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**LEGAL PLURALITY AND SOCIAL SECURITY IN SADC:
LAW AS A (UN)GENDERING PRACTICE¹**

DRAFT

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June 2006

SADC Social Security Specialists Conference
GENDER AND SOCIAL SECURITY IN THE SADC-REGION
5th – 7th July 2006, Safari Court Hotel, Windhoek

¹ Law as a gendering practice is a terminology adopted from Chunn D and Lacombe D 2000, Introduction to Law as a Gendering Practice, Oxford University Press
The general theme of the paper is part of the author's PhD thesis in development.

1. Introduction

Within a broader agenda for integration in the SADC region one of the challenges remain how to develop a regulatory framework that would set effective standards which reflect the lived realities of women and men in the different member countries and lead to progressive transformation of the respective social security systems. This paper attempts to provoke thought and debate on the paradox of law and the values that underpin it in its (un)gendered contribution towards social security and insecurity in the region.

Considering that the paper will be discussed in the context of elaborate country reports on the specific realities of each country, it is assumed that the country papers will have provided adequate background information to ground the discussion. The focus of the paper is therefore on the challenges facing attempts to reform the social security system in a way that effectively addresses the continuing exclusion and exploitation of the majority, from a legal and gendered perspective. The paper draws on literature on social security and gender especially from the region and on primary data and personal experience from research work in progress on social security in Malawi.

The paper argues that despite limited progress in formal and rhetorical regulation of social security, gender inequalities persist partly because reforms on social security regulatory frameworks have not paid enough attention to at least three related factors: the external and internal contradictions of and within law; vested interests and how the political economy predominantly continue to influence action; and identifying and strengthening the incentive – disincentive structures in social security regulatory frameworks.

The paper is divided into five parts. After this introduction the first part is a brief elaboration of the overall approach of the paper. The second part is a summary of the situation and context of gender and social security and its regulation frameworks. The third part offers an overview of the social security reform agenda and argues for reform to take a pluralist and principled approach. The fourth part focuses on the rhetoric of law and vested interests reflected in the making, interpretation and implementation of laws and the last part starts to make a case for an agenda that goes beyond the rhetoric through a critique of the incentive and disincentive structures in the regulatory frameworks. The paper concludes by highlighting some questions for debate.

2. The approach

The paper proposes to look at law in the broad sense of regulation from a three pronged approach². The first is from a plural perspective which refuses to privilege state law and goes beyond state recognised laws to social control and normative systems that regulate the day to day life of the majority of African women and men as they struggle to survive risks and shocks of life at family, community, national,

² Based on conception of law from a strong legal pluralist perspective which acknowledges a multiplicity of forms of normative ordering consisting of semi autonomous social fields that generate rules, customs and symbols internally but are also vulnerable to forces emanating from the larger world around. They have rule making capacities and the means to induce or coerce compliance set in a larger social matrix. (Moore) See Ann Griffiths, 2002, *Legal Pluralism in Banakar R and Travers M (eds), An Introduction to Law and Social Theory* Hart Publishing, Oxford , Portland Oregon

regional and international levels. Secondly law is seen as a site where struggles for meanings, resources and subjectivity take place resulting in deliberately orchestrated gendered outcomes from perspectives of those with power and vested interests and in some cases from those that attempt to resist and dislodge the former. Lastly, the approach acknowledges the continuous mutual interaction between law and politics, economics and social factors whilst at the same time maintaining its core characteristics as law, like the setting of standards and most importantly as a structure for incentives and disincentives for action or inaction. This approach recognises the belief some have in the law as a tool for transforming gender relations in the social security systems in the region whilst acknowledging its limitations.³ Ultimately with this conception gender is a legal construct and law is a (un)gendering practice.

In analysing gender as a legal construct, one finds a number of discourses in the various plural regulatory frameworks that are constructing and de-constructing gender, assigning roles and identities to men and women in a way that determines access to or contribution towards social security. The paper identifies at least three types of legal discourse in practice. The first is through naturalisation and stereotyping, where particular gender roles are presented as being so natural, a way of life that cannot be challenged. The second is through dichotomisation. Social relations and structures are presented in a polarised manner for example formal and informal, paid and unpaid work, productive and reproductive to the advantage of some and disadvantage of others. The third is presentation of the value basis for action in neutral terms and at times as rhetoric in a way that obscures lived realities and tensions and downplays / masks the vested interests of the actors. The first and second discourses are likely to be evident from the country presentations and will not be dealt with in this paper. The focus of the paper will be on part of the second assumption and the last assumption but within the context of the first assumption.

