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## **Ideas about equality in Namibian family law**

Namibia has introduced some far-reaching law reforms on gender issues in areas such as affirmative action and gender-based violence. And yet, like many other countries, it is a socially conservative society where the home is the last bastion of patriarchy. Men who support gender equality in other spheres are reluctant to countenance such equality in the home.

Men in Namibia are by and large very defensive about law reforms which they feel may somehow discriminate against or disadvantage men. Religious and customary law justifications have been advanced in Parliament as arguments for clinging to the status quo. Even where progressive law reforms have been enacted to advance gender equality, the key points of debate in Parliament and in the public at large have almost always been based on concerns about the preservation of male power and proprietary sexual control over women. At the same time, Supreme Court rulings on gender equality issues have shown a tendency to be deferential to “public opinion” as expressed in Parliament and in other male-dominated institutions shaped by Namibia’s patriarchal past, thus further entrenching inequalities based on current norms.

This paper will begin with a brief overview of family law reforms since independence. It will then look at three key family law cases decided by the Namibia’s Supreme Court, to examine the legal meaning of equality in Namibia. Next it will examine debates around the meaning of equality in the context of the Children’s Status Act, and explain how the South African courts have dealt with similar equality issues.

## **An overview of family law reform in Namibia**

Prior to independence, family law issues were governed primarily by inherited Roman-Dutch common law, an ancient set of legal rules which evolved in highly patriarchal societies. Those who supported the liberation struggle showed little public interest in incremental law reform on gender issues, as the legal system was viewed primarily as a colonial tool of repression.<sup>1</sup> Furthermore, issues of sexual equality were consciously subordinated to the larger objective of national liberation, which was viewed as the necessary enabling condition to advance all forms of political and social equality (Becker 1995: 143-ff). After independence, there was genuine political will to promote gender equality, even though this objective conflicted with some community and religious traditions and individual beliefs. The resulting contradictions were evident in the Parliamentary debates around gender-related law reform, particularly in the family sphere.

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<sup>1</sup> While some lawyers and judges applied the law in ways which provided a degree of protection for peaceful political protest, the legal system embodied the framework of apartheid, institutionalised repression and established a contract labour system that ensured a controlled supply of cheap labour.

### *Married Persons Equality Act*

The first major family law reform in post-independence Namibia was the Married Persons Equality Act 1 of 1996, which eliminated the discriminatory Roman-Dutch law concept of marital power. It was this “marital power” which placed wives in civil marriages in a similar position as minors, with husbands having the right to administer the property of both spouses. Couples married in community of property must now consult each other on most major financial transactions, with husbands and wives being subject to identical powers and restraints, while husbands and wives married out of community of property now have the right to deal with their separate property independently.<sup>2</sup>

Indications are that the Act is seldom utilised in practical terms. But the symbolic import of this Act is probably even more important than its practical provisions, as it sends out a clear message that the law will no longer recognise husbands in civil marriages as “heads of household”.

This aspect of the law generated much controversy both inside and outside Parliament. In fact, debate on this point was so fierce that additional language was added to the original draft to emphasise the fact that the removal of the legal designation of head of household would not interfere with a family’s private right to treat the male as the head of the household.<sup>3</sup>

### *Family law issues in rape and domestic violence laws*

The next set of law reforms affecting family life centred around the problem of violence against women and children.

The Combating of Rape Act 8 of 2000 is one of the most progressive pieces of rape legislation in the world. It introduces a broad, gender-neutral definition of rape and moves the focus away from the “consent” of the rape victim to the force or coercion used by the perpetrator. This law reform generally garnered strong political and public support. But the most contentious issue was marital rape.

The Bill contained a provision which removed the previous bar to a wife laying a charge of rape against her husband – a point which inspired long and heated discussion. Many Parliamentarians expressed fears that the new rule would be misused by women to gain power over their husbands, or asserted that there can be no such thing as rape in marriage because a husband has a “right” to sexual intercourse with his wife.

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<sup>2</sup> The gender-based inequalities in customary marriage, which stem from a different source, were not addressed by this law -- aside from giving husbands and wives in both civil and customary marriages equal powers of guardianship in respect of children of the marriage.

<sup>3</sup> The original Bill stated that one effect of the abolition of marital power was that “the common law position of the husband as head of the family is abolished”. Parliament added the proviso 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”.

These Parliamentary attitudes mirror more widespread public opinion. Various studies show that rape within marriage and other intimate relationships is common in Namibia (Becker/Claassen 1996; LeBeau 1996; Rose Junius 1998; LeBeau 1999; Talavera 2002). Even more disturbingly, one recent national study indicates that a significant number of both men and women believe that married women have no right to refuse sex with their husbands. It appears that there is still a widespread perception that women are subordinate to men in marriage, with decision-making – at least about sexual matters – still based on patriarchal constructs (MoHSS 2003: 40-45).

The new law on rape was followed by a companion piece of legislation on domestic violence, the Combating of Domestic Violence Act 4 of 2003. This law covers a range of forms of domestic violence, including sexual violence, harassment, intimidation, economic violence and psychological violence. It covers domestic violence between husbands and wives, parents and children, boyfriends and girlfriends, and other family members.

The law gives those who have suffered violence alternatives to laying criminal charges, by setting up a simple, free procedure for getting a protection order from a magistrate's court. A protection order is a court order directing the abuser to stop the violence. It can also prohibit the abuser from having any contact with the victim. In cases of physical violence, it can even order the abuser to leave the common home.

No new crimes are created by the law, but existing crimes between persons in a domestic relationship are classified as "domestic violence offences" with special provisions which encourage input from the victim on bail and sentencing, and protect the victim's privacy by prohibiting publication of information which might reveal the victim's identity.

