



***Review of the compliance of the Namibian domestic law to the United Nations
Convention on the Elimination of All Forms of Discrimination Against Women***

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for

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Background

This review was conducted by the United Nations Children's Fund in conjunction with the Ministry of Women Affairs and Child Welfare as part of a project to determine whether the domestic laws in Namibia conforms to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC). The report on the Convention of the Rights of the Child has been published as a separate document.

Namibia is a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (the Convention) and should strive to make its laws, policies and other programmes compatible with the Convention. This document reviews Namibia's obligations under the Convention under each substantive article of the Convention in so far as its domestic laws are concerned.

Namibia gained its Independence from South Africa on 21 March 1990 and inherited all the laws that were enforce immediately before Independence. This was a transitional arrangement to ensure a system of continued governance in the years immediately after Independence, and those laws were to remain valid until such time that they are declared unconstitutional by a Court of Law or repealed or amended by Parliament. A substantial number of these laws were and are not conformity with the new constitutional dispensation brought about by the Namibian Constitution (the Constitution) and international human rights law such as the Convention on the Elimination of All Forms of Discrimination Against Women.

Soon after Independence, the Namibian Government set about to reform much of the laws to bring it within conformity of the Constitution and the Convention. In the first 14 years of Independence, Namibia has made great strides in ensuring compliance, but law reform is an arduous and continuous process. Invariably, the laws with the best intentions do not necessarily result in the desired outcome, as the lack for gender equality and the violations for human rights generally are structural and systematic. More than just good laws are needed to reverse the situation, such as information dissemination, educational programmes, and financial and technical assistance to various programmes and projects which are aimed at ensuring the full respect for human rights including gender equality. Namibia has adopted a number of such programmes, which is beyond the scope of this study.

PART I

Article 1

For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or propose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil and any other field.

The Namibian Constitution ("the Constitution") contains several provisions, which explicitly forbids discrimination on the grounds of gender. On the outset, the Preamble of the Constitution proclaims that the inherent dignity and the equal and inalienable rights include "the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status..."

Article 10 of the Constitution on Equality and Freedom from Discrimination states that:

- (1) All persons shall be equal before the law.
- (2) No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Article 14(1) of the Constitution, which deals with the right to family, echoes the equality clause by proclaiming that:

- (1) Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.

Article 16(1) of the Constitution guarantees the right to property to all persons. The relevant part of Article 16(1) reads as follows:

- (1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immoveable and movable property individually or in association with others and to bequeath their property to their heirs or legatees...

Article 23(2) of the Constitution, which contains the authorisation for affirmative action legislation, places a special emphasis on the advancement of women through legislative or other measures, and it specifically states that such measures shall not be a violation of Article 10 (and by implication, all other provisions of the Constitution demanding equality) of the Constitution. Article 23 provides as follows:

- (2) Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the

implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws and practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.

- (3) In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.

In fact, the gender equality runs through the entire Constitution, with a careful language of specifically stating “all persons” or “every citizen” in order to avoid distinction on the basis of gender.

Article 1(6) of the Constitution states that “...the Constitution is the Supreme Law of Namibia.” Any law, practice or conduct, which is not consistent with the Constitution, is unconstitutional. Article 66(2) of the Constitution expressly states that:

- (2) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.

Another guiding principle for Namibia’s efforts to comply with the Convention and the Constitution is Article 95(a) of the Constitution. Article 95(a) provides:

The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:

- (a) enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society; in particular, the Government shall ensure the implementation of the principle of non-discrimination in remuneration of men and women; further, the Government shall seek, through appropriate legislation, to provide maternity and related benefits for women.

The provisions contained in Article 95 of the Constitution are not by themselves legally enforceable by any Court, but shall guide the Government in making and applying laws to give effect to the fundamental objectives of the principles.

The effect of these guiding principles had been tested in the Namibian Supreme Court in the case of *The Government of Namibia and Another v Mwilima and Others* (unreported judgment delivered on 7 July 2002), where the Court held that, by being a signatory to the International Covenant on Civil and Political Rights, which provides for free legal aid at the State’s expense and in certain cases, the Government has, as a matter of law, given effect to Article 95(h) (dealing with legal aid at the State’s expense), and thus that Article and the Covenant are enforceable as if domestic law. The effect of this judgment is profound in its impact: All international laws, such as the Convention, signed by Namibia are applicable in the same way as domestic laws.

In respect of the constitutional provisions, Namibia, as a signatory to the Convention has complied with its obligations under the Convention, particularly Article 2 of the Convention, which prescribes

that State Parties “embody the principle of the equality of men and women in their national constitutions...”

As envisaged by the Convention, national constitutions of State Parties, though the most important tool to bring about gender equality, are limited in their effect. National laws, policies and other measures will have to be adopted and enforced to give effect to the various provisions of the Convention.

In the years since the adoption of the Constitution, the Namibian Government has adopted several laws and policies aimed at giving effect and conform to the gender equality provisions of the Constitution and the Convention. These different laws and policies will be discussed under the relevant Articles of the Convention. The process of law reform is a cumbersome one, and many law reform efforts are still in the pipeline. Some of these laws or draft bills have been made available to the public for comments and are in different stages to become laws. These laws and bills will be discussed under the relevant Articles of the Convention.

Article 2

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

- (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;**
- (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;**
- (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;**
- (d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;**
- (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;**
- (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;**

(g) To repeal all national penal provisions which constitute discrimination against women.

As indicated in the discussion under Article 1 of the Convention, the principle of the equality of men and women has been firmly embodied in and underpins the Namibian Constitution.

One of the most noteworthy laws in Namibia giving practical realisation to the principle of equality between men and women is the Married Persons Equality Act of 1996. The Married Persons Equality Act abolished the concept of marital power and head of household, which previously bestowed all decision making powers concerning financial and other matters to the husband. The Act provides married women with equal access to financial transactions and further provides that immovable property be registered in both spouses' names if such spouses are married in community of property.

The Married Persons Equality Act gives practical effect to the obligation to remove discrimination against women under the Convention, at least in cases of married persons, and to Article 14(1) of the Namibia Constitution, which provides that men and women "...shall be entitled to equal rights as to marriage, during marriage and at its dissolution."

The Labour Act of 1992 and the Labour Bill of 2003 (which will replace the Labour Act) provides a comprehensive framework of prohibition against gender discrimination in the employment context. These provisions in the Labour Act and Labour Bill are discussed in detail elsewhere.

The Labour Act establishes District Labour Courts and the Labour Court, which can be approached for remedies and relief in cases where gender discrimination had occurred at the workplace.

Similarly, the High Court of Namibia has inherent jurisdiction to deal with any violation of fundamental human rights contained in the Namibian Constitution and other domestic laws (the Labour Court, which has the same status as the High Court, has exclusive jurisdiction to deal with labour disputes, including discrimination in the labour context).

The Office of the Ombudsman, established in terms of Article 89 of the Namibian Constitution, has extensive powers to investigate complaints concerning alleged or apparent instances of violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment of any person by any official or organ of Government.

Notably, the Office of the Ombudsman has a duty to investigate complaints concerning all organs and departments of the Government of alleged failure to achieve a balanced structuring of the Government – which certainly include a balanced gender representation in the public service – and equal access by all to the recruitment of Government.

The Office of the Ombudsman can also investigate violations of human rights and freedoms in private institutions or individuals.

These different tribunals and courts can be accessed by all regardless of gender. In other words, there are no legal impediments preventing women or men specifically from obtaining relief through these tribunals. However, discrimination against women, which can indirectly prevent women from

accessing these tribunals, manifests itself in different forms. Literacy, poverty and lack of access to information are but some of the structural issues that could make these noble ideals beyond the reach of women.

