup> Whilst gender equality and women's rights are key elements in the Universal Declaration of Human Rights, it was later recognised that certain rights are specific to women, or need to be emphasised in the case of women.<sup>29</sup>

The Convention's definition of discrimination is immediately indicative of an awareness of the fragility of women's standing in the law as regards previous conventions, the international bill of rights included. It is for this reason that CEDAW is so closely associated with the notion of substantive equality. The term 'substantive equality' was first produced in American jurisprudence in the case of *Griggs v. Duke Power*<sup>30</sup> where the employer had applied a uniform aptitude test to both white and African American job candidates. But because African-American applicants had long received inferior education in segregated schools, the test operated to disqualify such applicants at a substantially higher rate than whites. The Supreme Court held that equal treatment could be discriminatory if it led to unequal results. Thus, substantive equality should be viewed in the light of providing equity where simple formal equality would have led to an unfair result.

CEDAW places a positive duty on states to respect, protect and fulfil rights to equality and non-discrimination. This is a departure from the traditional view of protection of

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<sup>26</sup> UN, *Short History of the Commission on the Status of Women*, available at <<http://www.un.org/womenwatch/daw/CSW60YRS/CSWbriefhistory.pdf>>.

<sup>27</sup> A. Byrnes, 'Article 1', in M. Freeman, C. Chinkin and B. Rudolf (eds.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford University Press, Oxford, 2012) pp. 51–99, at p. 53.

<sup>28</sup> *Report of the Online Discussion on "Women and Human Rights" Moderated by the Office of the High Commissioner for Human Rights 1–26 February 2010*, p. 3

<sup>29</sup> UNFPA and UNICEF, *Women's & Children's Rights: Making the Connection*, available at <[https://www.unfpa.org/sites/default/files/pub-pdf/Women-Children\\_final.pdf](https://www.unfpa.org/sites/default/files/pub-pdf/Women-Children_final.pdf) p11>. See also S. Fredman, 'Substantive Equality Revisited', 14:3 *International Journal of Constitutional Law* (July 2016) pp. 712–738.

<sup>30</sup> *Griggs v. Duke Power Co.*, 401 US 424, 91 S Ct 849 (1971) (US Supreme Court).

rights which focused on individual interaction.<sup>31</sup> In other words, relief could only be had where the perpetrator was named, and if, say, there were structural inequalities that could not be traced to an individual, then that lay outside the scope of enforcement of the right to non-discrimination.<sup>32</sup> Article 2(d) of CEDAW prohibits public authorities and institutions from engaging in any discriminatory conduct to the detriment of women. This provides protection for women *ex ante*, or before the fact, in that women are not necessarily saddled with an evidentiary burden in proving that public authorities violated their rights. Rather, all they need to do is show that they have a right in terms of the Convention as well as showing that the public authority has a positive duty to respect, protect or fulfil that right. In any event, the Human Rights Committee in its General Comment of 1989<sup>33</sup> noted that Article 26 of the ICCPR ensures that discrimination in any field regulated by a public authority is prohibited. This only emphasises the point that provisions of the ICCPR and the ICESCR can be read with CEDAW for the fuller protection of women's rights.

Article 4(1) of CEDAW provides that adoption by state parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination. Special measures or affirmative action are controversial in that they appear to breach the equal treatment principle by requiring preferential treatment on the grounds of gender. However, once it is recognised that advantageous treatment might be necessary to counter previous disadvantage, it becomes clear that special measures are not a derogation from equality, but a means to achieve it. The wording of Article 4 of CEDAW demonstrates this tension. It appears to accept that gender-based provisions constitute a *prima facie* breach of the equal treatment principles, while at the same time recognising that measures specifically benefitting women might be necessary. Hence the need to call these measures 'special' and to insist that they are 'temporary'.<sup>34</sup> This then means that these temporary measures are not a means to an end but Governments are impressed upon to put in place measures that ultimately ensure 50/50 representation.

The CEDAW Committee in its General Recommendation No. 25<sup>35</sup> on temporary special measures stressed that the Convention was a dynamic instrument which went beyond the concept of discrimination used in many national and international legal standards and norms.<sup>36</sup> More to the point, the Committee had the following to say:

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<sup>31</sup> A. F. Bayefsky, 'The Principles of Equality or Non discrimination in International Law', 11:1–2 *Human Rights Law Journal* (1990) pp. 1–34, at p. 5.

<sup>32</sup> S. Fredman and B. Goldblatt, *Discussion Paper Gender Equality and Human Rights No. 4*, July 2015, p. 9.

<sup>33</sup> Human Rights Committee, General Comment No. 18: Non-discrimination (1989).

<sup>34</sup> S. Fredman, *Women and the Law* (Oxford University Press, Oxford, 1997) p. 97.

<sup>35</sup> UN Committee on the Elimination of Discrimination against Women, General Recommendation No. 25 (2004) on Article 4, paragraph 1 of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures.

<sup>36</sup> *Ibid.*, para. 5.