In Parliament, male fears and defensiveness were again evident in this debate, with some men worried that the gender-neutral Bill did not do enough to protect men - especially against forms of "violence" such as wives who deprive their husbands of sexual relations or use "witchcraft" to interfere with their husband's sexual functions.<sup>4</sup>

#### *Maintenance – paid by men and abused by women?*

The next major family law reform to come through Parliament was the Maintenance Act 9 of 2003. The difficulty of securing child support from absent fathers has been regularly cited as a key issue affecting children's welfare and women's economic independence. The Maintenance Act made significant changes to the maintenance system to make it more efficient, but most of the basic principles around maintenance remained the same. The new law provides for the first time for the sharing of expenses incurred during pregnancy, and gives clear guidelines for deciding how much maintenance

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<sup>4</sup> There were proposals to amend the Bill to cover these two issues, but they did not succeed.

should be paid. It also provides new methods of enforcement to use when maintenance orders are not obeyed.

During the Parliamentary debates, there were repeated allegations that women misuse the maintenance system – by having children just to get maintenance payments, by spending maintenance money on themselves or by demanding payment from men who are not in fact the fathers of the children.<sup>5</sup>

Many Parliamentarians – including women – were concerned about what they perceived as being “gender neutrality”. The maintenance system, under both the old law and the new one, is gender-neutral on its face, but in practice is used almost exclusively by mothers seeking maintenance from absent fathers. Some MPs tried to even the score by citing failings by mothers, to counterbalance the Bill’s obvious emphasis on fathers’ failure to take financial responsibility for their children. The search for a sense of even-handedness eventually moved to reciprocity between parents and children, instead of between men and women, and an amendment was eventually added to the Bill to clarify the duties of children to maintain elderly parents.

#### *Equal rights to communal land for women*

The Communal Land Reform Act 5 of 2002, although not primarily a family law reform, was a large step forward in protecting women’s rights to communal land tenure. In terms of this law, if a husband dies, his widow has a right to remain on the land if she wishes and is entitled to keep the land even if she re-marries. (The law is actually worded in gender-neutral fashion, but widowers were not historically forced off their land when their wives died.) If there is no surviving spouse when the holder of the land right dies, then the land will be re-allocated to a child of the deceased identified by the Chief or Traditional Authority as being the rightful heir. There was little Parliamentary debate about gender, as the discussions centred on race and class issues, with little acknowledgement of the intersection of these points of discrimination with gender discrimination.

One flaw in this law is that it fails to address the disposition of the land in the case of a polygamous marriage. Another problem is that it is not being uniformly implemented in practice, with some incidents of land-grabbing still occurring. And yet, it constitutes a radical departure from previous practice. Because most Namibian communities are patrilocal, it was previously the case that a widow was expected to return to her parents’ home. This law reform thus implicitly recognises women as autonomous actors, rather than dependents of their husbands or fathers.

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<sup>5</sup> Such objections were anticipated, and the initial Bill already contained provisions which criminalise abuse of maintenance money as well as providing false information in connection with a maintenance claim. The Bill also included a counter-balancing criminal offence for anyone who tries to intimidate someone not to file a maintenance case by means of any kind of threat, including the use of witchcraft.

However, there is a danger of a reaction against the advances for women contained in this law. The Ministry of Lands and Resettlement announced in 2006 that it is proposing to amend the Act. At present, any person irrespective of gender can apply for a customary land right within the communal area where he or she resides. But this provision has recently received some criticism, especially from men, who have suggested that married woman should not be able to apply for land in their own right. Others have said that single women should not be given land rights either, because of fears about what would happen to a woman's land when she marries and relocates to her husband's homestead.

### *Foot-dragging and fears*

One prominent theme which runs through these various law reform debates is a male reluctance to contemplate any form of "power-sharing" – particularly in sexual or economic spheres. Equality is not the universal goal. And even where equality is the genuine goal, there are fears that this will result in unfair treatment of men, by empowering women to take unfair advantage of men in family contexts.

One problem is that Parliament has sometimes applied simplistic understandings of sexual equality to issues of family law reform, without a sensitive analysis of the complex social context in which the legal rules will be applied. Namibian court cases on gender have also struggled with this challenge.

### **What is the legal meaning of sexual equality?**

There is only a small body of jurisprudence on sexual equality in Namibia. However, the decided cases have, on the most controversial issues, given a surprising amount of weight to "public opinion" as a source of values to guide Constitutional interpretation.

### *The Müller case*

Article 10 of the Namibian Constitution states that "(1) All persons shall be equal before the law" and "(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status." In interpreting this provision, the Namibian courts have drawn a distinction between "differentiation" and "discrimination".

The leading case on equality under Article 10(2), *Müller v President of the Republic of Namibia*, followed precedent in other jurisdictions by holding that "an element of unjust or unfair treatment" is inherent in the meaning of the word "discriminate". Differentiation on one of the prohibited grounds will not amount to "unfair discrimination" if it bears a "rational connection" to a "legitimate purpose".

The judgment gave a detailed explanation of how courts should determine whether unfair discrimination is present:

In this regard, the Court must not only look at the disadvantaged group but also the nature of the power causing the discrimination as well as the interests which have been affected. The enquiry focuses primarily on the “victim” of the discrimination and the impact thereof on him or her. To determine the effect of such impact consideration should be given to the complainant’s position in society, whether he or she suffered from patterns of disadvantage in the past and whether the discrimination is based on a specified ground or not. Furthermore, consideration should be given to the provision or power and the purpose sought to be achieved by it and with due regard to all such factors, the extent to which the discrimination has affected the rights and interest of the complainant and whether it has led to an impairment of his or her fundamental human dignity (*Müller*: 203A-B).

The subject of the *Müller* case was a gender question. When Mr Müller married Ms Engelhard, he wanted to take on her surname, so that the two of them could operate their jewellery business under her more distinctive and well-established business name. Under Namibian law, she could have simply started using his surname if she wished – but he could assume her surname only by going through a formal name change procedure which involved extra effort and expense.

The Supreme Court ruled that this particular differentiation did not amount to unfair discrimination. Key factors were the findings that the complainant, a white male, was not a member of a prior disadvantaged group;<sup>6</sup> that the aim of the name change formalities was not to impair the dignity of males or to disadvantage them; that the legislature has a clear interest in the regulation of surnames; and that the impact of the differentiation on the interests of the applicant was minimal since he could adopt his wife’s surname by a procedure involving only minor inconvenience. The Court noted that the legal provision in question “gave effect to a tradition of long standing in the Namibian community that the wife normally assumes the surname of the husband”, with the government being unaware of any other husband in Namibia who wanted to assume the surname of his wife (*Müller*: 204B). Thus, the Court gave particular weight to the status quo.

