

## **GENDER AND THE LAW: THE MILLENNIUM SCORECARD**

*Dianne Hubbard of the Legal Assistance Centre normally prepares a Gender Scorecard at the end of each year looking back at the year's accomplishments and failures on gender and the law. In honour of the millennium, the year's Gender Scorecard looks at gender and the law in Namibia since independence.*

### **The Constitution and the courts**

Almost ten years ago, the Namibian Constitution set the scene for a new era for women in Namibia by outlawing sex discrimination and making explicit provision for affirmative action for women.

These portions of the Constitution have functioned as a guiding light in many ways, but the sex discrimination clause has only been applied once by the courts. In the Müller case, the Supreme Court ruled that the fact that it is harder for a married man to adopt his wife's surname than for a married woman to adopt her husband's does *not* constitute unfair sex discrimination. The court reasoned that the differentiation does not in any way impair the dignity of men, particularly since men are not a previously disadvantaged group, failing to recognise that the prevailing customs on surnames are actually a manifestation of centuries of patriarchy.

There has not yet been any case where the courts have been approached by a woman claiming sex discrimination. But, as the court remarked in the Müller case, "our culture of non-discrimination is nine years old and not yet out of its infancy".

There have been two other significant court cases dealing with gender issues, although not with sex discrimination as such. In the Frank case, the High Court held that a lesbian relationship between two women, a Namibian citizen and a foreigner, can be legally recognised under the law of universal partnership and should have been taken into account as a positive factor in support of the foreigner's application for permanent residence in Namibia. And in a Supreme Court case decided just this month, the Supreme Court scrapped a special "cautionary rule" which previously applied to rape cases. This rule had its origins in unfounded male fears that women are prone to lay false charges of rape. The court found it an unnecessary burden in sexual cases which "may lead to grave injustice to the victims involved".

### **Affirmative action**

There have been great strides in affirmative action for women since independence. The affirmative action provision which has applied to the first two local government elections resulted in local councils that were 32% female after the first local elections, rising to a remarkable 41% after the second local elections in 1998. Unfortunately, none of our political parties seem to have developed a successful system for combining affirmative action for women with the principle of democratic choice in choosing regional council candidates or compiling national party lists, leaving this as a challenge for the new millennium.

There are several laws which set aside places for women on various statutory bodies and boards, ranging from the Council of the Polytechnic to the National Sports Commission. The Traditional Authorities Act gives all traditional leaders a duty to

promote affirmative action amongst the members of the community, particularly by promoting women to positions of leadership.

The most recent development in this area was the passage of the Affirmative Action (Employment) Act in 1998. This law requires specified employers to prepare affirmative action plans setting forth steps to improve the representation of blacks, women and disabled persons in the workforce. No quotas will be set by the state but employers will be expected to set their own numerical goals and timetables, based on the availability of suitably qualified or trainable persons in the designated groups. Progress in implementing affirmative action measures will be monitored by the government, and non-compliance will disqualify employers from state contracts and concessions, including potentially valuable mining and mineral rights. The act is not yet in full operation, so it is still too soon to determine its practical impact on women in the workforce.

### **Working women**

There have been other legal initiatives aimed at working women. The tax laws now treat all individuals equally, men or women, married or single. This was one of the first law reforms for women after independence, inspired by the outcry of The Hon Libertine Amathila when she compared her first Parliamentary paycheque with that of her husband, The Hon Ben Amathila.

The Labour Act passed in 1992 explicitly forbids discrimination in any aspect of employment on the basis of sex, marital status or family responsibilities (amongst other grounds). It also prohibits harassment on these grounds.

Domestic workers, who were excluded from key aspects of pre-independence labour legislation, are fully covered by all of the rules on minimum working conditions in the Labour Act.

The Act guarantees 12 weeks of maternity leave to all female employees who have been working for the same employer for at least one year, although it provides no paternity leave for fathers. Maternity benefits during the leave period are provided in terms of the Social Security Act. Any woman who has been a member of the fund for at least six months is entitled to receive 80% of her normal wage during her maternity leave, up to a ceiling of N\$3 000/month. Unfortunately, the social security system currently covers only employees who work for more than two days a week for the same employer, thus potentially excluding some domestic workers with multiple employers.

The biggest disappointment in the labour field has been the complete lack of action on the recommendations of the Presidential Commission on farmworkers and domestic workers which started work five years ago. The report of this Commission was never officially made public, and nothing has been done to protect these two most vulnerable sectors of workers.

### **Family law**

Progress in this field has been slow, perhaps because family issues are so literally close to home. The major stride forward was the passage of the Married Persons Equality Act, which removed discrimination against women in the context of civil

marriage. Even though the bill was passed by Parliament, some women were shocked by the debate which ensued, with some MPs citing everything from Adam and Eve to bulls and heifers in support of male authority.