Discrimination against women is still being practiced in other forms: An old rule of practice or “cautionary rule” in the Courts dictates that in cases of sexual offences, the evidence of women and children must be taken with caution. The cautionary rule has its origins in the view that the complainant was a “participant” in the offence and it is therefore easy for her to falsify the evidence. According to the views of some legal commentators, the victim of a sexual assault was to be treated virtually as an accomplice. Women were said to suffer from a vivid fantasy life, easily falsified consensual intercourse as forced for various reasons, including revenge or after discovery.

The Namibian Courts have slowly changed their attitude, although the position at present is by no means uniform. The cautionary rule had been inherited from South Africa at Namibia’s Independence, and an analysis of South African case law is appropriate here as these cases have a very strong influence in development of the jurisprudence in Namibia.

In civil proceedings, in *Mayer v Williams* 1981 (3) SA 348 (A) (South Africa), the court abolished the requirement that the evidence of a plaintiff in a paternity action must be corroborated. The plaintiff would of course always be a woman. The requirement of corroboration has been changed to a cautionary rule.

In criminal proceedings, there is a cautionary rule in a variety of sexual offences and the requirement is applied to both male and female complainants, although of course, its most common application is in the area of rape. This rule is still in operation in South Africa as is illustrated by the then South African Appellate Division decisions in *S v F* 1989 (3) SA 847 (A) and *S v S* 1990 (1) SACR 5 (A). There is a requirement of corroboration if the complainant may have had a motive to implicate the wrong person. There must be corroboration to connect the accused to the offence.

In *S v D (or Damaseb)* 1992 (1) SACR 143 (Nm); 1991 NR 371 (HC), the Namibian High Court held that the cautionary rule had no rational basis and was likely to be unconstitutional because it violated the right of women to equality before the law under Article 10. The cautionary rule was also premised on a view that women are deceitful, while men are incorruptible. This decision was criticised in *S v M* 1992 (2) SACR 188 (W) (South Africa), the court holding that the rule was a necessary admonition to apply common sense when approaching the evidence of complainants in sexual cases.

D or Damaseb’s case was criticized by Mtambanengwe J in a Namibian High Court judgment during 1998, who decided not to follow it. This judgment is at present on appeal to the Supreme Court. The law in Namibia is therefore at present still arguably uncertain on this point.

First the South African Cape Provincial Division in *S v M* 1997 (2) SACR 682 (C) and now the South African Supreme Court of Appeal in *S v Jackson* 1998 (1) SACR 470 (SCA) have held that the cautionary rule in sexual offences should no longer apply, because it stereotypes women as particularly unreliable and is in violation of the right to gender equality.

Although it would appear that the situation is now settled in South Africa – the cautionary rule no

longer applies – in Namibia the law is still unclear. The two High Court judgments dealing with the rule made conflicting decisions – one disregarding the rule, and the other upholding it. Only the Supreme Court, as a Court of last instance, can now settle the matter. It is likely that the Supreme Court, to which the application of the rule had been appealed to, will declare the cautionary rule unconstitutional – in light of Namibia's commitments under the equality clauses of the Constitution and in particular Article 2(f) of the Convention, and that the rule is so overtly discriminatory.

Article 3

States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

It was already been stated that the Constitution contains a whole range of equality and affirmative action provisions, which are in conformity with the Convention. The Namibian Government has enacted several legislations, which are aimed at promoting greater gender equality in all spheres of life.

Virtually all governing bodies of state institutions are obligated to have a varying number female representation on such governing bodies. The Affirmative Action (Employment) Act and the Married Persons Equality Act have made great strides towards conforming Namibia's laws and practices to the Convention and to the Constitution. The Communal Land Reform Act of 2002 prohibits the dispossession of land from spouses on the death of the other spouse, which will go a great extent of protecting women from discrimination in inheritance of land, especially under customary laws. The Parliament recently enacted the Child Maintenance Act, the Combating of Rape Act and the Combating of Domestic Violence Act, which hopefully will ensure that women are free from violence – a precondition of the full enjoyment of human rights and freedoms.

However, Namibia inherited a whole set of laws from South Africa, which, by and large, did not conform to the Convention, international human rights norms, and the Constitution. Many of these laws are still enforce. Regrettably, some of the laws enacted after Namibia's independence are not in conformity with both the Namibian Constitution and the Convention. There are laws which aims for a greater gender equality, whilst the Convention and the Constitution demand equality.

The several laws and lack of appropriate legislation to give effect to the Convention are discussed under the different articles of the Convention.

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in

the present Convention, aimed at protecting maternity shall not be considered discriminatory.

The Constitution expressly authorises the enactment of legislation for the purposes of affirmative action. A number of affirmative action provisions had been enacted, of which the most notable are found in the employment context. The Affirmative Act (Employment) Act of

The Labour Act of 1992 contains affirmative action provisions similar to that contained in the Constitution. Sections 106(1) and 106(2) of the Labour Act provide:

- (1) Nothing contained in this Part or any other provision of this Act, shall be construed as prohibiting any employer or person from implementing any employment policies and practices aimed at the advancement of persons who have been disadvantaged in the labour field by discriminatory laws or practices which have been enacted or practised before the independence of Namibia.
- (2) The provisions of this Part, in so far as they provide for the implementation of policy or practices which may diminish or derogate from the fundamental rights contemplated in Article 10 of the Namibian Constitution of any employer or employee other than an employer or employee referred to in subsection (1), are enacted upon the authority of Article 23 of the Namibian Constitution.

The Social Security Act of 1994, which establishes the Social Security Commission, requires that of the 10 Commissioners on the Commission, at least 3 must be women – one each from Government, trade unions and from the employers' organisations.

The National Vocational Training Act of 1994, which establishes the Vocational Training Board requires one female person representing the interests of from each of the following respective sectors: the State, employers, employees, and vocational training centres. The Vocational Training Board will consist of 17 members.

The Polytechnic of Namibia Act of 1994 requires that the Council of the Polytechnic of Namibia shall at least have one person representing the interests of women. It is, however, clear that such person need not be a woman.

The Local Authorities Act of 1992 specifically requires that political parties include a specified number of women candidates on their lists of candidates.

The Affirmative Action (Employment) Act of 1998 requires that at least one woman to be represented on the Employment Equity Commission and another person, which may not necessarily be a woman, to represent the interests of women on the Commission.

The Traditional Authorities Act of 2000 includes an affirmative action provision that requires traditional authorities to "promote affirmative action among the members of that traditional community, in accordance with Article 23 of the Constitution, in particular by promoting women to positions of leadership".

These affirmative action provisions will be further discussed under article 7 of the Convention.

The quota of four women on the Communal Land Boards, established under the Communal Land Reform Act of 2002, is another measure which the State adopted to ensure the acceleration of *de facto* equality between men and women, at least in the context of decision-making in land and land reform affairs. As stated under Article 3 above, the failure or neglect by the Namibian legislature to enact a similar provision in the Commercial (Agricultural) Land Reform Act of 1995 for the Lands Tribunal is regrettable, and appropriate amendments to the legislation to give effect to the Convention, the Constitution, the National Land Policy and the National Gender Policy is recommended.

Although not stated in any of these statutes, these measures adopted in terms of legislation can be discontinued when the objectives of equality of women and men had been achieved, by amending or repealing the provisions in the respective legislations. This will guard against the stated caution of the maintenance of unequal or separate standards. If the objective of equality had been attained, and the provisions are still in place, such provisions will however be unconstitutional and could be struck down by the Courts on the basis of violating the equality provisions in both the Convention and the Constitution.