The matter was subsequently referred to the United Nations Committee which oversees the International Covenant on Civil and Political Rights. This Committee ruled in March 2002 that the different procedures for dealing with surnames *do* amount to unfair sex discrimination in terms of the International Covenant, noting that long-standing tradition is not a sufficient justification for differential treatment between the sexes. The Committee gave the Namibian government 90 days to report on what it has done to rectify the problem. Mr Müller had already changed his name to Mr Engelhard by that stage (under the laws of his home country of Germany), but the underlying law has, more

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<sup>6</sup> The outcome might have been different if the argument had raised the corresponding discrimination on the wife of the applicant. (See Bonthys 2000.)

than five years later, still not been changed to remove the sex discrimination which was identified.<sup>7</sup>

### *The Frank case*

The next major gender issue to be considered by the Namibian courts concerned a lesbian relationship. In the case of *Frank v Chairperson of the Immigration Selection Board*, the Supreme Court rejected the argument that the Immigration Board had violated the applicants' fundamental rights to equality by failing to accord their lesbian relationship equal status with the relationships of men and women who are legally married.

The Supreme Court's approach to Constitutional interpretation here was to start with the "plain meaning" of the words in the relevant Constitutional provision, guided by "the legal history, traditions and usages of the country concerned", followed by a "value judgment" in any case where the Constitutional provision is not "absolute" (*Frank*: 133B-136A).<sup>8</sup>

In making such a value judgment, the Court stated that it must look to the "contemporary norms, aspirations, expectations, sensitivities, moral standards, relevant established beliefs, social conditions, experiences and perceptions of the Namibian people as expressed in their national institutions and Constitution" (*Frank*: 135G-H, 135J-136A, 136J-137A).<sup>9</sup> The Court noted that it is also appropriate to consider the emerging consensus of values in the international community, although local traditions and values should be given precedence to avoid creating a perception that the courts are imposing foreign values on the Namibian people (*Frank*: 141I-142B; 135H-I).

The Court identified "the Namibian parliament, courts, tribal authorities, common law, statute law and tribal law, political parties, news media, trade unions, established Namibian churches and other relevant community-based organizations" as sources of expressions of Namibian values, saying that "Parliament, being the chosen representatives of the people of Namibia, is one of the most important institutions to express the current day values of the people." (*Frank*: 137H-I)<sup>10</sup>

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<sup>7</sup> The Committee said: "In view of the importance of the principle of equality between men and women, the argument of a long-standing tradition cannot be maintained as a general justification for different treatment of men and women, which is contrary to the Covenant." (*Müller & Engelhard*, 2002: para. 6.8; see also Menges 2002).

<sup>8</sup> The Court cited the portion of Article 6 which prohibits the death penalty as an example (*Frank*: 137E).

<sup>9</sup> Other cases have also indicated that Constitutional interpretation must be carried out in the context of Namibian values. For example, Berker, CJ, in a concurring judgment in a 1991 case on corporal punishment stated that "the one major and basic consideration in arriving at a decision involves an enquiry into the generally held norms, approaches, moral standards, aspiration and a host of other established beliefs of the people of Namibia" (*Ex Parte Attorney-General, Namibia*: 197H-J; see also *Namunjipo*).

<sup>10</sup> The Court also listed as sources of information about values: "debates in parliament and in regional statutory bodies and legislation passed by parliament; judicial or other

However, the Court also expressed the need to exercise caution when considering the value of public opinion in Constitutional interpretation:

It is not a question of substituting public opinion for that of the Court. It is the Courts that will always evaluate the public opinion. The Court will decide whether the purported public opinion is an informed opinion based on reason and true facts; whether it is artificially induced or instigated by agitators seeking a political power base; whether it constitutes a mere 'amorphous ebb and flow of public opinion' or whether it points to a permanent trend, a change in the structure and culture of society... The Court therefore is not deprived of its role to take the final decision whether or not public opinion, as in the case of other sources, constitutes objective evidence of community values... (*Frank*: 138F-H).

Applying a value judgment to the issue before it, the Court found that the Namibian Constitution makes no provision for the recognition of homosexual relationships as being equivalent to marriage, and that the Constitutional term "family" clearly does not contemplate that a homosexual relationship could be regarded as a "natural" or "fundamental" group unit. In ruling that Article 10 does not protect homosexual relationships, the Court found that "Namibian trends, contemporary opinions, norms and values tend in the opposite direction". The main evidence cited for this conclusion was absence of a legislative trend towards the recognition of same-sex relationships in Namibia, and statements by the President and one male Member of Parliament which motivated against the recognition of such relationships.<sup>11</sup>

The Court concluded that discrimination on the basis of sexual orientation in the context before it is not "unfair discrimination" according to the *Müller* test: "Equality before the law for each person, does not mean equality before the

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commissions; public opinion as established in properly conducted opinion polls; evidence placed before Courts of law and judgments of Court; referenda; publications by experts" (*Frank*: 138C-D). The *Namunjepo* case similarly cites the importance of Parliament as a source of values.

<sup>11</sup> "[T]he President of Namibia as well as the Minister of Home Affairs, have expressed themselves repeatedly in public against the recognition and encouragement of homosexual relationships. As far as they are concerned, homosexual relationships should not be encouraged because that would be against the traditions and values of the Namibian people and would undermine those traditions and values. It is a notorious fact of which this Court can take judicial notice that when the issue was brought up in Parliament, nobody on the Government benches, which represent 77 percent of the Namibian electorate, made any comment to the contrary." (*Frank*: 150D-F). This suggests that the ruling party's perspective could guide constitutional interpretation whenever there is some ambiguity.