In the Committee's view, a purely formal legal or programmatic approach is not sufficient to achieve women's de facto equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.

Article 4(1) of CEDAW has found application in the Constitution of Zimbabwe. Section 124(1)(b) provides that for the life of the first two Parliaments after the adoption of the Constitution, 60 women shall be a part of the National Assembly under a proportional representation or quota system. This is not without its flaws because issues of merit and competence have to be taken into account. However, flawed or not, the quota system represents a tremendous opportunity for women to participate in leadership and influence gender-related issues until the expiry of the temporary measure. It is hoped that more women will be able to aspire to political and other forms of leadership as a result. A closer look at this affirmative action provision leaves a lot to be desired in practice. The 60 seats provided for by the constitution in a bid to right the past inequalities have not provided the needed consolation. In reality, women conferred the 60 seats have no constituencies thus their opinion is not valued. They are seen as it were, but not heard. To further indicate how these seats are problematic, these seats are regularised on party lines and anyone who does not ascribe to a political party is already excluded from the process. This then takes us to another problematic aspect which is that there is no meritocracy when it comes to selection of the candidates for the affirmative seats such that the experience has been that most do not necessarily have the capacity to engage at policy formulation and reveal level as they lack the know-how. Many women's rights activists have rightly pointed out that the 60 seats provision is not synonymous with gender balance which goes beyond affirmative action but is about 50/50. The efficacy of the 60 seats now seem like sweets that are given to a crying child, just to silence women. As reported by Gender Links<sup>37</sup>, in their report *Zimbabwe Gender and Elections*, currently, the Zimbabwean cabinet has a 29 per cent representation of women whilst the situation is dire at local government where the representation of women is at 14 per cent. The CEDAW shadow report by CSOs in Zimbabwe noted this anomaly which leads to gender imbalance as women are left out at the apex of government, at the grassroots level where participation is imperative and key especially in shifting the gender dynamics within society that contributes to the bigger picture of achieving equality.

Substantive equality is critical to the proper realisation and enjoyment of human rights by women, and this is because they have laboured under gender stereotypes

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<sup>37</sup> <<https://genderlinks.org.za/what-we-do/sadc-gender-protocol/advocacy-50-50/zimbabwe-gender-and-elections/> accessed on 24/12/2020- Zimbabwe Gender and Elections>.



for a long time. The Special Rapporteur on extreme poverty<sup>38</sup> highlighted that owing to gender stereotypes relating to family and work, depicting males as breadwinners and women as carers and nurturers, women tend to assume the bulk of the work at the expense of their human rights.<sup>39</sup> She goes on to say that:

The unequal distribution of unpaid care work is highly reflective and determinative of power relations between women and men. Discriminatory gender stereotypes, which construe women as second-class citizens whose place is in the home, cause and perpetuate this unequal distribution of work, rendering women's equal enjoyment of rights impossible. Addressing care responsibilities is thus an essential component of the obligations of States to ensure gender equality at home, work and in society more broadly.<sup>40</sup>

It is encouraging to note that our courts have acknowledged the contribution of women to the household even where they are not 'gainfully employed'. At the dissolution of marriage, the courts have found that a woman's role as a wife, mother, counsellor, housekeeper and day and night nurse for the family is in itself a contribution deserving of a share of the matrimonial estate.<sup>41</sup> In the spirit of righting some of the wrongs in the past especially with regards many who find themselves in unregistered customary law unions (UCLU), the government of Zimbabwe sought to repeal marriage laws.<sup>42</sup> The process to repeal marriage laws has not been a walk in the park and this has seen this initiative not yet concluded. The revised marriage bill has again failed to offer substantive equality to persons who are not legally married. It is unfortunate that the marriage bill is rubber stamping the attitudes of Zimbabwean society and has become a victim of the politics of the day. Adverse reports have been given with regards how the bill failed to recognise polygenous marriages, UCLU and same sex relationships which are an undeniable reality in the Zimbabwean community.<sup>43</sup>

Substantive equality operates on the premise that discrimination is an unnatural phenomenon in the field of human interaction. In other words, discrimination is socially constructed. It is for this reason that CEDAW promotes equality of opportunity, equality of access to opportunity and equality of result or outcome.<sup>44</sup> Some impediments to the realisation of substantive equality are the lack of economic wherewithal and imposition of economic sanctions on states. However, what this Convention requires is not to have a status of progress comparable to highly

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<sup>38</sup> *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, 23rd Session, A/HRC/23/36, 2013.

<sup>39</sup> *Ibid.*, para. 8.

<sup>40</sup> *Ibid.*, para 13.

<sup>41</sup> See *Tangirai v. Tangirai*, HH 65/13, p. 9.

<sup>42</sup> <<http://www.veritaszim.net/node/3599>>, accessed 30/12/2020

<sup>43</sup> <[researchgate.net/publication/340051701\\_Opportunities\\_inconsistencies\\_and\\_gaps\\_in\\_the\\_Zimbabwe\\_Marriages\\_Bill\\_of\\_2019](https://researchgate.net/publication/340051701_Opportunities_inconsistencies_and_gaps_in_the_Zimbabwe_Marriages_Bill_of_2019), Pretty Mubaiwa>, accessed 31 December 2020.