It is hard to determine the practical effect of this bill, although it seems to have had important symbolic value by putting men on notice that they are no longer the superior sex in the eyes of the law. Most of the act was not applicable to customary marriages, leaving patriarchy intact in that context.

Other key pieces of family law legislation have languished in the inner sanctums of government. These include a new Maintenance Act which would make important administrative improvements to the existing system, a Child Care and Protection Act which would give greater protection to children who are neglected or abused by family members, and a Children's Status Act which would remove legal discrimination against children born outside of marriage. Some of these have been "with the legal drafters" for years now, having seemingly fallen off the political agenda and into a mysterious void.

There have been no major changes in the area of customary law, despite the persistence of discrimination against women. However, customary law reform can be expected during the next decade, as the Law Reform & Development Commission has law reform proposals in various stages of preparation, on the recognition of customary marriage and on inheritance.

Other issues which will probably see legal change in the coming years – perhaps for both civil and customary marriage – are divorce and marital property regimes. We are also likely to see legal reform on the issue of informal cohabitation, which is already the family relationship of some 12% of the population.

### **Violence against women**

Lobbying by women's groups for law reform in this area started even before independence and has continued unabated, with a long series of demonstrations and petitions throughout the country. This long campaign is about to bear fruit, with a progressive Combating of Rape Bill already before Parliament and expected to pass early in the new year.

The Law Reform & Development Commission has a subcommittee on domestic violence which has prepared a draft bill for consideration by the full Commission, so legal change on this widespread problem should also move forward in the coming year. Recent research indicates that more than one-fifth of all violent crime reported to the police is domestic violence – and, since we know that the majority of such cases go unreported, this represents only the proverbial tip of the iceberg.

The legal moves on violence against women and children are just one part of a growing recognition of the seriousness of the problem. There are already eight Woman Child Protection Units which can offer sensitive and specialised help in violence cases. The Office of the Prosecutor-General has taken steps to create more child friendly courts, which will aid prosecution in child abuse cases. Counselling services and shelters are increasing, although still inadequate to meet the nation's needs.

One of the most serious shortcomings in this field is the lack of free anti-HIV and pregnancy prevention medication for rape victims.

### **Abortion**

The Minister of Health retracted a proposed law to liberalise access to legal abortion – without even waiting for the completion of research on the incidence of illegal abortion by her own ministry. This means that women with the resources to get themselves to South Africa (or elsewhere) can have access to safe abortions, while those without the necessary means resort to backstreet abortions or even infanticide. Although abortion is a very controversial issue in Namibia, surely we cannot continue to allow such a brutal distinction between rich and poor.

### **Plans and policies**

The Department of Women Affairs has put into place a National Gender Policy and an accompanying Plan of Action. To make these documents more accessible, the Department also prepared a simplified version for wide distribution. But this policy is not yet out of the starting gates. The nine gender sectoral committees which are supposed to form the lynchpin for communications on gender between government and NGOs have not been functional for years now, and the promised Gender Commission which is supposed to play a key monitoring role has not yet been established.

Another document pulling together goals for the future is the “Women’s Manifesto” prepared by a range of groups spearheaded by Sister Namibia. This document pulls together a set of topical gender issues to guide women in putting demands to the politicians who represent them.

### **International commitments**

Namibia is one of the few countries in the world which has ratified the UN Convention on the Elimination of All Forms of Discrimination against Women with no reservations. We have also ratified the UN Convention on the Rights of the Child, again without reservations. Namibia participated in the 1995 World Conference on Women in Beijing and has subscribed to the resulting Platform for Action.

### **The face of the future**

It is clear that there is no shortage of blueprints for action, but translating plans into realities is a difficult task. Namibia’s progress as a young nation is laudable, but the legal changes for women to date benefit urban women for the most part, while reform on issues such as inheritance and customary marriage which would be of intense interest to rural women are lagging behind.

Violence against women, sadly, is a problem that affects both rural and urban women, cutting across race, class, economics and every other conceivable dividing line. So action in this area is crucial for all Namibian women. An exciting development here is the growing interest amongst *men* to organise against violence against women. Tackling a social problem from the perspective of both sexes is the best way forward on any gender issue.

Another cross-cutting issue is HIV/AIDS, which is likely to change the face of Namibia's future more dramatically than any other single factor since independence. HIV infection is clearly a gender issue, with the majority of new infections throughout Africa occurring amongst young women. The burden of caring for sick family members and AIDS orphans also falls primarily upon the nation's women. It is a sombre thought to end upon, but we must rise to the challenge of conquering the linked problems of HIV/AIDS and violence against women.

And so here we stand, women and men, at the brink the millennium. May we have a new year of peace and equality between the sexes.