The Court looked to international law as well: "The 'family institution' of the African Charter, the United Nations Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Namibian Constitution, envisages a formal relationship between male and female, where sexual intercourse between them in the family context is the method to procreate offspring and thus ensure the perpetuation and survival of the nation and the human race." (*Frank*: 146F-H). The Court also stated that the International Covenant on Civil and Political Rights specifies "sex" but not "sexual orientation" as one of the grounds on which discrimination is prohibited. In fact, in March 1994 (*before* Namibia's ratification of the Covenant) the Human Rights Committee charged with monitoring the Covenant stated that the references to "sex" in the provisions on discrimination are "to be taken as including sexual orientation" (*Toonen*: para. 8.7).



law for each person's sexual relationships." However, the Court emphasised that "Nothing in this judgment justifies discrimination against homosexuals as individuals, or deprives them of the protection of other provisions of the Namibian Constitution" (*Frank*: 155E, 156H).

### *The Myburgh case*

The "absolute" approach to Constitutional interpretation was taken in the *Myburgh* case, which concerned a husband's marital power over his wife. In this case, the Supreme Court held that this discriminatory concept was already automatically invalid by virtue of its unconstitutionality, even before it was overruled by Parliament with the Married Persons Equality Act. Here the Court found unfair discrimination on the grounds of sex, without finding it necessary to make any value judgement.

The Court noted that the differentiation in question is based on stereotyping "which does not take cognisance of the equal worth of women", thus impairing the dignity of women as individuals and as a group.<sup>12</sup> The Court concluded that this was "not an instance where meaning and content must still be given to the provisions of the Constitution", stating that "no value judgement is necessary" to see that the common law rules on marital power are discriminatory (*Myburgh*: 268D-E).

### *Some comments on the Namibian jurisprudence*

These three cases (decided by a judiciary which is almost exclusively male) each give a different role to tradition and public opinion, thus giving us poor guidance as yet on when existing notions of sexual roles and relationships will prevail over a new world re-fashioned in light of constitutional ideals. All the institutions cited in the *Frank* case as sources of Namibian values are male-dominated institutions which have been shaped by patriarchal cultures, meaning that the courts are likely to be looking to "male" public opinion for guidance.

This approach also raises the danger of a circular and mutually-reinforcing dialogue between the courts and Parliament; the Court looked to Parliament's lack of support for homosexual relationships in the *Frank* case, and Parliamentarians have subsequently cited the Court's judgment in the *Frank* case as a justification for continuing to exclude homosexual relationships from the protection of the law.

Constitutional analysis in other jurisdictions has pointed out that Constitutional protections enforced by the judiciary are particularly necessary to protect the *unpopular* rights of the minority. Parliament, as the representatives of the majority, can in theory be relied upon to enact laws based on the will and

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<sup>12</sup> The Court noted that "the differentiation takes no cognisance of the fact that in many marriages in community of property the intelligence, training, qualifications or natural ability or aptitude of the woman may render her a far better administrator of the common estate than the husband..." (*Myburgh*: 266B-I).

values of the majority. But the Constitution and the courts should be the source of protection for the rights of those who are most vulnerable – often because they want to express an opinion or engage in a practice which *departs* from society’s existing norms.<sup>13</sup>

For example, in South Africa the Constitutional Court decided a case which was very similar to Namibia’s *Frank* case, yet with an opposite outcome, holding that it is unconstitutional for immigration law to favour non-citizen spouses over non-citizen same-sex partners. The constitutional framework is different in South Africa, where discrimination on the grounds of sexual orientation is explicitly forbidden. But in contrast to the *Frank* case, the South African Court did not look for the endorsement of public opinion but on the contrary found that it is especially important to afford constitutional protection to those who are already vulnerable because of societal stereotyping or prejudice.<sup>14</sup>

It is unthinkable that tradition would be cited by the Namibian courts to uphold any form of racism. Apartheid Namibia certainly had a long tradition of racism, and sadly, there is still public opinion that would support discrimination on the grounds of race or ethnicity in some quarters – but this would surely never be relied upon by the courts as a relevant factor in determining whether Article 10’s prohibition against race discrimination is applicable.<sup>15</sup> For example, in the case of *S v van Wyk*, Namibia’s High Court held that it was permissible to consider racism as an aggravating factor in sentencing for a racially-motivated crime, even though the culprit’s racism had been

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<sup>13</sup> This idea has often been espoused in respect of the US Constitution by Harvard Law School Professor Lawrence H Tribe. (See, for example, Tribe 2003.)

The right to freedom of speech is a good example – it seldom needs to be invoked to protect people who are agreeing with the prevailing views of those with power in society, but is usually asserted rather to safeguard the rights of those who want to challenge prevailing views or power structures.

<sup>14</sup> This judgment stated: “Society at large has, generally, accorded far less respect to lesbians and their intimate relationships with one another than to heterosexuals and their relationships.” Quoting Canadian jurisprudence, the Court noted that “ ‘It is easy to say that everyone who is just like “us” is entitled to equality. Everyone finds it more difficult to say that those who are “different” from us in some way should have the same equality rights that we enjoy.’ ” (*National Coalition for Gay and Lesbian Equality*: 28C-29D).

Unlike the Namibian Court, which looked to Parliament as one source of societal norms, the South African Court noted that although the South African Parliament had shown a legislative trend in the direction of equality for all sexual orientations, it had not yet gone far enough in recognizing same-sex life partnerships as relationships in law. (*National Coalition for Gay and Lesbian Equality*: 25D-E).

<sup>15</sup> Race and sex discrimination are treated identically by Article 10, as well as in the Preamble of the Constitution which states that the “inalienable rights of all members of the human family” 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 23 of the Constitution gives special emphasis to both race and sex discrimination, noting 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”.

conditioned by a racist environment. Here, one of the judges drew an analogy between racism and sexism:

At different times in history, societies have sought to condition citizens to legitimise discrimination against women, to accept barbaric modes of punishing citizens and exacting brutal retribution, and to permit monstrous invasions of human dignity and freedom through the institution of slavery. But there comes a time in the life of a nation, when it must and is able to identify such practices as pathologies and when it seeks consciously, visibly and irreversibly to reject its shameful past. That time for the Namibian nation arrived with independence (*S v van Wyk*: 456I-457A, concurring opinion of Judge Mohamed).<sup>16</sup>

Unfortunately, the analogy referred to is not being fully observed in practice.