3. The context

Social security is one of the emerging topical issues in current studies in Africa generally and Southern Africa in particular. Increasing levels of poverty and calls for the reduction or elimination of poverty have brought the debate to the fore. The ILO has also contributed to increasing interest in the area under its programme on extension of social security to the informal sector in Africa and the Global Campaign on Social Security and Coverage for all in Africa. Within the region the SADC (Southern African Development Community) Social Charter highlights the importance of social security as one of the human rights under serious threat⁴. The formation of a grouping of specialists in social security in the SADC region has given extra impetus to social security as an urgent issue not only within social policy but also in economics and law.

There is a growing consensus on the challenges facing social security in Africa generally and Southern Africa in particular. There is increasing vulnerability to shocks and risks within the region with the majority of people struggling to survive. This vulnerability is gendered with women suffering the most. People are suffering from both covariate and idiosyncratic shocks which include life cycle shocks,

³ The use of the term law in singular and plural terms is deliberate, signifying law as a system and the sub systems within it.

⁴ The influence of SADC, as regional body in Southern Africa, in social security developments is highlighted in Olivier, 2002: 337-402.

unemployment, sickness, drought and famine. The causes of increased vulnerability include political, economic, social and legal factors at macro, meso and micro levels.

A gendered analysis of the different social security systems highlights the extent of exclusion and exploitation suffered by the majority of women. Kasente⁵ shows how the limitations of coverage of the formal social security system⁶ exclude women more than men mainly due to the restriction of coverage to employees and related restrictive definition of employee to those in formal employment. MacDonalds⁷ attributes women's exclusion from formal social security to such factors as the conceptualisation of social security from a male bread winner model and economic dependence for women, intra-household inequalities in access to resources and the distinct labour market experiences of women. Sabates- Wheeler and Kabeer while acknowledging that the majority of women in developing countries are not in the formal labour market argue that casualization and feminisation of the labour market, life cycle events and gender neutral rules that adversely impact on women are factors contributing to the exclusion of women. Olivier also attributes the exclusion of women to restricted definitions of work and family which does not recognise work done by the majority of women, both reproductive and productive work in the informal economy⁸. Tamale links the undervaluing of women's work to ideologies of domesticity that are based on patriarchy, gender power relations and artificial dichotomisation of private and public relations⁹.

With regard to the informal social security system, the gendered debates highlight the importance of the informal social security system, especially the implications of a heavy reliance on the informal system and effects of strains on the system on men and women. Kasente highlights the finding that claims of strains on the informal sector basically mean that women become even more over burdened in provision of informal social security and benefit less from the system. Traditional systems have a tendency to exploit women for the benefit of other members of the family.¹⁰ Research further shows how the informal system subsidise the formal sector with limited recognition.

However the studies show that social security needs vary between men and women and among women and men too depending on such variables as age, socio economic status and geographical location.¹¹ One must therefore be cautious of the dangers of essentialising either women or men as homogenous groups and be alert to the finer distinctions between and within each gender category. Factors like class, race and ethnicity compound gender in varying degrees.

Literature further shows complex interdependence by the majority of people on different social security systems based on kinship, communities, the state, the market, religious organisations and NGOs to survive shocks and risks of life.¹² There is a

⁵ Kasente 2003 p3 further referring to studies by Mac Donald 1996 and Lund 1993

⁶ The distinction of the systems as formal and informal needs interrogation but is adopted for purposes of convenience only

⁷ MacDonalds, 1998, Gender and Social Security Policy and Pitfalls and Possibilities, Feminist Economics V.4 (1) 1-25

⁸ Olivier 2003, this is what Diane Elson calls the care economy, Elson 1992

⁹ Tamale Sylvia, 2004, pp50 -61

¹⁰ With reference to Lachenmann 1990

¹¹ Kasente 2003 p 3

¹² Benda - Beckmann 1999

plurality and complex constellations of social security systems manifested by the many interrelationships and mutual dependencies between elements of the different systems within the region. There is therefore need to avoid the dualist / dichotomous categorisation of social security systems as formal and informal without paying attention to the complex interplay among the various systems.