The Labour Act provides for protection against discrimination because of maternity and family responsibilities. These are discussed elsewhere.

Article 5

States Parties shall take all appropriate measures:

- (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudice and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;**
- (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.**

The prohibition to discriminate on the ground of family responsibility contained in section 106 of the Labour Act of 1992, and it seems will be retained in the Labour Bill of 2003, will hopefully ensure an understanding, at least in the employment context, that maternity is a social function.

Both the Labour Act and the Labour Bill do not provide for comparable leave benefits for fathers. The enactment of such a provision will not only remove the stereotypes of the roles of men and women, but, by facilitating a greater parental involvement, will also go a far way to instil a sense of responsibility by fathers towards the upbringing and development of their children.

The failure to provide for leave or comparable benefits for fathers due to family responsibilities might also violate the Namibian Constitution's commitment that both parents should bear the responsibility of care of their children, and the Convention on the Rights of the Child.

Article 6

States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.

Prostitution in Namibia is prohibited by the Combating of Immoral Practices Act of 1980, and section 7 of the Act provides that any person who –

- (a) "in any public street or place entices, solicits or importunes or makes any proposal to any other person for immoral purposes;
- (b) wilfully and openly exhibits himself in an indecent dress or manner of any door or window within view of any public street or place to which the public have access,

Shall be guilty of an offence and liable on conviction to a fine not exceeding two thousand rand or to imprisonment for a period not exceeding two years or both such fine and such imprisonment."

The Children Act (Act 33 of 1960) makes it an offence for the parent, guardian or custodian of a child to "cause or conduce", or to allow a child to reside in a brothel. This provision of the Act could also be used as a tool to combat the demand for child prostitutes. Likewise, section 2 of the Combating of Rape Act makes it an offence for someone to commit a sexual act with a person under the age of 14 if she or he is more than three years older, even if the sexual act was consensual.

PART II

Article 7

State Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) **To vote in all elections and public referenda and to be eligible for selection to all publicly elected bodies;**
- (b) **To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;**
- (c) **To participate in non-governmental organizations and associations concerned with the public and political life of the country.**

There are no overtly legal impediments on the right to vote and hold office in publicly elected offices or bodies for women. The right to vote and to hold public office is a constitutional right, and Article 17(2) of the Constitution provides:

- (2) Every citizen who has reached the age of eighteen (18) years shall have the right to vote and who has reached the age of twenty-one (21) years to be elected to public office, unless otherwise provided herein.

All citizens by birth or descent have the right to be voted to the office of the President. Article 28(3) of the Constitution states:

- (3) Every citizen of Namibia by birth or descent, over the age of thirty-five (35) years, and who is eligible to be elected to office as a member of the National Assembly shall be eligible for election as President.

However, even though the Constitution has gender neutral provisions in respect to the right to vote and hold publicly elected office or bodies, women still face structural discrimination, in especially asserting their rights to be elected into publicly offices or bodies.

There are four public bodies or offices to which people may be elected: The Local Authorities, Regional Authorities, Parliament and the Office of the President.

The local authority elections are conducted on a party-list system. In terms of section 6(4) of the Local Authorities of 1992, which regulate the local authority elections, a party or association wishing to participate in the elections is required to have a certain minimum number of women on the candidate list. Elections for a local authority that has more than 10 seats, the parties or associations must have at least 3 women on their lists. For a local authority with less than 10 seats, at least 2 women must be put on the party's or association's list.

The relevant part of section 6(4) of the Local Authorities Act reads:

- (3) For the purposes of any election contemplated in subsection (2) each party list shall contain as candidates for such election-
 - (a) in the case of a municipal council or town council consisting of 10 or fewer members or a village council, the names of at least three female persons;
 - (b) in the case of a municipal council or town council consisting of 11 or more members, the names of at least five female persons.

Although these affirmative action provisions are notable and have ensured a greater representation of female members at local government authorities (2004 elections – 45%), it still falls short of Namibia's commitments under the Convention to ensure equality of sex for selection to publicly elected offices and bodies. For example, the law does not specify what position must women be placed on the lists of parties or associations, which is left to the discretion of the individual parties. In other words, women can be placed low on the lists in, which case women are less likely to be elected, thus paying lip service to the requirement of female participation.

The regional councils' elections are held in each of the 13 regions of Namibia and on a constituency basis. No similar affirmative action provisions are contained in the Regional Councils Act, Act 22 of

1992.

The National Council consists of 26 members, with each of the 13 Regional Councils electing two representatives to serve on the National Council.

In an effort to increase female representation in publicly elected bodies, several non-governmental bodies proposed to the Namibian Government the *50/50 Bill*. The purpose of the 50/50 Bill is to:

- (a) provide for gender balance in the National Assembly, National Council, regional councils and local authority councils; and
- (b) to require that all future elections for local authority councils shall be held on a party list system with provisions for gender-balanced party lists;

To achieve a gender balance in the National Assembly, the 50/50 Bill proposes that the lists of all parties participating in the elections for the National Assembly must contain names of women and men candidates in a gender-balanced, alternate "zebra-style" basis. In the event that a vacancy occurs, a person of the same sex must fill the vacancy.

In respect of the National Council, the 50/50 Bill proposes that each Regional Council elect 2 members the same sex to the National Council if there are no members of the other sex on the Regional Council. Where possible, a National Councillor who vacates a seat must be replaced by a councillor of the sex other than the sex of the remaining National Councillor to maintain or achieve a gender balance.

The 50/50 Bill proposes that a requirement that any political party which contests more than one constituency in a region to include equal numbers of men and women amongst its candidates for that region. If the party fields an uneven number of candidates in that region, the numbers of men and women may differ by one.

The proponents of the 50/50 Bill acknowledges that it would be an unfair interference with party and voter choice to specify which constituencies must have only candidates from one sex, as all parties might put forward names of candidates of the same sex for a particular constituency. This proposal for Regional Council elections may not produce perfectly gender-balanced regional councils.

In that respect, the 50/50 Bill proposes that independent candidates can be of any sex.

For local authority elections, the 50/50 Bill similarly proposes that parties' lists be gender-balanced in a "zebra-style", which alternate women and men candidates on the lists. In the case of local authority councils with uneven numbers of members, the numbers of men and women on the list can differ by one (for example 5 candidates made up of 3 men and 2 women, or 7 candidates made up of 4 women and 3 men).

The 50/50 Bill requires that the names of men and women on each party list shall alternate, so that each group of two candidates in the order of presentation on the list contains one candidate of each sex. Parties are free to choose whether to put a man or a woman at the top of the list. The provision would apply to residents' associations as well as to political parties. Finally, the 50/50 Bill makes provision for casual vacancies to be filled by persons of the same sex as the members who vacated the seats, in order to retain the gender balance.

The 50/50 Bill proposes radical changes to effect gender balanced representation on these publicly elected bodies, but these proposals would bring Namibia's elections laws in line with the obligations to gender equality under both the Convention and the Constitution. After all, the Convention and the Namibian Constitution demand **equality** and not just greater gender representation.

Article 8

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

There are no specific laws which obligate the Government to ensure women, on equal terms with men, the opportunity to represent the Government at international levels or international organisations.