<sup>44</sup> Speech by Shanthi Dairiam, *Equality and Non-discrimination: The Two Essential Principles for the Promotion and Protection of the Human Rights of Women. Proceedings of a Conference organized by the Centre for Comparative and Public Law and the Women's Studies Research Centre, University of Hong Kong, 20 April 2002*, p. 3, available at <<https://www.law.hku.hk/ccpl/Docs/ShantiDairiam.pdf>>.

developed countries. Rather, it deals with the condition of women as against men. That is the context in which these issues must be considered.<sup>45</sup>

Ultimately, the problem of equality between the sexes is not one that can be solved by the law alone. Formal equality is achieved if policies are merely gender neutral, while substantive equality is concerned with the effects of equality policies and takes into account the need to correct prevailing inequality and this is outside the scope of the law and fully within the ambit of politics. As the CEDAW Committee points out in General Recommendation No. 25:

[A] purely formal legal or programmatic approach is not sufficient to achieve women's *de facto* equality with men, which the Committee interprets as substantive equality. In addition the Committee requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results ... Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.<sup>46</sup>

The above comments place gender issues squarely in the context of democratic citizenship in that women's right to equality is a condition-precendent for democracy and not merely a result of democratic recognition. This is because women's rights are not an expression of the will of the majority. They are a tool to ensure protections for women whatever the will of the majority may be.<sup>47</sup>

The African Protocol to the African Charter on Human and People's Rights of Women in Africa, also known as the Maputo Protocol, is the main instrument in which the African Commission on Human and Peoples' Rights could be said to have formulated and laid down principles and rules aimed at solving legal problems relating to women's rights and freedoms, and upon which African governments may base their legislation that may in one way or another affect the rights of women.<sup>48</sup> Zimbabwe ratified this instrument in September 2008.<sup>49</sup> It provides for a number of rights such as the right to freedom from discrimination, the right to dignity, access to justice and equal protection of the law<sup>50</sup> and so on. However, regarding the right to integrity and security of the person, it appears that one of the functions of the Protocol is to encourage states to legislate laws for the further protection of women where they have not already done so. To this end, Banda remarks as follows: "[T]he state is made responsible for violence including forced sex in the private sphere raising the

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<sup>45</sup> *Ibid.*

<sup>46</sup> Para. 8.

<sup>47</sup> F. Raday, 'Gender and Democratic Citizenship: The Impact of CEDAW', 10:2 *International Journal of Constitutional Law* (2012) pp. 512–530, at p. 515.

<sup>48</sup> J. D. Mujuzi, *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: South Africa's Reservations and Interpretative Declarations*, p. 43, available at <<http://www.saflii.org/za/journals/LDD/2008/12.pdf>>.

<sup>49</sup> B. Kombo, S. Rainatou and F. J. Mohamed, *Journey to Equality: 10 years of the Protocol on the Rights of Women in Africa*, p. 99, available at <[https://www.equalitynow.org/sites/default/files/MaputoProtocol\\_JourneytoEquality.pdf](https://www.equalitynow.org/sites/default/files/MaputoProtocol_JourneytoEquality.pdf)>.

<sup>50</sup> Article 2, 3 and 8 of the Protocol, respectively.

possibility that those African states which have not already done so, may have to legislate to make rape within marriage illegal.”<sup>51</sup>

Further to this, inclusion of rights such as the right not to be subjected to harmful practices details how comprehensive the protection of women’s rights is under the Protocol. The rights of rural women are also protected in Articles 18 and 19, which is important considering that approximately 60 per cent of women live in the rural areas.<sup>52</sup> Section 72 of the Constitution buttressed by Statutory Instrument 53 of 2014<sup>53</sup> have given relief to a lot of women when it comes to ownership of agricultural land. With regard to A1 and A2 farming lands, spouses of the deceased automatically inherit the title of the land. However, with regards to communal land, women are still disenfranchised because when their husbands die women can be chased away from the clan communal land as they do not have rights to ownership but just rights to access through their husbands. Land is still typically allocated within patrilineal lines in practice which leaves a lot of women greatly disadvantaged.