The literature also shows that this interplay is reflected in the regulatory frameworks of the social security systems. State law, customary law, religious law and living law co exist and interact with each other in social security systems and further in some cases informal norms of kinship and patronage relationship often determine whether and how official rules will be applied, forming a complex patchwork of official rules, kinship rules and rules of patronage.¹³ Elements of different legal systems combine in people's reality and are played off against one another and therefore become very significant in social security¹⁴. They also define circles of solidarity and their internal social differentiations. In actual life the provision of social security is negotiated within these different normative frameworks and people create mixes drawing on various normative frameworks and types of social security based on religion, customary law and state legislation.¹⁵ One may add international law and customs. The relevant regulatory framework in any given situation is determined by one's circle of solidarity and for those with access to more than one form of social security, on forum shopping. The totality of existing legal systems contributes to the strengthening or weakening of social security.

Most countries in the region have ratified international instruments on social security generally and those covering gendered aspects of social security¹⁶. They have also signed a number of related agreements and protocols at regional level. Some have further domesticated these by incorporating provisions into national laws in varying degrees. The most common recognition of gender inequalities has been in national constitutions that have outlawed both direct and indirect discrimination and provided for equality. This in some cases has been translated into statutes that provide for social security. At the same time some Constitutions recognise customary law and customs provided these are not inconsistent with the values underpinning the constitutions. In a few cases traditional leaders are also legally mandated to comply with constitutional principles.

Within this context various actors determine and continue to interpret risk and social responses in terms of for example, what risk to recognise, how to respond to the risk, who should benefit and who should provide based on assumed subjectivity of manhood and womanhood. Through different processes, the regulatory frameworks become a gendering practice and a sight of struggle for meaning and gender subjectivity.

¹³ Anders G. 2001 p 49

¹⁴ Benda Beckmann and Kirsch 1999

¹⁵ Beckmann Keebet 2004 p 12

¹⁶ International instruments related to social – economic rights include United Nations Covenant on Economic, Social and Cultural rights; African Charter on Human and People's rights, CEDAW and a number of ILO Conventions

4. The reform agenda, legal plurality and gender

In view of the general consensus on the inadequacy of the social security systems generally and the gender inequalities in particular, there is a shift in debates towards focused discussion of how to reform the social security systems. Two major challenges may have some relevance in discussion of gender and social security. First is the extent to which the proposals are pluralistic enough to reflect the realities on the ground and second is whether the reform agenda is founded on a sustainable principled framework that can effectively deal with the gendered challenges.

Proposals for reform have ranged from extension of formal social security, strengthening of informal social security systems to integration of the two systems.¹⁷ The ILO for example, advocates for the extension of coverage in two ways: extension of classical social security mechanisms of social insurance, universal benefits, social assistance and support of micro insurance and linking decentralised systems of social protection with other forms of public initiatives. The ILO approach is work based and is located within the overall objective of developing a culture of insurance and solidarity regarding protection. The ILO approach is criticised as top – down and paternalistic. It does not comprehensively deal with those in unpaid work. It also seems to be based on an approach that privileges state recognised regulatory frameworks which is inherently problematic.

Sabetes –Wheeler and Kabeer¹⁸ analyse the proposal to extend social security from a gendered perspective. Although the analysis is equally located within the ILO goal of decent work for all, the authors acknowledge that the traditional approach to extension that relies on gradual expansion of the formal sector employment is insufficient for women. The paper falls short of suggesting a broader inclusive framework mainly because it does not seem to have really focused on unpaid work of women. It is argued that in order to serve strategic interests and practical needs of women, reforms must recognise reproductive labour, male responsibility for reproductive work, and that the system should ensure that women benefit without reinforcing the traditional gender inequalities¹⁹. Integrating redistribution with substantive recognition within a plural frame of reference remains a challenge.