### ***Notions of “equality” in the Children’s Status Act***

Particularly pointed examples of how notions of equality affect law-making can be found in debates around the Children’s Status Act, first introduced into Parliament in 2003, and passed after several heated rounds of debate in late 2006.

#### *Custody – joint, equal or one at a time?*

One of the topics addressed by the Bill is parental rights over children born outside of marriage. The Bill initially proposed that the mother would have sole custody of such children from birth, then mothers and fathers would automatically acquire joint custody when the child reached the age of seven. Many NGOs objected that such a rule would be unworkable in practice, as well as contrary to the best interests of children in many situations.

The inspiration for the Bill’s approach seemed to be the fact that married parents have joint custody of children born of the marriage. But unmarried parents cannot be said to be similarly situated, especially where they are not cohabiting. Persons who are joined in marriage are bound by a number of reciprocal legal rights and responsibilities. In particular, married couples do not have the power to bring the marriage to an end without supervision. In the case of civil marriages, a court must make sure that the best interests of the child are protected. In the case of customary marriages, the relationship is regulated by a body of custom and negotiated by the extended family unit. None of these things apply to unmarried parents. Therefore, it did not make sense for the law to afford married couples and unmarried couples identical treatment.

In the wake of extensive public hearings throughout the country convened by a Parliamentary standing committee, the debate became so tangled that the

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<sup>16</sup> See also the *Kauesa* case, which upheld the Constitutionality of portions of the Racial Discrimination Prohibition Act 26 of 1991. Several of the passages supporting the Court’s decision equate several forms of discrimination, including racism, sexism and attacks on the basis of “sexual identity”. (The High Court decision was subsequently overruled by the Supreme Court on other grounds.)

Bill was intentionally allowed to lapse – at a time when a new President was scheduled to take office shortly, raising the possibility of a Cabinet re-shuffle.  
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A revised version of the Children's Status Bill was tabled by the new Minister of the newly-renamed Ministry of Gender Equality and Child Welfare in October 2005. The revised Bill jettisoned joint custody in favour of equal custody for both parents from birth unless one parent applied to a children's court for sole custody. The revised Bill was passed by the National Assembly very quickly, with relatively little debate, leading to a public demonstration by representatives of the NGO community appealing to Namibia's second House of Parliament, the National Council, to give further scrutiny to the Bill. The National Council referred the Bill to its own standing committee, which held additional public hearings in Windhoek.

Many NGOs asserted that equal custody, like joint custody, would be unworkable in practice. Because the social reality at present is that single mothers tend to take responsibility for the day-to-day care of children born outside marriage, equal rights on paper for single mothers and single fathers would be unlikely to translate into equal practice.

Debates around this issue replayed some familiar themes. In public hearings before the National Assembly Committee, some people motivated joint custody from birth on the grounds that men might otherwise be reduced to "cheque book fathers". However, there were more concerns that parents (and fathers in particular) might want to exercise their custody rights purely to avoid paying maintenance, with the result that the child would end up as a weapon in the "tug of war" that might ensue. (NA 2005: para. 6.5.1; *The Namibian*, 1/12/2005; *New Era*, 24/2/2006).

A large group of NGOs pointed out that children born outside of marriage are usually born to parents who are not living in the same household, meaning that their situation is similar to that of children of divorced parents. In divorces under both civil law and customary law, custody of the children is usually given to one parent while the other parent has rights of contact and access. This arrangement helps to prevent disputes. Submissions made to Parliament argued that children born outside of marriage are entitled to the same degree of clarity about parental rights and responsibilities as children born to married parents. If the proposed law did not give this same degree of protection to children in both situations, it would continue to discriminate against children born outside of marriage.

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<sup>17</sup> As a result of debates between the Parliamentary Committee and the Minister of Women Affairs and Child Welfare, two contradictory committee reports were issued, with both purporting to represent the views of a majority of the persons consulted. The first report, following the lines of a joint submission by a large coalition of NGOs, recommended that sole custody of a child born outside marriage should vest in the mother, with the father having automatic rights of access and the right to make application to a children's court to become the child's custodian. The Minister favoured "equal rights to custody" for both parents simultaneously from the child's birth, and this approach was recommended in the second committee report (MWACW 2005; Dentlinger 2005).

One proposed solution was to provide different approaches for unmarried parents, depending on whether or not they were cohabiting. It was suggested that cohabiting parents should be allowed to have joint custody and equal guardianship if they wish (subject to court approval), just like married parents. But where parents were *not* sharing a common home, then one parent must take primary responsibility for the daily care of the child while the other parent would have access rights, just like children of divorced parents. Both parents would have an equal right to become the child's custodian, thus providing a level playing field as a starting point. If the parents could not agree between themselves on who would act as the primary custodian, then the children's court could decide the question, based purely on the best interests of the child. The NGOs suggested that the mother could be the temporary custodian of the child until a parental agreement is registered or until a court decides the matter, since the mother (for obvious biological reasons) will definitely be present at the child's birth.

This proposal was not ultimately accepted, although it appeared to find favour with the Minister of Gender Equality at one stage. The approach ultimately adopted by Parliament, after the Bill was considered by a Parliamentary committee for a third time, was a mechanism for choosing a single primary custodian for all children of unmarried parents. Unmarried parents can make an oral or written agreement between themselves on who will act as the primary custodian. If no agreement is made, either parent (or someone acting on behalf of the child) can apply to the children's court for the appointment of a primary custodian. The person with physical custody of the child can make an application to any court (including a traditional tribunal) for a quick order for interim custody if the child's best interests are at risk. This interim order will remain in effect until the same court makes a final decision on custody. There is no default position. If the parents make no agreement and no one approaches the court to request legal custody of the child, then the child will remain in legal limbo, without a legal custodian or guardian to make decisions on behalf of the child.

This final approach seems to bend over backwards to pretend that children have two identical parents, instead of a mother and a father. It is arguably "gender-neutral" to a fault, despite the fact that childbearing and childrearing are not gender-blind activities in Namibia. In addition to the sex-based biological facts of childbearing and breastfeeding, societal problems such as domestic violence and the failure to provide child maintenance continue to have a gendered nature. The law is not yet in force, so it is too soon to assess how it will play out in practice.