The Protocol heavily emphasises that states should carry out educational campaigns in order to sensitise men and women to break down stereotyping and culturally engrained patterns of superiority and inferiority.<sup>54</sup> It also seeks to eliminate harmful practices through educational programmes and outreach initiatives<sup>55</sup> and enjoins states to eliminate stereotypes in textbooks, syllabuses and the media.<sup>56</sup> In the same spirit, Zimbabwe through the Education Amendment Act<sup>57</sup> made it illegal for pregnant girls to be expelled from school.<sup>58</sup> While this is welcome, there is still a lot of work that needs to be done in shifting the attitudes of society that impede pregnant girls from accessing education. It is one thing to have a right to remain in school while pregnant, and another to have an environment that supports and upholds such a right. Change of attitude cannot be legislated.<sup>59</sup> This stance is in line with the above expressed notion that discrimination is not the natural state of humanity and that the effects of gender inequality can be gradually reversed through education and change of attitude and behaviour. The Protocol goes further by providing in Article 10(3) that states must prioritise their spending in favour of social development in general and the promotion of women in particular. Viljoen argues that this provision sets a basis for the review of states’ budgetary allocations by the African Commission or the

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<sup>51</sup> F. Banda, ‘Blazing a Trail: The African Protocol on Women’s Rights Comes into Force’, 50 *Journal of African Law* (2006) at p. 79

<sup>52</sup> Right to a healthy and sustainable environment and right to sustainable development, respectively.

<sup>53</sup> <<http://extwprlegs1.fao.org/docs/pdf/zim158139.pdf> accessed 30/12/2020>.

<sup>54</sup> Article 2(2).

<sup>55</sup> Article 5(a).

<sup>56</sup> Article 12(1).

<sup>57</sup> <<https://zimlil.org/zw/legislation/num-act/1987/5/Education%20Act%20%5BChapter%2025-04%5D.pdf> accessed 30/12/2020>.

<sup>58</sup> <<https://www.aljazeera.com/news/2020/8/25/its-now-illegal-for-zimbabwe-schools-to-expel-pregnant-girls> accessed 30/12/2020>.

<sup>59</sup> <<https://theconversation.com/zimbabwes-education-law-now-does-more-for-children-but-there-are-still-gaps-145265> accessed 30/12/2020>.

African Human Rights Court in order to assess states' dedication to gender equality.<sup>60</sup>

In comparison with CEDAW, the Protocol locates the protection of women's rights in more specific contexts than does the former. For example, the special temporary measures provided for in CEDAW<sup>61</sup> are aimed at accelerating equality between the sexes but appear to apply in the most general of contexts. This allows for a broad interpretation of rights which in its own right is not a negative thing. The Protocol on the other hand provides explicitly that in certain circumstances women are to be favoured over men, for example in electoral quotas.<sup>62</sup> Positive action on the part of states is also required in the areas of discrimination in law,<sup>63</sup> illiteracy and education.<sup>64</sup>

## **5 Comparative Analysis of Gender Equality Provisions under the Old and the New Constitution**

The 2013 Constitution is widely acknowledged for its firm commitment to gender equality. The affirmative action provisions further assert the Constitution's resolve to redress gender inequality. The Constitution reaffirms earlier commitments shown by the 2005 Constitutional Amendment No. 17 to the 1979 Constitution. Chapter 2 on national objectives in the 2013 Constitution spells out gender balance as being one of the objectives to guide the state, all institutions and agencies of government. Throughout the statement of the 26 national objectives equality is emphasised and, where appropriate, women and girls are specifically mentioned.

The Constitution also has special enforcement provisions in section 85, in that any of the following persons – namely any person acting in their own interests, acting on behalf of another person who cannot act for themselves, acting as a member, or in the interests of a group or class of persons, acting in the public interest, or any association acting in the interests of its members – is entitled to approach a court, alleging that a fundamental right or freedom enshrined in the Constitution has been, is being or is likely to be infringed, and the court may grant appropriate relief, including a declaration of rights and an award of compensation.

The founding values and principles in Chapter 3 of the 2013 Constitution further provide that Zimbabwe is founded on the respect and recognition of the equality of all human beings, gender equality, recognition of the rights of women, the elderly, youths and children and the equitable sharing of national resources, including land. These founding values and principles demonstrate the Constitution's spirit and intent with regard to the principle of equality. The values and principles of recognition of the inherent dignity and worth of each human being, the recognition of the equality

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<sup>60</sup> F. Viljoen, 'An Introduction to the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa', 16:1 *Washington and Lee Journal of Civil Rights and Social Justice* (2009) at p. 31.

<sup>61</sup> Article 4(1).

<sup>62</sup> Article 9(1).

<sup>63</sup> Article 2(1)(d).

<sup>64</sup> Article 12(2).

of all human beings and gender equality are all stated separately to emphasise the importance of these values and bringing out the Constitution's commitment to equality of persons before the law and in the society.

### **5.1 The Right to Equal Opportunities in Political, Economic and Social Activities**

The Declaration of Rights in Chapter 4 of the 2013 Constitution recognises that men and women have a right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres. The national objectives in Chapter 2 are a new concept in the constitutional history of Zimbabwe. The objectives are a summary of the framework which the government and all state institutions are to use in the formulation and implementation of policy. The gender balance objective in section 17(1)(c) provides that the state *must* promote full gender balance in Zimbabwean society, and, in particular, the state and all institutions and agencies of government at every level must take practical measures to ensure that women have access to resources, including land, on the basis of equality with men. Section 17(2) further provides that the state must take positive measures to rectify gender discrimination and imbalances resulting from past practices and policies.