However, as an employer, the Government is bound by the Affirmative Action (Employment) Act, which promotes gender equality in the employment context. The Government, as far as employment practices at international levels and organisations are concerned, must institute positive measures to further the employment opportunities for women, which may include giving preferential treatment for women in employment to ensure that such women are equitably represented in the workforce. This provision is obviously applicable to the entire Government service, but can be enforced in particular individual sections or departments, such as the foreign missions of Government.

Article 9

1. States Parties shall grant women equal rights with men to acquire, change or retain their nationality. They shall ensure in particular that neither marriage to an alien nor change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless or force upon her the nationality of her husband.

2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

Namibia's laws on nationality are gender-neutral and no obvious discriminatory provisions are detected.

PART III

Article 10

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(a) The same conditions for career and vocational guidance, for access to studies and for the achievement of diplomas in educational establishments of all categories in rural

as well as in urban areas; this equality shall be ensured in pre-school, general, technical, professional and higher technical education, as well as in all types of vocational training;

- (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard and school premises and equipment of same quality;
- (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programmes and the adaptation of teaching methods;
- (d) The same opportunities to benefit from scholarships and other study grants;
- (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women;
- (f) The reduction of female student drop out rates and the organization of programmes for girls and women who have left school prematurely;
- (g) The same opportunities to participate actively in sports and physical education.
- (h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.

The right to education is provided for in Article 20 of the Namibian Constitution, which provides:

- (1) All persons shall have the right to education.
- (2) Primary education shall be compulsory and the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge.
- (3) Children shall not be allowed to leave school until they have completed their primary education or have attained the age of sixteen (16) years, whichever is the sooner, save in so far as this may be authorised by Act of Parliament on grounds of health or other considerations pertaining to the public interest.
- (4) All persons shall have the right, at their own expense, to establish and to maintain private schools, or colleges or other institutions of tertiary education: provided that:
 - a) such schools, colleges or institutions of tertiary education are registered with a Government department in accordance with any law authorising and regulating such registration;

- b) the standards maintained by such schools, colleges or institutions of tertiary education are not inferior to the standards maintained in comparable schools, colleges or institutions of tertiary education funded by the State;
- c) no restrictions of whatever nature are imposed with respect to the admission of pupils based on race, colour or creed;
- d) no restrictions of whatever nature are imposed with respect to the recruitment of staff based on race or colour.

Article 95(e) of the Namibian Constitution obligates the State to actively promote and maintain the welfare of all people by adopting policies aimed at, *inter alia*, the ensurance that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law.

The Education Act of 2001 provides for the establishment of private schools. A private school may be established if, to the satisfaction of the Minister responsible for education, the school will not impose restrictions of whatever nature with respect to the admission of learners and the recruitment and appointment of staff based on race, ethnic origin, colour or creed. The prohibition of restrictions based on gender is glaringly absent, which could mean that the Education Act does not prohibit the establishment and operation of schools which only admit learners (and it appears, teachers also) from one sex.

The Convention requires State parties to eliminate any stereotyped concepts of the roles of men and women at all levels and in all forms of education by encouraging co-education. The establishment of same-gender-only schools might contribute to the perpetuation and maintenance of these stereotypes, and could be offensive of the Convention and the Constitution, particularly the right to education, the right to equality and the right not to be discriminated on the basis of sex.

It is recommended that the Education Act be revised to give effect to the concept of equality which underpins the Constitution and the Convention.

Article 11

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;**
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;**
- (c) The right of free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;**

- (d) **The right of equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;**
- (e) **The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;**
- (f) **The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.**

2. In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, State Parties shall take appropriate measures:

- (a) **To prohibit, subject to the imposition of sanctions, dismissal on the ground of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;**
- (b) **To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;**
- (c) **To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;**
- (d) **To provide special protection to women during pregnancy in types of work proved to be harmful to them.**

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 21(1)(j) of the Namibian Constitution guarantees the right to practice any profession, or carry on any occupation, trade or business. There is no law in Namibia which reserves certain professions, occupations, trade or business to one gender only. The right contained in Article 21(1)(j) should be read with the general equality clauses of the Namibian Constitution. There is however, no express right in Namibia to the right to work, although the Labour Act of 1992 and the Labour Bill of 2003 (which will soon replace the Labour Act), does provide for protection against summarily dismissals from employment.

The discrimination that women and girls face in making free choices concerning their careers are more structural, such as stereotypes on the role of men and women, poverty and cultural.

In line with the provisions of Article 11 of the Convention, the Constitution provides a strong

constitutional framework for the elimination of discrimination in the employment context. In addition to the equality provisions in Articles 10(1) and 10(2), the Principles of State Policy contained in Article 95(a) of the Constitution further guides the Government to provide for the:

- (a) enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society; in particular, the Government shall ensure the implementation of the principle of non-discrimination in remuneration of men and women; further, the Government shall seek, through appropriate legislation, to provide maternity and related benefits for women.

The Labour Act of 1992 contains very strong provisions protecting employees or prospective employees from discrimination on the grounds of, *inter alia*, sex, marital status and family responsibilities.

The Labour Act provides for maternity leave of 12 weeks for all female employees who have been working for the same employer for at least one year. The Labour Act also provides that a female employee on maternity leave shall not be deprived of any rights which vested in her by virtue of her employment on the date immediately before the date on which her maternity leave commenced, and such other rights, including any rights in relation to seniority, promotion and any benefits to which she entitled by virtue of her membership of a medical scheme or fund or a pension scheme or other retirement scheme, shall continue as if her period of employment were not interrupted during the period of any maternity leave granted to her.

However, the Labour Act provides that a female employee on maternity leave shall not be entitled to receive any remuneration during the period of maternity leave. The only remuneration that a female employee can get will be from the Fund established for maternity leave benefits under the Social Security Act, which may be construed as “comparable social benefits” as envisaged by Article 11.2(b) of the Convention. The current maternity leave benefits under the Social Security Act are set at 75% of an employee’s wage to the maximum of N\$ 2 500.00. For lower income earners, this will certainly qualify as “comparable social benefits”, whilst higher earners will be at a disadvantaged position as the maximum might be far lesser than their actual wages and not be “comparable” to their wages.

The Labour Bill of 2003 inserts a new provision with regard to payment during maternity leave, and provides that the *employer must pay*, during the period of maternity leave, to the employee the remuneration payable to that employee. According to clause 25(4) the employer may recover from the Social Security Commission that part of the remuneration paid the employee which constitutes the basic wage of the employee. It is recommended that this clause in the Labour Bill be retained as it removes the ambiguity of what “comparable social benefits” are by obligating the payment of the full wage during the period of maternity leave to a female employee.

The Labour Act further provides protection against dismissal or retrenchment of female employees whilst on maternity leave.

Similarly, the Labour Bill of 2003 contains a comprehensive prohibition against discrimination in the employment context. In respect of the general prohibition of discrimination, the Bill emulates the Constitution, with the exception of section 5(2)(b), which added “family responsibility” and section

5(2)(e), which added “degree of physical or mental disability” as prohibited grounds of discrimination.

Section 5(2) of the Bill states the following:

A person must not discriminate in any employment practice, directly or indirectly, against any individual on one or more of the following grounds –

- (a) race, colour , or ethnic origin;
- (b) sex, marital status or family responsibilities;
- (c) religion, creed or political opinion;
- (d) social or economic status; or
- (e) degree of physical or mental disability.

Although, “family responsibility” and “degree of physical or mental disability” added as prohibited grounds of discrimination in addition to what the Namibian Constitution provides, could be read in Article 14 of the Constitution, it was appropriate to specifically include it in the Labour Bill.

The Labour Bill further provides that, for the purposes of section 5(2):

It is discrimination to differentiate without justification in any employment practice between employees who do work of equal value, or between applicants for employment who seek work of equal value.

