

GENDER AND LAW REFORM IN NAMIBIA

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BACKGROUND

Namibia is a small country which is short on human and material resources. This fact hampers progress in a number of fields. To give a concrete example, we have a population of some 1.5 million, which includes only about 150 lawyers. The same small base of expertise is evident in other fields. The positive side of this is that individuals can make a difference. The negative side is that key organisations and individuals are stretched very thin, especially in the field of gender.

Namibia, which is sometimes referred to as Africa's last colony, was a German colony which came under South African control after World War I. After a liberation struggle which spanned more than 20 years, Namibia became independent from South African rule on 21 March 1990. This event heralded a period of legal and social change which has provided favourable opportunities for gender developments.

GENDER AND THE NAMIBIAN CONSTITUTION

The Namibian Constitution provides a strong backdrop for sexual equality. It is one of the few constitutions in the world that uses gender-neutral language throughout, and it explicitly forbids discrimination on the basis of sex. It provides for equality in all aspects of marriage, and gives special emphasis to the women in the provision which authorises affirmative action. Furthermore, it explicitly states that customary law survives only to the extent that it does not conflict with the Constitution, meaning that customary law may not entail any form of sex discrimination. The Constitution also puts men and women in an identical position with respect to citizenship, including the acquisition of citizenship by marriage.

In addition, Namibia is a signatory to the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the UN Convention on the Rights of the Child, with no reservations.

GENDER-RELATED LAW REFORMS SINCE INDEPENDENCE

There have been many significant law reforms concerning gender in the 9½ years since Namibia became independent, but family law and customary law issues have received relatively low priority.

Affirmative action

Significant progress has been made in the area of affirmative action and labour law. An affirmative action provision applied to the first two local government elections, with the result that there are currently 41% women on local councils, as compared to about 3% women on regional councils and 15% women in Parliament, where no affirmative action applied.

Individual affirmative action provisions have also been made applicable to a number of statutory bodies and boards – ranging from the Social Security Commission to the National Sports Commission --with the most significant of these being the regional Communal Land Boards which will in future have important supervisory powers over the allocation of customary land rights by traditional leaders.

A new law providing for affirmative action in employment was passed in 1998, although it has not yet come into full operation. This Act requires employers with more than 50 employees 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, in light of the availability of suitably qualified or trainable persons in the designated groups. Employers who hire non-Namibian citizens will be obliged to provide a Namibian “understudy” to ensure the transfer of skills. Progress in implementing affirmative action measures will be monitored by an Employment Equity Commission comprising representatives of government, trade unions and employers, as well as persons representing the interests of each of the designated groups. Non-compliance will disqualify employers from state contracts and concessions, including potentially valuable mining and mineral rights.

Other law reforms affecting working women

There have been other law reforms in the field of labour. After independence, the very first law reform pertaining to sex discrimination was the removal of discrimination against married women in the income tax laws. This came about when two MPs (both Ministers) who happened to be husband and wife compared their pay cheques at the end of their first month in office – and she complained very loudly and publicly when she discovered that *hers* was smaller than *his* because of the rules concerning tax deductions!

The Labour Act passed in 1992 prohibits discrimination in any aspect of employment on the basis of sex, marital status, family responsibilities and sexual orientation (amongst other things), as well as forbidding harassment on the same grounds. Also important to women is the fact that domestic workers, who were excluded from pre-independence labour legislation, are fully covered by the provisions of the new labour law.

The Labour Act provides for three months of maternity leave for any woman who has been employed for at least one year by the same employer. This provision has been supplemented by the Social Security Act, which provides maternity benefits (80% of full pay up to a ceiling of N\$3000) through a mandatory combined scheme for sickness, maternity and death benefits financed by matching employer and employee contributions. These reforms will obviously have significance primarily for the minority of Namibian women who are in formal employment.