### *The rights of rapists*

Another contentious equality issue in the Children's Status Act brought up the topic of rape – and marital rape – once again. The original Bill included a provision stating that "male perpetrators of rape which results in the conception of a child born outside marriage" would have no parental rights over the child but could be required to pay maintenance.

One concern that arose here was gender neutrality. Since the Combating of Rape Act is gender-neutral, it is possible for women to be convicted of rape – although this usually involves a woman who acts as an accomplice to a male rapist or commits a sexual act other than intercourse (for obvious biological reasons). A submission based on input from 31 NGOs supported the reference to male rapists on the grounds that it would be very rare for a pregnancy to result from the actions of a female rapist, and that even in such a rare event, there might be a need for the female rapist to care for the child for a time for the purposes of breastfeeding (LAC 2006).

But Parliamentarians generally felt that any exclusion of rights based on a pregnancy resulting from rape should apply equally to male and female rapists. For example, one asked: “Why this discrimination: are men being punished because they are men? ...We have had many incidents where women raped men.” (The Namibian, 4/3/2004). In fact, in a sample of 409 rape dockets examined by the Legal Assistance Centre from locations around the country covering the period since the new rape law came into force, there were only 3 female perpetrators amongst the 477 perpetrators – and none of these women were convicted (LAC 2007: 176).

The Parliamentary committee which initially studied the Bill recommended that the provision should be re-worded in gender-neutral terms (NA 2004: paragraph 6.10).<sup>18</sup> But the revised version of the Bill tabled in 2006 instead eliminated the restriction on the rights of rapist fathers altogether – which sparked further debate.

A second equality concern which arose around this issue related to rape inside marriage versus rape outside marriage. Because the Bill at hand concerned custody and guardianship rights for children born outside marriage, the proposed exclusion of rapists’ rights logically applied only to children born outside marriage. On this point, the submission based on input from 31 NGOs stated:

We do not propose limiting the rights of all fathers who are convicted of rape (or any other crime). But the situation is different where the ONLY connection between the child’s mother and father is that he is the rapist and she is the rape victim. (LAC 2006)

In any event, rape in marriage could be a basis for divorce proceedings which would settle the question of custody.

But this approach inspired strong objections. For example, one Parliamentarian complained about this source of inequality, saying that “a husband who rapes his wife inside marriage has custody over his child, but a

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<sup>18</sup> Some who made representations to the committee felt that if a rapist father can be required to pay maintenance, then he should also have parental rights. Astonishingly, the suggestion was put forward that a woman who falls pregnant from a rape should choose in the early stages of pregnancy either to reconcile with the rapist father so that he could have parental rights, or to have an abortion.

father who rapes a mother of a child born outside marriage would not have such a right to custody” (National Council debate, 27/2/2006). What is interesting about this argument is that whereas many male Parliamentarians were reluctant to recognise the existence of marital rape in 2000, in 2005 they were not only admitting the existence of marital rape but worrying about the relative rights of marital rapists.

A third aspect of the equality debate raised involved the distinction between men who father a child by means of rape and other criminals. One local NGO, the National Society for Human Rights, asserted that there should be no distinction “between a father and a mother who is a convicted murderer and one who is a convicted rapist!” (NSHR: para. 2.6.3). Many other NGOs felt, on the contrary, that there is a very important distinction between a parent who commits a crime and a parent *who causes the conception of a child* through a heinous crime against the other parent. One of the most disturbing aspects of the latter situation, for example, was the idea that a woman who has fallen pregnant by means of rape might actually have to get the *consent of the rapist* to put the child up for adoption.

After considering this range of viewpoints, the National Council’s Parliamentary committee recommended that the law should restrict male perpetrators from having rights of custody, guardianship or access over a child born of the rape unless a court has specifically approved such rights. (NC 2006: para. 1.8). But the National Council as a whole rejected this proposal (National Council debate, 27/2/2006).

After hearing strong objections on this point from the NGO community, the Minister tabled an amendment in July 2006 which inserted a gender-neutral restriction on the parental rights of any persons who cause a pregnancy through rape, requiring a court order to authorise any rights over the child in question. (The Namibian, 13/7/2006 and 17/7/2006). This amendment was incorporated into the final version of the law <sup>19</sup>

### ***The role of social realities in considering equality***

One question implicit in the discussions around the Children’s Status Act was what weight to give to current social reality. Women’s groups pointed to statistics indicating that only 4% of Namibian children under age 15 live with their fathers but not their mothers while both parents are alive, and only 0,4% live with their fathers even after their mothers have died (MoHSS 2003: 11-12). <sup>20</sup>

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<sup>19</sup> In terms of the final law, people who have caused the conception of a child by means of rape have no rights to custody or access in respect of that child without explicit court approval. The rapist may not inherit from the child in the absence of a will. The child, on the other hand, may inherit from the rapist parent, and the rapist parent is legally liable to bear a share of the child’s maintenance expenses just like any other parent.

<sup>20</sup> Many children were living with someone other than a parent. One-quarter of children under age 15 were living with both parents, one-third with their mothers only (even though their father was still alive) and one-third with someone other than a biological parent (even though both parents were in most of these cases still alive).

It was contended that the fact that children born outside of marriage are generally cared for by their mothers and not their fathers justifies giving mothers a procedural advantage over fathers, by giving them custody as a starting point – as long as fathers had the right to approach a children’s court and request custody, with the ultimate decision being based solely on the best interests of the child. Asking fathers to be the ones to go to court if they really want custody was asserted as being the best way to avoid placing an impossible burden on Namibia’s already overstretched courts. This procedural difference would be a variation of the one upheld by the Court in the *Müller* case, although it could be argued that such an approach gives too much weight to the status quo.

The South African Constitutional Court considered precisely this issue in the 1997 *Hugo* case. In 1994, South African President Nelson Mandela pardoned certain categories of prisoners who had not committed very serious crimes. A blanket pardon was given to mothers with minor children under the age of 12, while fathers of young children were eligible to apply for remission of sentence on an individual basis. The justification for the different procedures was that only a minority of South African fathers are actively involved in childcare. A male prisoner challenged the pardon on the grounds that it was unfair sex discrimination, and the Constitutional Court found that the different pardon procedures were not unconstitutional.