In that regard, the Labour Bill goes further than the Labour Act by specifically prohibiting discrimination of differential treatment for work of equal value, which will bring Namibia’s laws in compliance with Article 11(1)(d) of the Convention.

The Social Security Act establishes the funds for maternity leave, sick leave, death, medical, pension and development benefits. The establishment of these funds is in compliance with the obligations under Article 95 of the Namibian Constitution and Article 11(1)(e) of the Convention. The Funds for medical, pension and development funds are not in operation yet.

Article 12

- 1.1 **States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.**
- 1.2 **Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.**

The Hospitals and Health Facilities Act of 1994, as amended by the Hospitals and Health Facilities Amendment Act of 1998 provides for access and admission to and treatment in state hospitals and state health facilities, and according to section 11 of the Act, *every person in Namibia* has access, subject to the provisions of that Act and to such hospital rules as may be made, to a state hospital or

a state health facility, and is entitled to receive treatment or other medical care and benefit from any of the health services established under that Act.

There are no overtly discriminatory provisions in the Hospitals and Health Facilities Act between men and women with regard to access to health care services and facilities.

Section 41 of the Labour Act of 1992 provides for maternity leave, and according to subsection (1) thereof, a female employee who has completed at least 12 months continuous service in the employment of an employer shall, with a view to her confinement, be entitled to at least four weeks maternity leave before the expected date of her confinement, certified in writing by a medical practitioner to be such expected date, and ending at least eight weeks after the date of such confinement, so certified to be such date of confinement.

Sections 28 and 29 of the Social Security Act of 1994 provides for the establishment of a Maternity Leave, Sick Leave and Death Benefit Fund and the payment of maternity leave benefits, respectively. A female employee who is entitled to maternity leave benefits must claim such benefits directly from the Fund concerned.

Subsection (3) provides that an employer shall not terminate any contract of employment of a female employee who is on maternity leave or at the expiry of such leave -

- (a) on account of the re-organisation of the business carried on by such employer or for economic or technological reasons; or
- (b) on account of such female employee being incapable of continuing to perform the work she performed on the date immediately before her maternity leave commenced,

unless such employer has taken all reasonable steps to offer her another appropriate work or such female employee has unreasonably refused to accept any such offer.

The new proposed Labour Bill of 2003 contains new provisions in respect of maternity leave and provides for new procedures regarding maternity leave benefits. According to clause 25(1) of the Labour Bill a female employee is entitled to not less than 12 weeks maternity leave, calculated as follows -

- (a) before her actual date of confinement -
 - (i) the employee is entitled to commence maternity leave 4 weeks before her expected date of confinement, as certified by a her medical practitioner; and
 - (ii) the employee is entitled to maternity leave for the entire time from the commencement of her maternity leave as contemplated in subparagraph (i), until her actual date of confinement;
- (b) after her date of confinement, she is entitled to -
 - (i) 8 weeks maternity leave in every case; and

- (ii) in the case of an employee whose date of confinement occurred less than 4 weeks after the commencement of her maternity leave, the amount of additional time required to bring her total maternity leave to 12 weeks.

Clause 25(3) of the Labour Bill inserts a new provision that provides that the *employer must pay*, during the period of maternity leave, to the employee the remuneration payable to that employee. According to clause 25(4) the employer may recover from the Social Security Commission that part of the remuneration paid under subclause (3) which constitutes the basic wage of the employee. According to subclause (5) an employer must not dismiss an employee during her maternity leave or at the expiry of that leave on -

- (a) any grounds contemplated in clause 33 thereof; or
- (b) any grounds arising from her pregnancy, delivery, or her resulting family status or responsibility.

Subclause (6) provides that subclause (5) does not apply if -

- (a) the employer has offered the employee appropriate alternative employment; and
- (b) she has unreasonably refused to accept that offer.

Clause 26 of the Labour Bill provides for *extended maternity leave* equal to the greater of -

- (a) one month; or
- (b) the amount of accrued sick leave that the employee has at that time,

when complications justified such leave.

No appropriate services are granted free at this stage. Female employees who are entitled to maternity leave benefits contribute to the Maternity Leave, Sick Leave and Death Benefit Fund on a prescribed scale. The employer concerned also contributes to that Fund on the same scale.

Adequate nutrition is available at state and private health facilities to mothers during pregnancy and lactation, but it is doubted whether it is made available free of charge.

RECOMMENDATIONS:

- 1.1 No free services are granted to women in connexion with pregnancy, confinement and the post-natal period, and provision should be made therefore if necessary.
- 1.2 No nutrition is at this stage made available free of charge to mothers during pregnancy and lactation, and provision should be made therefore if necessary.

Article 13

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(a) The right to family benefits.

According to common law and statutory law, married women have the same right to family benefits as their husbands. Section 5 of the Married Persons Equality Act of 1996, gives to spouses married in community of property equal rights -

- (a) to dispose of the assets of the joint estate;
- (b) contract debts for which the joint estate is liable; and
- (c) to administer the joint estate.

The position of women to do this in terms of customary law is however not clear. According to Article 66 of the Constitution, customary law of Namibia remains valid to the extent to which such law does not conflict with the Constitution or any other statutory law. Customary law which is in conflict with the Constitution or any other statutory law may be repealed or modified by Act of Parliament.

(b) The right to bank loans, mortgages and other forms of financial credit.

There is no discrimination against women to obtain bank loans, mortgages and other forms of financial credit based on gender only or on the marital status of women. Subject to the provisions of the Married Persons Equality Act of 1996, with regard to the administration of a joint estate -

- (a) section 2(1)(a) of that Act repeals the common law rule in terms of which a husband acquires the marital power over the person and property of his wife; and
- (b) section 2(1)(b) of that Act abolishes the marital power which any husband had over the person and property of his wife immediately before the commencement of that Act.

According to section 3 of the Married Persons Equality Act the effect of section 2 (1) is, subject to that Act -

- (a) to remove the restrictions which the marital power places on the legal capacity of a wife to contract and litigate, including, but not limited to, the restrictions on her capacity -
 - (i) to register immovable property in her name;
 - (ii) to act as an executrix of a deceased estate;
 - (iii) to act as a trustee of an insolvent estate;

- (iv) to act as a director of a company; and
- (v) to bind herself as surety; and
- (b) that the common law position of the husband as head of the family is abolished, provided that nothing herein shall be construed to prevent a husband and wife from agreeing between themselves to assign to one of them, or both, any particular role or responsibility within the family.

Section 16 of the Married Persons Equality Act, however provides that the provisions -

- (a) regarding the abolition of the marital power and the consequences of that abolition as set out in Part I of that Act;
- (b) regarding marriages in community of property as set out in Part II of that Act; and
- (c) regarding marriages out of community of property as set out in Part IV of that Act,

do not apply to *marriages by customary law*.

(c) The right to participate in recreational activities, sports and all aspects of cultural life.

There is no legislation which prohibit women from participating in recreational activities, sports and all aspects of cultural life.

The Namibia Sports Act of 2003, does not discriminate against women to partake in sport in Namibia. Section 26 of the Namibia Sports Act, provides for the registration of *national umbrella sports bodies*, and section 4(1)(a) of that Act provides that the Namibia Sports Commission established by section 2 thereof, consists of *one person nominated by the national umbrella sports body for women in sport*, as one of its members.