Family law

The only law enacted since independence in the area of family law is the Married Persons Equality Act. This law eliminates the discriminatory Roman-Dutch law concept of marital

power which previously applied to civil marriages. Couples married in community of property must now consult each other on all major transactions (with husbands and wives being subject to identical powers and restraints), while couples married out of community of property have the right to deal with their separate property independently. The gender-based inequalities in customary marriage, which stem from a different source, were not addressed by this law. However it did give husbands and wives in both civil and customary marriages equal powers of guardianship in respect of children of the marriage. It also makes a wife's domicile independent of that of her husband in both civil and customary marriages, and provides that the domicile of children of the marriage will be the place with which they are most closely connected.

Somewhere in the proverbial pipeline are long-awaited laws on child maintenance, the position of children born outside of marriage and new procedures to protect abused and neglected children (including mechanisms for removing children from the family environment if necessary). These laws have been in draft form for years now, and the fact that they have been stalled represents a failure of lobbying attempts on the part of women. (More on that topic to follow.) Other issues which have started on the law reform path are inheritance, the registration of customary marriages, and Namibia's outdated laws on divorce. None of these, however, have progressed as far as draft legislation.

Laws pertaining specifically to rural women

The major development for rural women is the Communal Land Reform Bill. After being discussed for years and going through countless draft stages, this bill was recently tabled in Parliament. In terms of this Act, men and women are equally eligible for rights to customary land, and the treatment of widows and widowers is identical. This will alter the current practice in some areas, whereby a widow can be dispossessed of the communal land she occupies upon her husband's death, or forced to pay an additional occupation fee.

It is also noteworthy that the law which provides a procedure for official recognition of traditional authorities requires that they "promote affirmative action amongst the members of that community", particularly "by promoting women to positions of leadership." Although the Act contains no specific monitoring or enforcement mechanisms, it provides a basis for encouraging greater participation by women in traditional leadership positions.

In general, law reforms in the area of customary law have been slow to come, probably because of the political ramifications of imposing change in this area. For instance, the Constitution requires the establishment of a Council of Traditional Leaders, but the legislation implementing this directive only came into force last year, eight years after independence.

Violence against women

Following on years of lobbying from a broad range of groups, a Combating of Rape Bill which will implement a number of progressive reforms to the law on rape is before Parliament at present. Law reform on domestic violence is also underway, with a draft bill in progress. (More about these bills below.)

KEY GOVERNMENT STRUCTURES & THE LEGAL ASSISTANCE CENTRE

In order to set the scene, it is also necessary to give a brief background on key government structures and to explain the overall role of the Legal Assistance Centre.

Department of Women Affairs (DWA)

Namibia has a Department of Women Affairs (DWA) in the Office of the President. This body plays a coordinating and facilitating role. In consultation with a range of government bodies and NGOs, it has drafted a National Gender Policy and Programme of Action which has been approved by Cabinet. However, the Gender Commission which is supposed to function as the monitoring body for these policies has not yet been put into place. The DWA also has responsibility for monitoring the implementation of CEDAW and the Beijing Plan of Action in Namibia. The head of the DWA has a non-voting seat in Cabinet. On paper, it seems as if there would be significant linkages between the DWA and the NGO community for lobbying and information-sharing purposes. But in practice, the DWA is not perceived as a key partner in this area, perhaps because it is too much a part of the government, or perhaps because it has been bedevilled by internal conflicts as well as some initial indecision about its function. Up to now, it has not played a leading role in pushing for law reform on gender issues -- or at least not one that has been visible to the broader community.

Law Reform & Development Commission (LRDC)

The Law Reform & Development Commission is a statutory body with responsibility for conducting research and making recommendations for legal change. The majority of its members have other full-time duties, and it has only a very small staff. Only one of the laws relating to gender which have been passed since independence was initiated by the LRDC, although many law reforms on gender have been required to go forward through this body, resulting in some long delays.

Legal Assistance Centre (LAC)

The Legal Assistance Centre (LAC) fits into the law reform process as an NGO with a good working relationship with government. The LAC is a public interest law firm dedicated to human rights. It was established in 1988, and was initially concerned primarily with human rights abuses perpetrated by the old apartheid regime. Since independence, this type of work has been supplemented by a new focus on research and policy development, alongside community education.