According to the South African Court, it is necessary to look at the practical considerations involved. Since male prisoners outnumber female prisoners almost fifty-fold in South Africa, releasing the fathers of young children as well as the mothers would have meant the release of a very large number of prisoners. This might have produced a public outcry. And because fathers play a lesser role in child-rearing, the release of male prisoners would not have contributed very significantly to the President’s goal of serving the interests of children. In other words, the costs of such a move would have outweighed the gains. The President’s pardon did not restrict the rights of any fathers permanently. It did not stop any of them from applying to the President for an individual remission of sentence on the basis of their own special circumstances. So the Court found that there was discrimination in the sense that mothers and father were treated differently, but that this discrimination was not unfair – and therefore not unconstitutional. The different treatment was justifiable as a reasonable way to serve the best interests of the children involved.

One concurring justice argued that society must move away from gender stereotyping, which has prevented women from “forging identities for themselves independent of their roles as wives and mothers” and discouraged fathers from participating in child rearing, to the detriment of both the fathers and their children. This justice therefore concluded that the Presidential pardon constituted unfair sex discrimination, but found that it was nevertheless justifiable on practical grounds (*Hugo*: 41G-H;42B).



Another justice rooted her opinion in social realities. She asserted that the discrimination in question was not unfair, even though it was based on a gender stereotype, because that stereotype is a social fact:

In this case, mothers have been afforded an advantage on the basis of a proposition that is generally speaking true. There is no doubt that the goal of equality entrenched in our Constitution would be better served if the responsibilities for child rearing were more fairly shared between fathers and mothers. The simple fact of the matter is that at present they are not. Nor are they likely to be more evenly shared in the near future. For the moment, then, and for some time to come, mothers are going to carry greater burdens than fathers in the rearing of children. We cannot ignore this crucial fact in considering the impact of the discrimination in this case. (*Hugo*: 49E-G).

One justice disagreed, saying that although it is true that women actually bear a disproportionate burden of child-rearing in society, it is not fair to base a legal distinction on this fact (*Hugo*: 36C). He argued that the view of women as the primary care-givers for children relegates women to a “subservient” and “inferior” role which is part of the old system of patriarchy rejected by the new Constitution, and may hamper the efforts of those men who want to break out of the stereotypical mould and become more involved with their children. In his view, the Presidential pardon thus reinforced existing “gender scripts”, whereas “whatever tradition, prejudice, male chauvinism or privilege may maintain. Constitutionally the starting point is that parents are parents” (*Hugo*: 37E-F, 38C-F; 39D-E).<sup>21</sup>

The roles of mothers versus fathers were also considered in the *Fraser* case in South Africa, where an unmarried father challenged the Constitutionality of a statute which required that married mothers and fathers must both give consent to put their child up for adoption, while only the mother’s consent was required in cases where the parents of the child were not married. The Court agreed that this distinction was an unfair form of discrimination between married fathers versus unmarried fathers, and between unmarried mothers versus unmarried fathers. The Court gave Parliament two years in which to develop an alternative approach, but warned that a blanket rule which treated all parents equally would be just as unlikely to produce the desired result:

Why should the consent of a father who has had a very casual encounter on a single occasion with the mother have the automatic right to refuse his consent to the adoption of a child born in consequence of such a relationship, in circumstances where he has shown no further interest in the child and the mother has been the sole source of support and love for that child? Conversely, why should the consent of the father not ordinarily be necessary in the case where both parents of the child have had a long and stable relationship over many years and have equally given love and

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<sup>21</sup> Two commentators criticized the Court’s analysis for failing to give proper recognition to the complexities of situations where fathers are in fact acting as primary care-givers: “The Court seems unable to see Hugo as both part of an advantaged group of fathers, and as distinct from that group, because of his location within the sub-group of disadvantaged fathers or the groups of primary care-giver parents. The problems of application faced by the Court arise where the Court tries to relate the complainant to a particular group but loses sight of the overlapping nature of social groups.” They suggest that the discrimination should have been found to be unfair, but nevertheless justifiable (*Albertyn/Goldblatt* 1998: 264-65). For another useful analysis of the *Hugo* case, see Kende 2000.

support to the child to be adopted? Indeed, there may be cases where the father has been the more stable and more involved parent of such a child and the mother has been relatively uninterested in or uninvolved in the development of the child. Why should the consent of the mother in such a case be required and not that of the father? (*Fraser*: 283E-H)

The Court noted that statutory and judicial responses to these problems in other jurisdictions are “nuanced”, having regard to factors such as the duration and the stability of the relationship between the parents, the age of the child, the intensity or otherwise of the bonds between parent and child, the reasons why the relationship between the parents was not formalised by marriage and the best interests of the child. The Court also urged Parliament to be “acutely sensitive to the deep disadvantage experienced by the single mothers in our society” and to ensure that law reforms on the issue did not “exacerbate that disadvantage” (*Fraser*: 282C-D).<sup>22</sup>

Other equality cases decided by the South African Constitutional Court give good examples of sensitive considerations of the social context of discrimination and the social impact of specific legal rules – although sometimes in the dissenting judgments rather than the majority judgements.<sup>23</sup>

Unfortunately, this kind of nuanced analysis is what is, to date, often missing in Namibian jurisprudence and Parliamentary debate.

The question of how to promote equality in an unequal world is a vexed one. As the debates discussed above illustrate, Parliament has sometimes applied simplistic understandings of sexual equality to issues of family law reform. Treating people equally does not mean treating everyone in exactly the same way. It means treating people who are in similar situations in a similar way, but like a hall of mirrors this gives rise to additional questions about who is similar to whom in what ways.

Legal analysis often distinguishes between two kinds of equality: “formal” versus “substantive”. Formal equality means adopting gender-blind rules which eliminate all gender distinctions. Substantive equality means looking at laws in their social context – a context formed by race, sex and class inequalities – to see what approaches will best advance meaningful equality in real life. One South African commentator gives this explanation of the differences between the two concepts of equality:

[F]ormal equality is blind to entrenched structural inequality. It ignores actual social and economic disparities between people and constructs standards that appear to be

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<sup>22</sup> The South African Parliament has applied a succession of rules which have tried to capture some of these nuances. See the Natural Fathers of Children Born out of Wedlock Act 86 of 1997; the Adoption Matters Amendment Act 56 of 1998, and the Children’s Act 38 of 2005.