Bailey²⁰ advocates for the need to balance between community-based initiatives which draw on African kinship and shared support, strengthening public social security schemes and development of universal schemes. He argues that reforms must be based on the needs and capacity of individuals and groups and must take into account the historical and geographical patterns of the different countries in Africa. The importance of such accounts is highlighted in the context of adverse colonial influences and transplants of legislation on social security systems in Africa. There is also growing informalisation of economic activities and the shrinking of the formal sector.

Olivier and Kaseke writing on social security systems in the Southern African Development Cooperation (SADC) region start to make an elaborate case for

¹⁷ The ILO approach is elaborated upon by Reynaud Emmanuel, 2002, conceptualised within the ILO decent work for all goal.

¹⁸ Sabetes-Wheeler R and Kabeer Naila 2003,

¹⁹ Mc Donald

²⁰ Bailey Clive, 2004, Extending Social Security Coverage in Africa ESS Paper no. 20 Geneva, ILO

integration of the informal and formal social security systems²¹. They propose what is termed a systematic approach to the linking and integration of the formal and informal social security systems and offer criteria for this which includes the following: First that the primary responsibility for the regulation and provision of social security should lie with the state. Secondly that the purpose of the link must be to increase coverage and provide a minimum level of protection, protection of benefits against abuse, preservation of core values of the informal social security system and integration of only those arrangements that are amenable to such integration. The paper also makes suggestions on the process of integration that would include the development of a common regulatory framework. This integration proposal through development of a common regulatory framework however, did not fully deal with the issue of plurality of the regulatory frameworks for social security in the region and their compatibility and gender implications.²² The proposal, labelled as exploratory, seems more centralist than pluralist and privileges state recognised regulation.

With regard to the second challenge, writing on transformation and social security in South Africa Klink, like Olivier et al, emphasises on the importance of clarity and consensus on principles that should inform the reform process amongst other key elements of transformation. “Transforming a system requires appropriate cultural values which it is argued give legitimacy to the proposed system and structural values which point to the feasibility of the proposed system”.²³ Most of the proposals reviewed above have emphasised on the importance of the values embedded in each system. However there has been inadequate discussion of these values and the gender implications. The importance of the need for such a discussion can be shown if considered in light of the meaning and paradox of values. Schwartz’s writing on this is illuminating²⁴.

Schwartz defines values as conceptions of the desirable that guide the way social actors select actions, evaluate people and events and explain their actions and evaluations. Within this context cultural values represent shared abstract ideas about what is good, right and desirable in society. The paradox of values is highlighted in the paper in three ways. First it is relational in that it may give rise to individualism on the one hand or collectivism or communalism on the other or stated differently autonomy or relatedness, independence or interdependence. Secondly by inducing responsible behaviour that should preserve the social fabric through either power differences that legitimises unequal distribution of power, roles and resources or egalitarianism with societal members recognising each other as moral equals sharing basic interests as human beings. Thirdly it is manifest in attitudes towards the social world either through mastery on the one hand, furthering personal goals or harmony on the other. According to Schwartz these three bipolar dimensions express apparent contradictions which may in some cases be compatible or directly conflicting. Therein lays the paradox and consequently the opportunity for manipulation of law and by law to the advantage of some and / or disadvantage of others in gendered ways.

²¹ Olivier et al 2004

²²Limited pluralist approaches have been advocated by Meas An, 2003, pp39 – 58. See also Beckmann and Kirsh

²³ Klink Elsabe; 2001 pp 4, 6 and partly quoting Berghman 2001

²⁴ Schwartz Shalom, 1999, pp 23 -47

In the context of the plurality and gendered nature of the social security systems the challenge is, whether in the first place the underpinning values of the two systems are similar and indeed amenable to the proposed integration. Secondly there is a danger of reifying the values of one system against another without critically analysing the extent to which these values may in fact reinforce gender inequalities. Kasente makes the point that there is a gap in the analysis of the underpinning values of social security systems regarding what the values are and whose values they are. This principled approach is important in gender analysis of social security regulation.