Section 17 of the 2013 Constitution categorically defines 'gender balance' to mean the promotion of the full participation of women in all spheres of Zimbabwean society on the basis of equality with men. In addition, the objective proceeds to state that the state must take measures, including legislation, to ensure that there is equal representation of men and women in all state institutions and agencies and at all levels.

Section 23 of the old Zimbabwean Constitution provided that in implementing any programme of land reform the government shall treat men and women on an equal basis with respect to the allocation or distribution of land or any right or interest therein under that programme. This provision which was added in 2005 by Amendment No. 17 to the Constitution was exempted from the application of the claw back clauses in section 23(3)(a) and (b) of that Constitution. This definite positive move is also provided for in the 2013 Constitution. The 2013 Constitution has a clear provision for women to access resources, including land, on an equal basis with men. For a country whose economy is agro-based and depends heavily on the land, this provision indicates acknowledgement that the economy should be driven by both men and women. This, however, can only be achieved if women's work is fully recognised and not seen as an appendage to that of men.<sup>65</sup>

Section 13(1) of the 2013 Constitution requires state parties and agencies of the government to facilitate rapid and equitable development. The government is mandated to take measures to support private initiative and self-reliance, to foster the development of industrial and commercial enterprises in order to empower Zimbabweans and to bring about balanced development. Subsection (3) requires

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<sup>65</sup> See also J. Klugman and S. Twigg, *Gender at Work in Africa: Legal Constraints and Opportunities for Reform*, Working Paper No. 3, January 2015.

that these measures must protect and enhance the right of the people, particularly women, to equal opportunities in development.

By themselves the principles of equality and non-discrimination are not sufficient to guarantee true equality. Temporary special measures may sometimes be needed in order to bring disadvantaged or marginalised persons or groups of persons to the same substantive level as others. Temporary special measures aim at realising not only *de jure* (or formal) equality but also *de facto* (or substantive) equality for men and women. Equality guarantees that women and men enjoy all human rights on an even, like or same basis.

The affirmative action clause in section 23(3)(g) of the old Constitution did not satisfactorily address women as an oppressed group, and this resulted in the sub-optimal improvement of women's social status. Affirmative action is the nearest and most effective tool to realise and bring out women's worth in every sector of the society. Affirmative action, apart from improving gender equality in every sector of Zimbabwe, can ultimately improve economic development if there is full commitment to its goals and measures by government and the private sector.

Section 14(1) of the 2013 Constitution provides that the state and all institutions and agencies of government at every level must endeavour to facilitate and take measures to empower, through appropriate, transparent, fair and just affirmative action, all marginalised persons, groups and communities in Zimbabwe. Subsection (2) calls for the state and all institutions and agencies of government at every level to ensure that appropriate and adequate measures are undertaken to create employment for all Zimbabweans, especially women and youth. Section 246(f) enables the Gender Commission to recommend affirmative action programmes to achieve gender equality. These provisions on gender equality and equity are a landmark development in our law. It is something that the old Constitution lacked. The manner in which these sections are worded shows a positive move towards achieving equality between men and women. It is important though to note that whilst the 2013 constitution's spirit is geared towards achieving equity, the practice thus far has not reflected this commitment in many spheres.

Section 24 of the 2013 Constitution provides that the state and all institutions and agencies of government must adopt reasonable policies and measures to provide everyone with an opportunity to work in a freely chosen activity, in order to secure a decent living for themselves and their families. At every level, the state must endeavour to secure full employment and the removal of restrictions that unnecessarily inhibit or prevent people from working and otherwise engaging in gainful economic activities. They must also secure vocational guidance and the development of vocational and training programmes, including those for persons with disabilities, and the implementation of measures, such as family care, that enable women to enjoy a real opportunity to work.

## 5.2 Women's Rights in the Context of Customs, Traditions, Religious and Cultural Practices

Discrimination is further outlawed by the Prevention of Discrimination Act (Act No. 19 Of 1998) (Chapter 8:16). The purpose of this Act is stated in its preamble as “to prohibit discrimination on the ground of race, tribe, place of origin, national or ethnic origin, political opinions, colour, creed or gender and to provide a remedy for persons injured by such discrimination; to prohibit the promotion of such discrimination ...” This Act prohibits discrimination by one person against another in regard to: (a) the admission and supplying of commodities or services in public premises and facilities;<sup>66</sup> (b) the disposal of immovable property;<sup>67</sup> (c) the granting of finance;<sup>68</sup> and (d) the making or communication of statements based on racial superiority or hatred.<sup>69</sup> It is a criminal offence to discriminate against any person in any of the above instances.

Despite the operation of this provision, women's plight under the old constitutional provisions was far from being lessened. This was so because discrimination could be effected against them on the pretext of complying with customary law, which, based on the old constitutional provisions, was permissible.<sup>70</sup> This will no longer be the case under the 2013 Constitution as section 56 provides for unequivocal, unfettered equality between women and men, which is unlike the situation under the old Constitution where equality and non-discrimination were not clearly stated as being between men and women.