The Gender Research Project was established in 1993. It is staffed primarily by one lawyer (myself) and one researcher. We receive legal assistance at times from visiting volunteers (lawyers and other academics) as well as the occasional student intern. We employ local consultants for specific projects, and we sometimes carry out field research with assistance from paralegals in our advice offices, which are situated in different parts of the country.

We have at times been commissioned by government ministries to prepare draft legislation. We have on other occasions prepared research papers and draft bills at our

own initiative, or at the request of the LRDC but with our own funding. We believe that it is usually better not to utilise funding which comes from or through the government so that we can retain ownership of our research. Financial independence ensures that we are in a position to make any research reports and draft bills that we prepare freely available to the public.

KEY NEEDS IN THE FIELD OF GENDER AND GOVERNANCE

Against this backdrop, I will give more details about the law reform situation from an NGO perspective. The discussion is organised around four factors which could improve the process of law reform around gender issues in Namibia.

A more predictable law reform agenda

Gender-related law reforms seem to move forward in an unpredictable fashion. As already noted above, tax law reform was the first, not because it was perceived as being the highest priority, but because discrimination against women in this area received very pointed publicity – and also probably because correcting the problem was a relatively simple task.

Another example is the Combating of Rape Bill which is currently before Parliament. This is a law reform that a spectrum of groups have been advocating or years, starting even before independence. For instance, numerous appeals for law reform in this area were made to the Ministry of Justice by a diverse spectrum of organisations over the years. In 1989, Women's Solidarity (an NGO which provides education on violence against women and counselling for victims) published a paper proposing law reform in this area, with specific recommendations backed up by comparative research. It continued to lobby relentlessly for these reforms, stating in 1994: "We know of few other law reform issues which have received such a broad range of public support."

A petition which included specific requests for the reform of the laws on rape was signed by ten different NGOs and presented to the Minister of Justice as part of the commemoration of International Women's Day in March 1993. Also in 1993, the Namibia Women's Agricultural Association made a formal request to the LRDC to consider the option of imposing a minimum penalty for convicted rapists. This proposal was supported by the Legal Assistance Centre, which provided the Government with detailed research on the constitutionality of such a step and on approaches to rape sentencing in other countries. Shortly after this, the Namibian Law Society, which represents all practising attorneys, gave its official support to sentencing guidelines as well as a range of other rape law reforms. In May 1994, another petition on law reform, signed by representatives from five government ministries and ten NGOs and again including specific demands for reform of the law on rape, was presented to the Ministry of Justice.

In 1995, in the wake of a brutal attempted rape of a woman journalist in Windhoek, the Namibia Media Women's Association presented a petition to the LRDC that included demands for stiffer sentences and the elimination of bail for accused sexual offenders. Violence against women in general has been the topic of a substantial number of grassroots demonstrations. In 1995 there was even a community-based group of *men* who called for

law reform and made a broad range of recommendations on government and community strategies to combat rape.

Finally, in July 1997, a draft Combating of Rape Bill was prepared by the Law Reform and Development Commission and circulated for public comment. The report released by the LRDC gave an interesting explanation as to how action on the topic was finally triggered. The report stated that the Commission had planned to prepare a comprehensive report to accompany the draft bill, but was pressured to release the draft bill before the accompanying report was ready because *“Namibia experienced an increase in cases of the most abhorrent manifestations of rape, mainly on children, even infants. This resulted in a public outcry for urgent action backed up by demonstrations and which culminated in a special debate in Parliament.”*

In actual fact, there was not a sudden increase in the number of reported rapes and attempted rapes, but rather a steady increase of some 30 to 60 cases each year, moving from 564 reported cases in 1991 to a high of 830 reported cases in 1996, followed by a slight *decrease* to 778 cases in 1997 and 714 cases in 1998. Neither was there a sudden increase in the proportion of child victims. The police kept statistics during the first half of 1991 which produced the highly-publicised finding that *one-third* of all reported rape cases involved girls under the age of 16.