5. The paradox of values and gender implications

Results from empirical research in Malawi showed that the majority of people consider *umunthu* as the core value that underpins family and community based social responses to risk. This is consistent with literature that has attributed similar values to the informal / traditional types of social security, (for example *ubuntu* in South Africa, *harambee*, *ujama* in Tanzania).²⁵ On the other hand people felt that social assistance that they get from government and in a few cases from employers were based on values related to human rights, although most of them could not elaborate on what these were and mean. This perception was confirmed by some officials who justified the basis of their social security programmes on constitutional human rights requirements. Similarly in the majority of countries in the SADC region formal social security is based on a regulatory framework underpinned by a discourse of rights. Two issues arise from this. First whether *umunthu* and human rights are really two distinct values. This is an important question in light of the question of compatibility of the systems. The related question is if people's own systems are justified on values that are different from in the formal systems to what extent can social transformation using such principles be embraced at the local level? A third question is, to what extent does state-regulation recognise and incorporate the local values and vice versa and what are the gendered implications of this?

In South Africa the concept of *ubuntu* has been recognised in the context of social security²⁶ described by Mokgoro as a metaphor for group solidarity where the group is dependent on limited resources. Olivier argues that the respect for and the promotion of the principle of *ubuntu* would guarantee the success of a comprehensive social security system in South Africa.²⁷ This concept has actually been recognised by the South African Constitutional court where Judge Langa said "The concept is of some relevance to the values we need to uphold. It is a culture which places some emphasis on communality and on the interdependence of the members of a community. It regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all."²⁸ *Ubuntu* is ironically said to be the unwritten part of the South African Constitution. There is no similar direct official recognition of *umunthu* in Malawi. There are also efforts in South Africa to regulate recognition of constitutional principles by traditional leaders.²⁹ Traditional leaders are required to transform and adapt customary law and customs to comply with the Bill of rights by preventing unfair discrimination and promoting equality. In the case of Malawi, apart from civic education programmes that have

²⁵ See Olivier

²⁶ Oliver 2001 p 27.

²⁷ Ibid p 27

²⁸ In the case of *S v Makwanyane* 1995 3 SA 39(CC); 1995 6 BCLR 665 (CC) par 224

²⁹ Traditional Leadership and Governance Framework Act 2004

focused on “educating” traditional leaders on rights there is no specific legislation on this.

The second point relates to the articulation of the values. The articulation of *umunthu* in the Malawian context was in gender neutral terms. “*Umunthu* means shared responsibility, reciprocity, interdependence of all human beings etc.” This is similar to articulations of human rights principles like equality, human dignity and freedom in most constitutions in the region. There are at least two implications arising from this neutrality. First the neutrality may obscure the gendered lived realities on the ground. From the empirical research, social responses to risks were gendered in most cases to the disadvantage of women either through exclusion or exploitation. Similarly despite the neutral equality provisions in constitutions gender disparities have continued to exist. Paradoxically this articulation has the potential to be a powerful basis for dealing with gender inequalities.

The paradox of solidarity as a value in social security has been shown in some studies. Some literature that has focused on solidarity as the underlying value for social security in Africa has articulated its gendered aspects and the different exclusionary and inclusive conceptions of solidarity. One study looking at the South African white paper for Social Welfare critiqued the concept of *Ubuntu* using the ethic of care concept.³⁰ The paper argues that apart from the neo-liberal vocabulary and social democratic-oriented values at play in the white paper, there is also an outspoken communitarian influence stressing the family in the community as the location of care reinforced by invoking the value of *Ubuntu*. It is further argued that the importance of care is mentioned in the paper from a familial model masked in the concept of *ubuntu* without questioning the gender divisions in care and thereby preserves the privatised overtones of care. This it is argued is a contradiction to the goal of integrating women espoused in the white paper and reinforces normative assumptions about the position of women. The discussion shows the paradox of *ubuntu* and how it needs to be unpacked to reveal some exclusionary undertones that may be embedded in it. This article is highly instructive on how to critically analyse the neutrality of values in the context of social security and especially in relation to gender and social insecurity. The reform agenda has not fully engaged with this type of analysis.

The critical unpacking of the values in the regulatory frameworks should also question the ideological underpinnings of the gender neutral values. Most constitutions have adopted a neo liberal interpretation of rights which is more individualistic than the social democratic alternative. This has serious implications on the compatibility of *Umunthu* which is more communal on one hand and on the other hand the individualistic liberal democratic conceptions of human rights, as is predominantly the case in Malawi for example.