Section 80(1) of the 2013 Constitution provides that every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities.

Section 80(3) of the 2013 Constitution further provides that all laws, customs, traditions and cultural practices that infringe the rights of women conferred by the Constitution are void to the extent of the infringement. This is also provided for in section 2 of this Constitution which says that the Constitution is the supreme law of the country and “all laws and any law, practice, custom or conduct inconsistent with it is invalid to the extent of that inconsistency ...”. In terms of the realisation of women's rights, this provision requires that laws and policies are subject to being interpreted as being in violation of the fundamental rights set out in the Constitution. The provision that any law inconsistent with the Constitution is invalid lays a good foundation for women to exercise and enjoy the rights provided for under the 2013 Constitution.<sup>71</sup> In subjecting all laws, including customary laws, to the equality clause, the 2013 Constitution addresses discrimination and equality clearly and

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<sup>66</sup> Section 3.

<sup>67</sup> Section 4.

<sup>68</sup> Section 5.

<sup>69</sup> Section 6.

<sup>70</sup> See generally J. Stewart *et al.*, *Shadow of the Law: Women and Justice Delivery in Zimbabwe* (Women and Law in Southern Africa Research Trust, Harare, 2000).

<sup>71</sup> See *Mudzuru and another v. the Minister of Justice, Legal and Parliamentary Affairs and others*, CCZ 12-15.

unambiguously and presents a real opportunity to re-view and re-envisage women's rights and entitlements in Zimbabwe. In theory this is such a great stride but in reality the traditional institutions and customs are still to come to speed with this concept of equality. Presently women have not been able to navigate the cultural spaces. Out of over 200 chiefs in Zimbabwe, only 6 are women. Chiefs shape the customs and traditions that govern about 60 percent of the population that stays in the remote areas and not having women at such decision making tables has a negative impact on shaping the norms, traditions and values.

### **5.3 Intersectionality of Disadvantage and Substantive Equality**

Section 56(1) of the 2013 Constitution provides that all persons are equal before the law and have the right to equal protection and benefit of the law. Unlike in the old Constitution in which equality and non-discrimination were not clearly stated as being, among other things, between men and women, section 56(2) of the 2013 Constitution categorically states that women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

This section takes a substantive approach which recognises that in order to redistribute benefits equally between women and men, there must be measures to promote women's rights that must transform the unequal power relations between women and men in the process. There should not only be equal opportunities for women but also equal access to those opportunities.<sup>72</sup>

Subsection (3) further provides that "every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic and social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status or whether they are born in or out of wedlock".

The substantive equality approach taken in this section recognises that women and men cannot be treated the same, and for equality of results to occur, women and men may need to be treated differently. The challenge is to know when to take note of difference, and to decide on appropriate measures for different treatment that will facilitate equal access, control and equal results.<sup>73</sup> Such measures will have to be assessed to ensure that they promote autonomy rather than protection or dependency. This has to be done without compromising the claim for equal rights and equality as a legal standard.

Substantive equality for men and women will however not be achieved simply through the enactment of laws or the adoption of policies. In implementing the Constitution, the state should take into account that such laws, policies and practice can fail to address or even perpetuate inequality between men and women because

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<sup>72</sup> Byrnes, *supra* note 27, p. 55.

<sup>73</sup> *Ibid.*



they do not take account of existing economic, social and cultural inequalities, particularly those experienced by women.<sup>74</sup>

In addition to the above, the CEDAW Committee in its General Recommendation No. 25 on Article 4(1) of CEDAW on temporary special measures further elaborated the principle of non-discrimination as well as achievement of equality between men and women. In paragraph 8, the Committee noted that, in its view, a purely formal legal or programmatic approach is not sufficient to achieve women's *de facto* equality with men, which the Committee interprets as substantive equality. In addition, the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences. Pursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming under-representation of women and a redistribution of resources and power between men and women.

Despite the ordering of the modern society and the progressive provisions of the law, gender inequality still rears its ugly head. To understand the underpinning factors leading to the chronic inequality it is necessary to understand the relationship between gender equality, women's rights and feminism on a broader praxis.

## **6 Gendered Impact of COVID-19 and Its Implications on Women's Rights**

On the 11<sup>th</sup> of February 2020, the World Health Organization (WHO) officially declared COVID-19 a global pandemic. The WHO declared the disease to be a public health emergency of international concern. The government of Zimbabwe, as it is enjoined to do, responded by putting in place a series of extraordinary measures to combat the global pandemic. Through promulgation of statutory instruments, rights such as freedom of movement and assembly, religion and culture were limited.<sup>75</sup> The Constitution as has already been noted protects fundamental rights and freedoms in the Declaration of Rights. The rights most relevant to the COVID-19 response are: the right to life, personal liberty, human dignity, personal security, privacy, education, healthcare, food and water. These rights may be limited only

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<sup>74</sup>Article 3(8) ICESCR.