According to Article 19 of the Constitution every person is entitled to enjoy, practice, profess, maintain and promote any culture subject to the terms of the Constitution and further subject to the condition that the rights protected by that Article do not impinge upon the rights of others or the national interest. Section 68 of the Education Act of 2001 provides for the establishment of cultural institutions or organisations. According to that section the Minister responsible for basic education may, out of moneys appropriated for this purpose by Parliament -

- (a) establish cultural institutions or organisations, or facilitate or assist in the establishment of cultural institutions or organisations by private persons in order to promote culture and to ensure the enjoyment of cultural opportunities;
- (b) cause cultural activities to take place at schools to enable the practice, maintenance and promotion of any culture, language or tradition;
- (c) enter into agreements with any organisation for the purpose of enhancing culture and related activities; and

- (d) after consultation with the Advisory Council, regional and local authority councils and other bodies interested in culture, establish such councils or other bodies as may be necessary for the co-ordination and administration of cultural programs on national, regional or local level.

The Minister responsible for basic education should be encouraged to implement the provisions of section 68 above.

According to common law and statutory law, women have the same rights as men to participate in all aspects of cultural life.

RECOMMENDATIONS:

NONE.

Article 14

- 3.1 **States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetised sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of this Convention to women in rural areas.**

There is no law on the economic empowerment of rural women. Rural women have limited access to facilities such as hospitals and other health facilities and educational institutions in the sense that the same services and quality of services are not available in rural areas as in urban areas. Rural girl children also have limited access to educational institutions such as pre-primary and other schools. According to section 69 of the Education Act of 2001, the Minister responsible for basic education may provide support and assistance to any registered person or community providing pre-primary education, including -

- (a) professional advice and training of early childhood developers; and
- (b) the provision of appropriate programs and materials.

The Communal Land Reform Act of 2002 provides *inter alia* for the allocation of rights in respect of communal land; for the establishment of Communal Land Boards and for the powers of Chiefs and Traditional Authorities and boards in relation to communal land.

- 3.2 **States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:**
 - (a) **To participate in the elaboration and implementation of development planning at all levels.**

Women in rural areas have the opportunity to participate on an equal basis with men, in the elaboration and implementation of development planning at all levels through their representation on communal land boards. Section 2(1) of the Communal Land Reform Act, 2002, provides for the establishment of Communal Land Boards by the Minister of Lands, Resettlement and Rehabilitation. According to section 3 of the Communal Land Reform Act, 2002, the functions of a Communal Land Boards are -

- (a) to exercise control over the allocation and the cancellation of customary land rights by Chiefs or Traditional Authorities under this Act;
- b) to consider and decide on applications for a right of leasehold under this Act;
- (c) to establish and maintain a register and a system of registration for recording the allocation, transfer and cancellation of customary land rights and rights of leasehold under this Act;
- (d) to advise the Minister, either of its own motion or at the request of the Minister, in connection with the making of regulations or any other matter pertaining to the objectives of this Act; and
- (e) to perform such other functions as are assigned to a board by this Act.

Section 4 of the Communal Land Reform Act of 2002, deals with the composition of Communal Land Boards and according to subsection (1) thereof a board consists, apart from women who are traditional leaders and who may represent the Traditional Authorities within a board's area, *inter alia* of *four women*, of whom -

- (a) two are women engaged in farming operations in the board's area; and
- (b) two are women who have expertise relevant to the functions of a board.

The Agricultural (Commercial) Land Reform Act of 1995, is in relation to the composition of the Land Tribunal not in compliance with Article 14 of the Convention. Section 63 of the Agricultural (Commercial) Land Reform Act, 1995, which deals with the establishment and composition of the Lands Tribunal, fails to take into consideration that women play a very important role in land, agriculture and natural resources, and does not provide for the representation of women on that tribunal. That Act should reserve a certain number of seats for women on the Lands Tribunal in the same way as the Communal Land Reform Act of 2002, reserved for women on the each of the communal land boards.

(b) To have access to adequate health care facilities, including information, counselling and services in family planning.

The Hospitals and Health Facilities Act of 1994, apply to women in rural areas with regard to access to adequate health care facilities, including information, counselling and services in family planning. Hospitals and clinics exist in rural areas in Namibia where they can obtain same, and there are no provisions in the Hospitals and Health Facilities Act, which prevent women in rural areas from access to the services mentioned above.

(c) To benefit directly from social security programmes.

Women in rural areas may benefit directly from social security programmes in terms of the Social Security Act of 1994.

(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency.

Women in rural areas have on an equal basis with men, access to illiteracy programmes in their areas, as well as to community and extension services in order to increase their technical proficiency. Section 67 of the Education Act of 2001, deals with *adult education and literacy programmes*, and subsection (1) thereof provides that the Minister responsible for basic education may establish, maintain and support, out of moneys appropriated for this purpose by Parliament and upon application by any community, *adult education and literacy programs*, and may prescribe -

- (a) minimum requirements for admission of minors over the age of 16 years;
- (b) the entitlement of adults to free or subsidised tuition;
- (c) the measures for the control, monitoring and evaluation of adults study groups;
- (d) curricula for and standards of courses of study;
- (e) the provision of staff training and materials development;
- (f) requirements and procedure for registration and subsidisation of private and public sector bodies providing basic education to adults, including the manner of reporting on the progress of programs; and
- (g) the fees payable by persons enrolled for adult education or literacy programs or the fees payable in respect of any examinations or the issue of certificates to persons enrolled for such education or programs.

"Adult education" is defined in section 1 of the Education Act of 2001, as *basic education provided to adults, including minors over the age of 16 years*. "Basic education" is defined as the *formal education which is provided from the level of the first grade to the level of the twelfth grade*, and includes -

- (a) adult education;
- (b) special education; and
- (c) education of any other nature which the Minister under subsection (2) declares to be basic education.)

According to subsection (2) of section 67 of the Education Act of 2001, the Minister responsible for

basic education may establish, after consultation with the Advisory Council, regional council and local authority councils and other bodies interested in education, such councils or other bodies for the co-ordination and efficient administration of adult education programs on a national, regional or local level.

(e) To organise self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment.

Women in rural areas have the opportunity to organise self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment. The Co-operatives Act of 1996, provides for *inter alia* the formation of co-operatives. According to section 8 two categories of co-operatives may be formed and registered in terms of that Act, namely worker's co-operatives and service co-operatives. Section 9(a) states that a co-operative shall have as its objects the promotion of the economic and social interests of its members by providing effective services to its members according to sound business principles. According to section 10, read with the definition of "person" in section 1 of that Act, natural persons, corporate bodies or unincorporated association of persons may participate in forming a co-operative or of becoming a member of a co-operative.

(f) To participate in all community activities.

Article 17 of the Constitution states *inter alia* that all citizens have the right to participate in the conduct of public affairs, whether directly or through freely chosen representatives. According to the common law and statutory law, women in rural areas may on equal footing with men participate in all community activities. The Traditional Authorities Act, 2000, does not prohibit women from being members of traditional authorities. In fact, according to section 3(1)(g) thereof the functions of a traditional authority, in relation to the traditional community which it leads, shall be to promote peace and welfare amongst the members of that community, supervise and ensure the observance of the customary law of that community by its members, and in particular to promote affirmative action amongst the members of that traditional community, in accordance with Article 23 of the Namibian Constitution, in particular by promoting gender equality with regard to positions of leadership.

The Local Authorities Act of 1992 does not specifically provide that women or a certain percentage of women be nominated as candidates for local authority council elections and it should be amended in order to provide therefore.

(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes.

According to the common law and statutory law, women in rural areas have access to agricultural credit and loans, marketing facilities, appropriate technology (where available) and equal treatment in land and agrarian reform as well as in land resettlement schemes.