<sup>23</sup> Good examples of such analysis can be found, for example, in the dissenting judgment of Justice O’Regan in *Harksen*: 333-ff and the dissenting judgments of Justices O’Regan and Sachs in *S v Jordan*: 656-ff.

neutral, which in truth embody a set of particular needs and experiences which derive from socially privileged groups. Reliance on formal equality may therefore exacerbate inequality. Substantive equality, on the other hand, requires courts to examine the actual economic and social and political conditions of groups and individuals in order to determine whether the Constitution's commitment to equality is being upheld. (De Vos 2000: 67)<sup>24</sup>

An analysis based on substantive equality seeks to compensate for past inequalities, and recognizes that applying formal equality to an unequal reality may simply entrench the existing situation.<sup>25</sup>

Of course, a law which takes account of unequal realities must also try to move towards the ideal of sexual equality. Achieving this delicate balance in complex family situations will be very difficult.

Similar issues will probably arise in future in other contexts. For example, the Deputy Minister of Labour recently announced that his Ministry was hard at work on introducing paternity leave proposals for paternity leave, to correspond with the paid maternity leave already provided for mothers, on the grounds that "men should also have the right to obtain leave to look after their babies" (The Namibian, 10/7/2006).<sup>26</sup> However, proposals for paternity leave may founder on the twin shoals of biological fact (given that there is no limit to the number of children a man can father over any particular time period) and social reality (given that most Namibian men are not involved in the day-to-day care of their children, no matter how much one might wish for the situation

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<sup>24</sup> See also Cassidy 2002: 58. The South African *Hugo* case explained the distinction this way:

[A]lthough a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context. (*Hugo*: 23E-G)

<sup>25</sup> Ideas about substantive equality are inherent in arguments for Black Economic Empowerment, although these arguments usually focus on race inequality to the exclusion of class inequalities.

<sup>26</sup> The Labour Act 6 of 1992 which is currently in force provides for three months of maternity leave for any woman who has been employed for at least one year by the same employer (section 41), with maternity benefits (80% of full pay up to a ceiling of N\$3000) financed by matching employer and employee contributions through the Social Security Act 34 of 1994. Neither Act makes any provision for paternity leave or parental leave. The Labour Bill 2007 which is before Parliament at the time of writing would provide improved provisions on maternity leave, but still makes no provision for paternity leave. (See also The Namibian, 31/3/2004 and Burnett 2004a & 2004b.)

Previously, after Deputy Minister of Higher Education Hadino Hishongwa called for the introduction of paternity leave, Director General of National Planning Commission Saara Kuugongelwa-Amadhila jokingly expressed the hope that "our very sensible men" will soon get the benefit of paternity leave "so that they can have more time to go to kambashus (shebeens) and come back and harass wives and their newborn babies who disturb them in the night" (The Namibian, 8/5/2002).

to be different). The debate on when and in what ways women and men are similarly situated on this issue, and on how to tailor such a law to encourage more involvement between fathers and children in reality, will be interesting.

### ***Moving forward***

There is a large plain of uncharted territory between the ideal and the actual. For example, during the debates about child custody in relation to the Children's Status Act, many women expressed their hope that someday men and women in Namibia will play a genuinely equal role in child care, but pointed to the dangers of legislating today for a social ideal that is perhaps still several generations away. The law can lead, but not if it moves so far ahead that the public can no longer see its light.

Men in many parts of the world are struggling to adapt as definitions of masculinity are in a state of transition (Kaufman 1993). Namibia has seen a number of far-reaching social changes since independence, so it is not surprising that changes in the home are particularly frightening to some. It is natural for people to be fearful of change, and particularly when they believe that the change in question will lead to a reduction in their personal power and status.

This is not to imply that men are the sole source of resistance to changes in the direction of gender equality. Some women are exploiting the situation – for example, by bringing false charges of rape – and some are as reluctant as men to change familiar relations between the sexes. Another problem is the “sugar daddy” syndrome (where young girls give sexual favours to older men in exchange for money and luxuries). This type of relationship reinforces stereotyped ideas that girls are dependent on males for their success and security, while the age gap works against any form of equality in the relationships. This also suggests that sex is the main attribute of value which girls have at their disposal, and that men are to be valued not in themselves but only in terms of what material goods they can provide. In this way, sugar daddy relationships can undermine the self-respect of both parties involved.

One root of the problem seems to lie in public perceptions of power within families as a finite resource, so that the empowerment of women is viewed as leading ineluctably to the disempowerment of men.<sup>27</sup> If family issues are to move forward effectively, it will be helpful for men and women to understand different interpretations of power and how increased sexual equality can be an economic and emotional gain for the entire family. To this end, public awareness efforts on family law issues should not focus only on information about new laws, but also on influencing attitudes which affect the acceptance of new approaches.

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<sup>27</sup> For example, a study based on interviews with urban men in Katutura, Khomasdal and Windhoek, and rural men in northern Namibia concluded that many men feel that gender-related laws discriminate against men in favour of women. They feel that “men and women should have equal laws”, but believe at the same time that “the law protects women mostly” (Lebeau/Spence 2004: 30).

It is also important for the courts, the legislature and the public to develop deeper understandings of sexual equality. The goal should not be to ensure that every law in Namibia is gender-neutral, but rather to ensure that past discrimination is remedied and harmful stereotypes and practices are eliminated.

There is at present increased attention to gender issues in Africa – at least in terms of rhetoric if not yet in reality. The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa – ratified by 21 nations and signed by a total of 43 of the 53 members of the African Union as of June 2007 – takes a very progressive stance on a range of family law topics, ranging from polygamy to the rights of widows. At the same time, Namibia's Parliament and other national institutions are constantly acquiring experience, and hopefully increased maturity. It would not be unreasonable to hope that these developments will lead to more subtle understandings of equality as a complex concept.

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