<sup>75</sup>Measures that were put in place include but not limited to: The Civil Protection (Declaration of State of Disaster: Rural and Urban Areas of Zimbabwe) (COVID-19) Notice, 2020 (Statutory Instrument 76 of 2020) which declared the Coronavirus an infectious disease and a state of disaster; The Public Health (COVID-19 Prevention, Containment and Treatment) Regulations, 2020 published as Statutory Instrument 77 of 2020 which declared the disease a formidable epidemic disease; and the COVID-19 Prevention, Containment and Treatment (National Lockdown) Order, 2020 contained in Statutory Instrument 83 of 2020 which declared a period of 21 days of lockdown of all sectors except for essential services and few cases exempted. In terms of Statutory Instrument 83 of 2020, authorities in Zimbabwe have been empowered to arrest anyone who breaks mandatory quarantine, isolation or partake in gatherings during the period of lockdown

where a law of general application permits it and subject to it being necessary and reasonable in a democratic society.<sup>76</sup>

However, during emergencies, these rights may be limited through a written law to the extent to which the emergency strictly requires it. Whilst progress has been made in the Constitution in broadening equal opportunities for women and affirming their rights, impacts of the COVID-19 pandemic deepens pre-existing inequalities and persistent violations of the rights of women and girls as compared to men and boys. Disease outbreaks affect women and men, girls and boys differently based on the perceived cultural and societal roles and responsibilities. According to Kameri-Mbote, past disease outbreaks such as Ebola virus in 2014 and Zika virus in 2015-2016 have had gendered impacts.<sup>77</sup> The same can be said regarding COVID-19.

The Zimbabwean Constitution provides a solid legal stand-point for the promotion and protection of equality and non-discrimination in Zimbabwe.<sup>78</sup> However, the unprecedented impact of COVID-19 disproportionately affects women, and this has the likelihood of increasing their vulnerabilities. According to the Organisation for Economic Co-operation and Development (OECD), 70 per cent of health workers are women and such are most exposed to the COVID-19 pandemic.<sup>79</sup> In a depressed economy such as that of Zimbabwe, there is need for a closer look on the impacts of lockdowns and the impact that the pandemic has on vulnerable groups such as women and girls.

On 23 April 2020, the United Nations Secretary General António Guterres released a policy brief titled: *COVID-19 and Human Rights: We are all in this together*. In this policy brief, the Secretary General asks the question why human rights are so important to the COVID-19 response. In answering this question, the Secretary General offers six key messages<sup>80</sup> which must underline responses to COVID-19.<sup>81</sup> According to one of the key messages, the virus does not discriminate, but its impacts do and therefore everyone should be involved in the responses. The gender dimensions of the pandemic are numerous and can be severe. The invisible coronavirus made systemic gender inequalities and injustices visible.<sup>82</sup> There are

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<sup>76</sup> Section 86 (2).

<sup>77</sup> P. Kameri-Mbote and D. A. Kipkoech, *Human Rights Implications of the Covid-19 Pandemic in Kenya* (School of Law, University of Nairobi, 2020) p. 17, citing *The COVID-19 Outbreak And Gender: Key Advocacy Points from Asia and the Pacific* (UN Women | Asia and the Pacific, 2020) accessed 5 April 2020.

<sup>78</sup> Section 56.

<sup>79</sup> See <<http://www.oecd.org/coronavirus/policy-responses/women-at-the-core-of-the-fight-against-covid-19-crisis-553a8269/>>.

<sup>80</sup> Protecting people's lives is the priority; protecting livelihoods helps us do it. The virus does not discriminate; but its impacts do. Involve everyone in your response. The threat is the virus, not the people. No country can beat this alone. When we recover, we must be better than we were before.

<sup>81</sup> Zimbabwe Human Rights Association, *A Human Rights Approach to Fighting COVID-19 in Zimbabwe in the Light of The United Nations Policy Brief on COVID 19 and Human Rights* (Accessed 29 April 2020) p. 1.

<sup>82</sup> L. Schalatek, *The Invisible Coronavirus Makes Systemic Gender Inequalities and Injustices Visible* (7 May 2020), <<https://za.boell.org/en/2020/05/07/invisible-coronavirus-makes-systemic-gender-inequalities-and-injustices-visible>>.

many socio-economic effects of the pandemic to women due to the nature of the role that they play in the community.<sup>83</sup>

Globally, women do most of the domestic work and unpaid care. Due to closure of schools and the limitation on movement for members of the family it is highly likely that women will be required to perform more caregiving responsibilities. Further, the shift of work spaces from public offices to homes has the effect of increasing women's workload as well as constraining their workspace given the gender division of labour.<sup>84</sup> *A Gender Assessment of COVID-19 and the Countrywide Lockdown Process*, carried out by UN Women Zimbabwe, revealed that women reported an increased burden in taking care of children, performing household chores among other routine duties they have at household and community level.<sup>85</sup> The pandemic jeopardises some of the achievements observed since 2013 in several aspects of gender equality and women's empowerment. The crisis' economic and social consequences will exacerbate existing inequalities and discrimination against women and girls, especially against the most marginalised and those in extreme poverty.<sup>86</sup>