The Agricultural (Commercial) Land Reform Act does not discriminate against women with regard to land reform and the allotment of agricultural land as contemplated in Part V of that Act. The Agricultural (Commercial) Land Reform Act, however does not positively promote the equal

representation of women on statutory boards contemplated therein.

Section 4(1)(g) of the Agricultural (Commercial) Land Reform Act provides for only 2 females, out of 12 members, to be members of the Land Reform Advisory Commission. This composition should be revised. With regard to the Lands Tribunal, no provision has been made for any females to be members of the Tribunal. (See a further discussion thereof under paragraph 3.2(a)).

With regard to resettlement schemes administered by the Ministry of Lands, Resettlement and Rehabilitation, assurance was given that the criteria of having access to and participating in those schemes, do not discriminate against women.

With regard to the Affirmative Action Loan Schemes of the Agribank: The Committee which consider loans, consists of 4 male and 2 female members. The fixed members of the Agribank Board consists of 1 male and 4 female members.

According to information received, the criteria for participating in the Affirmative Action Loan Scheme does not discriminate against women, and many women are nowadays the recipients of such loans.

(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Compared with men, women in rural areas enjoy the same living conditions in relation to housing, sanitation, electricity and water supply, transport and communications.

RECOMMENDATIONS:

- 1.1 The Agricultural Land Reform Act, 1995, should be amended in order to provide for more representation by women on the Land Reform Advisory Commission and the Lands Tribunal.
- 1.2 The Local Authorities Act, 1992, should be amended in order to provide that women or a certain percentage of women be nominated as candidates for local authority council elections.

Article 15

4.1 States Parties shall accord to women equality with men before the law.

Article 10 of the Constitution states that all persons shall be equal before the law.

Despite Article 10 of the Constitution, women in Namibia do not have full equality with men before the law. The cautionary rules which has been discussed under Article 2 of this Convention is a perfect example, and the Supreme Court should declare the application of such rules in especially sexual offences to be unconstitutional.

The Legal Aid Act of 1990 provides for the granting of legal aid to those persons whose means are inadequate to enable them to engage legal practitioners assist and represent them. Section 7 of that

Act provides that the Minister of Justice may in respect of any district or area determined by the Minister establish a legal aid committee. With regard to the composition of a legal aid committee there is no explicit provision in that Act that the Minister concerned shall also appoint women as members of legal aid committees.

4.2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.

According to Article 10 of the Constitution all persons are equal before the law, and no person may be discriminated against on the ground of *inter alia*, gender (or sex). Before the case of *Müller v President of the Republic of Namibia and Another*, 1999 NR 190 SC, Article 10 of the Namibian Constitution was only once before the subject of interpretation. In *Mwellie v Minister of Works, Transport and Communication* 1995 (9) BCLR 1118 (NmH) the approach of a Court to Article 10(1) was set out as follows:

"...article 10(1) ... is not absolute but ... it permits reasonable classifications which are rationally connected to a legitimate object and that the content of the right to equal protection takes cognizance of 'intelligible differentia' and allows provision therefor".

In regard to Article 10(2) the Court stated the following:

"As far as article 10(2) is concerned it prohibits discrimination on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status. Apart from the provisions of article 23 any classification made on the grounds enumerated by the sub-article will either be prohibited or be subject to strict scrutiny."

The Court in fact did not deal with Article 10(2) of the Namibian Constitution.

The *Müller*-case said that the purpose of Article 10 was clearly not only to prevent discrimination and inequality but also, in our context and history, to eliminate them. The Court stated that the approach of our Courts towards Article 10 should in regard to article 10(1) be that the questioned legislation would be unconstitutional if it allowed for differentiation between people or categories of people and that differentiation was not based on a rational connection to a legitimate purpose. The Court said with regard to article 10(2) that the steps to be taken were to determine -

- (a) whether there existed a differentiation between people or categories of people;
- (b) whether such differentiation was based on one of the enumerated grounds set out in article (2);
- (c) whether such differentiation amounted to discrimination against such people or categories of people; and
- (d) once it was determined that the differentiation amounted to discrimination, it was unconstitutional unless it was covered by the provisions of Article 23 of the Constitution.

According to Article 16 of the Constitution all persons (who are not Namibians) shall have the right in any part of Namibia, to acquire, own and dispose of all forms of immovable property individually or in association with others and to bequeath their property to their heirs or legatees.

With regard to *common and statutory law*, women indeed have in civil matters the same legal capacity to that of men and the same opportunities to exercise that capacity. Women in particular have equal rights to conclude contracts and to administer property, and they are also treated equally in all stages of procedure in courts and tribunals. Women married in community of property have equal rights as men with regard to the joint estate (see section 5 of the Married Persons Equality Act, 1996).

In *Myburgh v Commercial Bank of Namibia* 2000 NR 255 SC the Court had to deal with the legality of common law provisions restricting the legal capacity of women married in community of property, which were in conflict with the Namibian Constitution. The question arose whether common law provisions which were in conflict with the Namibian Constitution, remained valid until it was repealed or amended or declared invalid by competent Court, or whether the effect of Article 66(1) of the Namibian Constitution was such that the common law in conflict with the Constitution became to that extent invalid when the provisions of the Constitution took effect on Independence. The Court then decided that common law provisions which were in conflict with the Namibian Constitution ceased to exist when the provisions of the Constitution took effect on Independence, namely 21 March 1990.

Section 7 of the Married Persons Equality Act, 1996, deals with *acts requiring the consent of the other spouse in the case of a marriage in community of property*, and provides *inter alia* that, except in so far as permitted by subsection (4) and (5), and subject to sections 10 and 11, a spouse married in community of property shall not without the consent of the other spouse -

- (a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate;
- (b) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other real right in immovable property forming part of the joint estate;
- (c) alienate, cede, or pledge any shares, stocks, debentures, debenture bonds, insurance policies, mortgage bonds, fixed deposits or similar assets or any investment by or on behalf of the other spouse in a financial institution, forming part of the joint estate;
- (d) alienate or pledge any jewellery, coins, stamps, paintings, livestock, or any other assets forming part of the joint estate and held mainly as investments;
- (e) alienate, pledge, or otherwise burden any furniture or other effects of the common household forming part of the joint estate;
- (f) as a purchaser enter into a contract as defined in the Sale of Land on Instalments Act, 1971 (Act 72 of 1971), and to which the provisions of that Act apply.

4.3 States Parties agree that all contracts and all other private instruments of any kind

with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void.

Article 8(2)(a) of the Constitution provides that in any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed. Article 9(1) thereof provides that no persons shall be held in slavery or servitude. Any contracts and other private instruments with a legal effect which is directed at restricting the legal capacity of women should be abolished.

4.4 States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

According to Article 21(1) of the Constitution all persons have the right, subject to reasonable restrictions imposed by law (as in the case of for example, the "Sperrgebiet" or the Diamond Area), to move freely throughout Namibia and to reside and settle in any part of Namibia. The restrictions concerned however does not apply to women only, but to men too.

RECOMMENDATIONS:

Section 7 of the Legal Aid Act of 1990, should be amended in order to provide specifically for female representation on legal aid committees.

Article 16

5.1 States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage.

Women has the same right as men to enter into marriage. According to Article 14 of the Constitution men and women of full age have the right to marry and to found a family. "Full age" is however not defined in the Constitution, and it is an open question what that age will be. The Marriage Act of 1961 prescribes the minimum age for marriage for boys and girls to be 18 years. (See paragraph 5.2 below for a discussion thereof).