6. The rhetoric

Although the values are mostly gender neutral, there is some difference between the informal / traditional system and the more formal system. It is argued that the formal systems are more rhetorical than the informal ones. In the informal system the neutrality is not prominent when one looks at the norms and the gendering processes. In a way then one would have expected that it would be easier to deal with the

³⁰ Sevenhuijsen, Bozalek Gous and Minnaar McDonald 2003, pp 299- 321

adverse effects of such gendering at the informal rather than the formal system, which is not the case. This part first provides a brief overview of the gendering processes at informal system and later compares this with the challenge brought by rhetorical discourses in the formal system.

Based on the lived realities of the majority of ordinary Africans the regulatory framework of their life in dealing with risks and shocks of life in most cases revolves around familial and communal systems of social control. Rules, obligations and expectations within the extended family are institutionalised at the family and community levels and conflicts are in most cases dealt with in for a within these institutions. The regulatory system enculturates and socialises people in varying gendered forms at different stages of their lives through institutionalised ceremonies during adolescence, marriage, child birth, child rearing, divorce or widowhood and death. At each stage girls and boys, men and mostly women are told how to behave in situations of risk and how to interact with each other. In case of deviation and conflict the system has elders and traditional leaders who enforce the rules and maintain order. However an analysis of the system in relation to social security shows how each stage reinforces gendered practices that either weaken or strengthen social security. Some of the major gendering processes include:

- emphasis on the different roles of men and women, with men constructed as providers and women as carers with implications for the reduced role of men in reproduction, domestic and care work
- Decision making processes within the family that maintains the subordinate position of women based on the belief that man is the head of the family with authority to maintain discipline among members of the family including the use of violence
- Conception of property with kitchen utensils as feminine, woman's property and the more valuable property as masculine and therefore male property with serious implications for survivorship. For example most women are easily disposed of property on the death of a man and in some cases a few men are denied inheritance on the general assumption that the woman did not own any property
- The ceremonies at each of the stages have varying focus on men and women. In some cases youth ceremonies target both boys and girls although the content of the teachings is different. The older they grow the more the ceremonies focus more on women than men, reinforcing ideas of a good woman and a good mother.

Overall the regulatory system at this level emphasises gender differences with a more subordinate status for women in most of the cases. The core values may be expressed in gender neutral terms but most of the norms are gendered and translate into gendered practices.

Rhetoric of rights

The extent to which a human rights discourse can influence a successful transformation of the social security system to the advantage of the poorest especially women is contestable. The celebration of rights has been that the protection and enforcement of the human rights guaranteed by constitutions and other instruments will facilitate positive social, economic and political change. However it is arguable that the universality of human rights as espoused in most constitutions raises the

problem of a jurisprudence that fails to take into account the realities on the ground. The present condition of various disadvantaged groups is the product of the dynamics of a specific political economy.³¹ The prospects for the incremental transformative role for human rights on the condition of the disadvantaged sections of the population are further limited by amongst other factors the structural conditions that limit the numbers of people who have access to enforcement mechanisms and social economic forces that depend on the maintenance of existing gender relations.³² There are vested interests that are sustained by the inequalities. There should therefore be a general recognition that within the rhetoric of human rights, patriarchal social, economic and political structures entrenched over the years by customary and state laws are critical impediments to the achievements of practical translation and enjoyment of rights. Unless this reality is embraced, rights remain within the realm of rhetoric.

The Equality principle

Within the context of this discussion the point can be further elaborated by focusing on the right to equality. Literature shows that social security provisioning has been extended to the excluded through the use of equality and non discrimination laws³³. The Malawi Constitution for example obliges the state to take various measures to ensure that there is "equality of opportunity" in access to basic resources, education, health services, food, shelter, employment and infrastructure.³⁴ This provision is coined as an aspect of the right to equality in development. Further the Constitution provides for formal equality by declaring, without qualification, that all persons *are* equal before the law.³⁵ Most countries in the region have a similar provision. The SADC social Charter also provides for equality. The interpretation of the right to equality like most other rights is open to contestation.