The pandemic manifested itself at a time the international community was focusing on taking stock of achievements made in implementing the Beijing Platform of Action with its global commitments towards comprehensive gender equality and the fulfilment of women's universal human rights over the past 25 years.<sup>87</sup> The COVID-19 pandemic further poses a severe threat to the achievement of gender-related SDGs.<sup>88</sup> The development of the outbreak might also put a hold to some gender-transformative policies and reforms by diverting resources away from past and current needs of women, whereas the crisis will actually increase and expand them.<sup>89</sup> According to the UN, COVID-19 could reverse the limited but important progress that has been made on gender equality and women rights. Women's leadership and contributions must be at the centre of coronavirus resilience and recovery efforts.<sup>90</sup>

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<sup>83</sup> ZWRN *Coronavirus Lockdown and Women: The Effects of the Pandemic on the Existing Strides Made on Gender Equality and Women's Equal Participation* (2020), <<https://www.zwrcn.org.zw/index.php/news/400-coronavirus-lockdown-and-women-the-effects-of-the-pandemic-on-the-existing-strides-made-on-gender-equality-and-women-s-equal-participation>>.

<sup>84</sup> Kameri-Mbote and Kipkoech, *supra* note 77, p. 17.

<sup>85</sup> *"Building Back" Resilience of Rural Women after COVID-19*, <<https://zimbabwe.un.org/en/95733-building-back-resilience-rural-women-after-covid-19>>.

<sup>86</sup> *OECD Policy Responses to Coronavirus. Women on the Core of the Fight Against Covid 19 Crisis* (2020), <<https://www.oecd.org/coronavirus/policy-responses/women-at-the-core-of-the-fight-against-covid-19-crisis-553a8269/>>.

<sup>87</sup> *"Building Back" Resilience of Rural Women after COVID-19*, *supra* note 85.

<sup>88</sup> *OECD Policy Responses to Coronavirus. Women on the Core of the Fight Against Covid 19 Crisis*, *supra* note 86.

<sup>89</sup> *Ibid.*

<sup>90</sup> See <<https://www.un.org/en/un-coronavirus-communications-team/put-women-and-girls-centre-efforts-recover-covid-19>>.

## **7 Conclusion – Substantive Equality, Transformative Constitutionalism and the Future of Women’s Rights in Zimbabwe. Is It a Case of Elusive Equality?**

This chapter explored how women’s rights are secured in Zimbabwe and draws upon legislation at local, regional and international levels. The chapter is located within equality and non-discrimination and the broader human rights discourse. The rights discourse is a powerful tool for making governments accountable for the treatment of their citizens. As such, liberal feminists have adopted this discourse to help secure women’s rights. Securing women’s rights means ensuring that women are included in the group to whom the entitlement is extended. General Comment No. 28 of the CEDAW Committee and section 56 of the 2013 Constitution emphasise the obligation of the state to take all necessary steps in order to prohibit and prevent violations of the rights of women. Both emphasise that religious or traditional attitudes are not a legitimate defence of such violations. In terms of General Comment No. 28, states parties are required to report on the measures they have taken to eliminate and prohibit discrimination against women.

The concept of equality is traditionally understood to mean ‘the right to be equal to men’. This becomes problematic when it is extended to the understanding that women must be treated exactly like men if they are to gain equality with men.<sup>91</sup> It implies that women must be treated according to male standards, obscuring the ways in which women are different from men and how they will be disadvantaged because of these differences. It is thus imperative that the implementation of the 2013 Constitution focuses on the need to attain substantive equality that encompasses equality of opportunity.<sup>92</sup> Substantive equality recognises that women do not necessarily have the same experiences as men and, therefore, should not be treated identically to men in all circumstances. Focus should be on equality of results, which focuses on equality of outcomes and requires the transformation of the underlying structures that are the cause of inequality. Therefore the concept of equity should take precedent as this focuses on creating a level playing field and meeting people where they are in order to attain substantive equality. Without that the 2013 Constitution will be another case of elusive equality.

What is evident though is that in as much as the law sometimes creates the framework that facilitates change, it sometimes is complicit in providing a framework that justifies exclusion. It is also important to note that change itself needs to come through social, cultural, religious, economic and political dispensations. Law is indeed the enforcement mechanism but it is not the panacea-the end all. There has to be political will to achieve substantive justice from the highest office through the whole policy making machinery.

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<sup>91</sup> S. Fredman, ‘Beyond Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights’, in I. Boerefijn (ed.), *Temporary Special Measures* (Intersentia, 2003) pp. 111–124, at p. 111. See also R. J. Cook and S. Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010) p. 229.

<sup>92</sup> L. Chiduzo and P. N. Makiwane, ‘Strengthening Locus Standi in Human Rights Litigation in Zimbabwe: An Analysis of the Provisions in the New Zimbabwean Constitution’, 19 *Potchefstroom Electronic Law Journal* (2016).