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent.

According to common and statutory law, women have the right to freely choose a spouse and to enter into marriage only with their free and full consent. According to Article 14(2) of the Constitution marriages shall be entered into only with the free and full consent of the intending spouses.

(c) The same rights and responsibilities during marriage and at its dissolution.

According to common and statutory law women have the same responsibilities during marriage and

at its dissolution as men. The second sentence of Article 14(1) of the Constitution states that men and women are entitled to equal rights as to marriage, during marriage and at its dissolution. See Part II (sections 4 to 11) in the case of marriages in community of property, and Part IV (section 15) in the case of marriages out of community of property, of the Married Persons Equality Act.

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount.

Women have the same rights and responsibilities as men as contemplated in this subparagraph. Section 3 of the Maintenance Act of 2003, deals with a *parental duty to maintain children*, and subsection (1) thereof provides that, subject to section 26 [which deals with the termination of maintenance orders] and the law relating to the duty of a parent to maintain a child who is unable to support himself or herself, both parents of a child are liable to maintain that child regardless of whether the -

- (a) child in question is born inside or outside the marriage of the parents;
 - (b) child is born of a first, current or subsequent marriage; and
 - (c) parents are subject to any system of customary law which does not recognise both parents' liability to maintain a child.
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.**

In terms of common law and statutory law women have the same rights as men to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights. Hospitals, clinics and other health facilities exist throughout Namibia where the information concerned may be obtained.

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount.

Except for restrictions imposed by legislation, women have the same rights and responsibilities as men with regard to guardianship, wardship, trusteeship and adoption of children. Section 4(3) of the Matrimonial Affairs Ordinance of 1955, as amended by section 21(b) of the Married Persons Equality Act, provides that, subject to any order of court -

- (a) a parent to whom the sole guardianship or custody of a minor has been granted under subsection (1) or a father or mother upon whom a children's court has under section 60 of the Children's Act, 1960 (Act No. 33 of 1960), conferred the exclusive right to exercise any parental powers in regard to a minor, may by testamentary disposition appoint any person to be the sole guardian or to be vested with the sole custody of the minor, as the case may be;

and

- (b) the parent of a minor to whom the sole guardianship of the minor has not been granted under subsection (1) or upon whom a children's court has not conferred the exclusive right to exercise any parental powers in regard to a minor shall not be entitled by testamentary disposition to appoint any person as the guardian of the minor unless such parent was the sole natural guardian immediately before his or her death.

Section 4(5) of that Ordinance provides that the court or a judge may, where a parent has appointed a guardian or a custodian as provided in paragraph (a) of subsection (3), upon application of the other parent or such guardian, made after the death of the testator or testatrix, make such order in regard to the guardianship or custody of the minor *as the court or judge may deem in the interest of the minor*.

The draft of the Child Status Bill which is presently considered by a committee of the National Assembly provides that custody of a child not born from a marriage will until the age of seven years vest in the mother, and thereafter the parents will have joint custody. Apparently this issue is not acceptable and the committee concerned investigated the issue.

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation.

According to common law and statutory law, women have the same personal rights as men with whom they are married, and they may choose a family name, a profession and an occupation. Women are not compelled by law to change their names after marriage, and they may retain their maiden names.

With regard to the right to choose a family name, section 9(1) of the Aliens Act of 1937, provides that a person who uses another surname than the one he or she bore or was known with, commits an offence, unless that person has obtained the authority of the Minister of Home Affairs or a staff member in the public service authorised by the Minister, to assume that other surname and such authority has been published in the *Gazette*. Paragraph (a) of the proviso to section 9(1) provides that when a woman on her marriage assumes the surname of her husband, she does not commit an offence as contemplated in section 9(1), while paragraph (b) of that proviso provides the same with regard to a married or divorced woman or a widow who resumes a surname which she bore at any prior time.

In *Müller v President of the Republic of Namibia and Another*, *supra*, the appellant *inter alia* appealed against a decision of the High Court that section 9(1)(a) discriminates against men by not allowing them to assume the surname of their wives and is therefore in conflict with the Namibian Constitution. The Supreme Court for various reasons held section 9(1)(a) not to discriminate against men and therefore not to be in conflict with the Namibian Constitution.

Despite the decision in the *Müller*-case, it may be argued that the legislator should indeed amend section 9(1) on the strength of Article 10 of the Constitution in order to provide that a man may on his marriage assume the surname of his wife. There is no doubt that section 9(1), in not allowing a man on his marriage to assume the surname of his wife, discriminates against women on the

grounds of gender (or "sex" as contemplated in Article 10(2) of the Constitution), in not allowing their husbands to also assume the surnames of their wives.

Article 21(1)(g) of the Constitution states that all persons have the right, subject to reasonable restrictions imposed by law, to practise any profession, or carry on any occupation, trade or business. There are no restrictions in common law or statutory law upon women not to choose a specific profession and an occupation.

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

Married women have the same rights as men in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration. In this regard, section 5 of the Married Persons Equality Act, 1996, regulates the position of women married in community of property. (See paragraph 4.2 above.)

5.2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

A minimum age has been specified for marriage and that age has been increased in the case of girls. Section 26(1) of the Marriage Act of 1961, as amended by section 24 of the Married Persons Equality Act, provides that *no boy or girl under the age of 18 years* shall be capable of contracting a valid marriage *except with the written permission of the Minister of Home Affairs or any staff member in the Public Service authorised by the Minister which he or she may grant in any particular case in which he or she considers such marriage desirable: Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law: Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted.*

It is an open question as from what age the Minister of Home Affairs (or an authorised staff member) may grant permission to a boy or a girl under the age of 18 years, to be married. May the Minister or the authorised staff member grant the permission concerned with regard to *any age whatsoever* under the age of 18 years, or only in respect of an age which relate to the puberty of the parties concerned?

Marriages according to the common and statutory law must be registered in an official register. Marriages according to customary law are however not registered and not even recognised officially.

RECOMMENDATIONS:

1.1 The legislator should amend section 9(1) of the Aliens Act, 1937), or substitute it with other legislation in order to provide that a man may on his marriage assume the surname of his wife. There is no doubt that section 9(1), in not allowing a man on his marriage to assume

the surname of his wife, discriminates against women on the grounds of gender (or "sex" as contemplated in Article 10(2) of the Namibian Constitution), in not allowing their husbands to also assume the surnames of their wives.

- 1.2 The legislator should amend section 26(1) of the Marriage Act, 1961, in order to make it clear from what age the Minister of Home Affairs (or an authorised staff member) may grant permission to a boy or a girl under the age of 18 years, to be married.

Legislation reviewed:

1. Namibian Constitution
2. Affirmative Action (Employment) Act of 1998
3. Agricultural (Commercial) Land Reform Act of 1995
4. Aliens Act of 1937
5. Children's Act of 1960
6. Child Status Bill of 2003
7. Combating of Domestic Violence Act
8. Combating of Rape Act
9. Communal Land Reform Act, Act 5 of 2002
10. Education Act of 2001
11. Hospital and Health Facilities Act of 1994
12. Labour Act, Act 6 of 1992
13. Labour Bill of 2003
14. Legal Aid Act of 1990
15. Local Authorities Act, Act 23 of 1992
16. Namibia Sports Act of 2003
17. National Vocational Training Act of 1994
18. Marriage Act of 1961
19. Married Persons Equality Act of 1996
20. Regional Councils Act of 1992
21. Polytechnic of Namibia Act of 1994
22. Social Security Act of 1994

23. Traditional Authorities Act of 2000