There are those that believe in the autonomy of human beings and that women are just as rational as men and should therefore have equal opportunity with men to exercise their rights in self interest.³⁶ In this sense equality is conceptualised as being limited to similarly situated requirement, treat like alike (formal equality). Others are critical of this arguing that this in case of women for example, assimilates women into men and endorses entrenched patriarchal values. It has also been argued that formal equality masks the reality that due to its inherent qualities, law is not neutral towards people of different classes, sexes, races, or other hierarchical social classification.³⁷ On the other hand the presupposition of formal equality has in some cases served as the basis for the anti-discrimination provisions in constitutions and other legislation³⁸.

³¹ Kanyongolo, 2004 p65

³² Kanyongolo 2004 p 79

³³ Within national constitutions and or in separate legislation eg South Africa's Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act) and the Employment Equity Act

³⁴ Section 30(2).

³⁵ Sections 20(1) Constitution of Malawi

³⁶ Cain 1990 p 1149.

³⁷ Generally see S. Adelman and K. Foster, "Critical Legal Theory; The Power of Law", in I. Grigg-Spall and P. Ireland (eds.), *The Critical Lawyers' Handbook*, (London: Pluto Press, 1992), pp.39-43. Also see I. Grigg-Spall and P. Ireland, "Afterword: Law's (Un)spoken (Pre)sumptuous (Pre)suppositions", *ibid.*, pp.127-140, 127-129.

³⁸ For a discussion on the potential of the equality discourse to bring in more inclusion of women in social security see Luckhaus 2000.

Some of the critics alternatively argue that equality should be based on differences between men and women (substantive equality). Substantive equality should take into account social and historical factors and be outcome based. Some constitutions embody affirmative action principles as part of such an approach to equality³⁹. Other countries have incorporated substantive equality by providing for both maternity and paternity leave for example.

Yet others reject the idea of a single conception of equality and argue that the correct interpretation should depend on specific circumstances. These argue for a concept of equality which recognizes that “although a society affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context”⁴⁰.

7. Ambivalence of values, conflicts and tensions

The other challenge for a rights discourse is the extent to which tensions, conflicts and limitations within constitutions and other documents are dealt with. Many constitutions like Section 30 of the South African constitution protect language and culture, giving everyone “the right to use the language and to participate in the cultural life of their choice in a manner that is consistent with provisions of the Bill of Rights.”⁴¹ At the same time there are those that additionally mandate the state to pass legislation to eliminate customs and practices that discriminate against women.⁴² Given that the existing cultural diversity and the extent that culture reinforces differences between men and women, the right to cultural choice could potentially come into conflict with the right to equality.

Another example of a conflict is between the right to religion (conscience) and religious teaching against women’s equality. Religion is largely seen as irredeemably patriarchal⁴³. There is diversity of beliefs and practices within religions as well. Religious traditions may be sources of women’s oppression but can also be a powerful source of protection for human rights, commitment to justice and of energy for social change.

Apart from these conflicts other tensions arise from limitations embedded within some regulatory frameworks. Some constitutions for example contain a clause that limits enjoyment of some rights provided that the limitation is recognised by law, it is reasonable and acceptable in a democratic society. The other limitation relate to

³⁹ Eg the Malawi Constitution provides that legislation *may* be passed to address social inequalities (Section 20(2)); that women, children and the disabled shall be given special consideration in the application of the right to development Section 30 (1)

⁴⁰ Jangwath 2005

⁴¹ Similar to Section 26 of the Malawi Constitution

⁴² Section 24 (2).

⁴³ Martha Nussbaum, (2000) Women and Human Development The Capabilities Approach, Cambridge University Press p179

implementation of the right where this is made subject to available resources and progressive realisation of the rights.⁴⁴

Unfortunately, some constitutions do not provide a principle which can be applied to resolve the conflict between the right to equality and other rights. It may be easier to resolve the conflict in cases involving customary law where these are required to be consistent with constitutional principles. Conflicts involving customs within the realm of other normative frameworks can not be so easily resolved if not equally limited. It has also been argued that it is unlikely that parliament will pass legislation to eliminate inequalities which are rooted in traditions and customary law for fear of alienating the vast majority of people for whom this normative system governs virtually all aspects of their life.⁴⁵ This ultimately reduces further the potential of the law to deal with gender inequalities that compound social insecurity.

The role of the judiciary as the ultimate arbiter in interpreting the values especially in cases where conflicts arise cannot be overemphasised⁴⁶. Litigation has been used in some countries most notably South Africa to drive social transformation including social security⁴⁷. This in a way provides a mechanism for challenging rhetoric and other legislative shortfalls. However problems related to knowledge of rights, physical and financial access to courts and the right to appear / rules on locus standi have partly contributed to low number of cases being taken to court in some countries.

Jangwath argues that while it is rare to find individual litigants acting on behalf of disadvantaged groups, the role of organized civil society in constitutional litigation has led to some successes for these groups in the courts. However considering that some of the factors contributing towards the rhetoric, conflicts and tensions are beyond the ambit of the law, other players must be equally concerned for example human rights bodies outside court. The role of grass-root organisations is equally important. However literature shows that most of these have been neglected in favour of middle-class led organisations.

The use of international law and regional standards may offer guidance. However these instruments also contain similar conflicts and limitations and may not be too helpful. Further the extent to which African countries get involved in the development of international norms and the implications of ratification of international instruments is a contestable. Part of the question is also whether, ratification and incorporation signal general agreement with the principles in the international instruments. Banda has rightly raised doubts on whether ratification is a mere strategy to access

⁴⁴ See the Malawi and South African Constitutions. The South African constitution requires the state to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of the right in question

⁴⁵ Kanyongolo , 1999. (Also Check Gaidzaniwa 1994 in Meena Gender In Southern Africa)

⁴⁶ In the case of *Mungomo v The Electoral Commission* (Miscellaneous Civil Application No.23 of 1999) for example, the court considered the fact that the Government of Malawi relies on donors to finance its elections to be a relevant consideration in its decision ordering a postponement of the 1999 presidential and parliamentary elections because of irregularities in the voter registration process. In effect, therefore, lack of resources was factored into a decision which directly affected the exercise of rights by Malawians. Kanyongolo 1999

⁴⁷ See for example the case of *Vumazonke and Others v MEC for Social Development, Eastern Cape Province*

international capital or a genuine belief in the overall spirit and objectives of the instruments.⁴⁸

8. Of incentives and disincentives

Could the answer be found in man's ultimate driving forces, seeking pleasure and avoiding pain? This suspicion is partly based on a simple question that was raised by one of the respondents on the last day of field research, who said, "I now see the nature of relationships between men and women in a different light, but if I am to change the way we have lived, what's in it for me?" Similarly one commentary on implementation of social- economic rights in South Africa observed how progress has been compromised by rules that disallow execution against state property or personal contempt of court proceedings against officials that fail to comply with court orders⁴⁹.

The paper was premised on conception of regulatory frameworks as existing in an interactive and mutually constituting relationship with other factors such as politics and the economy. However each system construes and gives meaning to struggles on its own terms. The terms of law include legal or illegal (permitted or not permitted) coupled with reward and punishment. The law is therefore capable of not only setting standards from whichever perspective but also of coercing through a reward- penalty system or incentives and disincentives system. The argument here is that attention to the incentive – disincentive structures in the regulatory frameworks would contribute to a greater potential for progressive social transformation.

The question then is to what extent have the regulations provided enough incentives or disincentives for positive action? Consider the SADC Social Charter, what mechanisms would compel member states to comply with the provisions of the charter. The same applies to all international instruments. The minimal requirement of state reporting is flouted by most countries in the region. At the same time the region has noted how some civil and political rights have been transformed through politics of aid, why then is it that the similar strategies are not employed in relation to the right to social security generally and equality in particular. What more needs to be done?

9. Conclusion

Regulatory frameworks entrench perceptions and institutionalise particular values and norms engendering particular responses to risks of life. There is continuing power struggle in the legal construction and deconstruction of gender which at the moment is dominated by a discourse that is failing to seriously address gender inequalities in social security. The discourse needs to reflect the lived realities of the weak and the subordinated. Reform needs to go beyond rhetoric and formal tinkering with the edges. It should move towards structural change based on substantive equality that integrates redistribution and recognition as the social security systems become equally integrated.

⁴⁸ Banda F. 2005 p4

⁴⁹ Open Society Foundation for South Africa, 2005, South Africa Justice Sector and The Rule of Law p21

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