What actually happened is that one particular case caught the attention of the public and Parliament. A two-year-old child in Tsumeb was raped, resulting in severe injuries. There was a spontaneous public demonstration about this case in Tsumeb, as well as a month-long series of protests in Windhoek (the nation's capital) organised by the Multi-Media Campaign on Violence Against Women and Children, which is a network of NGOs and government bodies. Members of the public dressed in black and gathered publicly each Thursday for a month at lunch hour. Many prominent political figures joined in these demonstrations. This was not the first time that there had been public demonstrations on the topic of rape in Namibia, but it was this series of events which captured the attention of the government in a meaningful way.

Similarly, the government in general and the LRDC in particular gave law reform on domestic violence a higher priority after a particularly horrific case where a man allegedly murdered his wife, the mother of two small children, and then dismembered her body and cooked some of her body parts. This case similarly inspired a highly-visible public outcry, which -- although not the first such case or the first such demonstration -- gave significant impetus to law reforms on domestic violence.

The ability of the government to respond to particular incidents and public sentiments is praiseworthy, but the process is somewhat unpredictable since some “public outcries” seem to capture the government's attention, but not others. This makes it difficult to strategise effectively.

For example, the LAC devoted a great deal of energy to a Child Maintenance Campaign during 1998, as both a mechanism for raising public awareness and a lobbying strategy. A

new Maintenance Act has been in preparation since 1995, and was in a fairly advanced stage by 1997. There was every indication that it would be enacted in 1997 or 1998 at the latest, and the campaign aimed to advance the bill by giving information and support to local organisations which organised public demonstrations in many locations, and by keeping the topic in the public eye through televised debates, a series of television advertisements, newspaper articles and an extensive series of radio programmes in all the major Namibian languages. All of these activities were accomplished successfully, but it is now clear that this bill will not even be tabled in Parliament this year. Although we are continuing to work on this issue together with other concerned organisations, we are struggling to maintain a high public profile for this issue over such a long period.

Our response as an NGO has been to try to remain flexible. We often find ourselves temporarily shelving one research project in midstream, in order to give attention to another issue when a “window of opportunity” has unexpectedly opened. This is sometimes frustrating when it comes to planning, as well as being difficult to explain to donors.

A more accessible decision-making process

It is difficult to lobby effectively and to make strategic inputs into law reform issues because the decision-making process is not fully accessible to NGOs and members of the public. I will again explain this by means of example.

As noted above, the Law Reform and Development Commission released a draft Combating of Rape Bill for public comment. This bill had been preceded by regional and national workshops convened by the LRDC on the general topic of violence against women, but there was no discussion of specific law reforms at these forums – only a few general suggestions, such as calls for stricter sentences and restrictions on bail.

Written comments on the draft bill were submitted by only five groups and individuals (including the Legal Assistance Centre). These written comments were never made public. Refinement of the bill proceeded by an internal process, through a series of meetings with representatives of various concerned government departments and agencies. The Legal Assistance Centre was invited to these meetings, the only party from outside government, presumably because of our long history of research on the topic of rape. But the various successive drafts were confidential.

The bill which came out of this process was substantially different from the one which went into it, but the public had no access to the revised bill at this stage. After the internal committee meetings, the bill went to Cabinet and to the most influential decision-making body in the entire process -- the Cabinet Committee on Legislation. This committee consists of only three people: the Minister of Justice, the Attorney-General and one other Cabinet member who changes from time to time. When a minister is proposing a specific bill, he or she meets with the Cabinet Committee, accompanied by other invited members of government who will help to explain, motivate and comment on the bill. The proceedings are not open to the public, nor is there any public record of them. And yet this is probably the most significant decision-making forum in the entire legislative process.

This Cabinet Committee altered the Combating of Rape Bill in several important ways – with some new issues being inserted into the bill which had never been discussed in the previous public or private forums. The bill which came out of Cabinet was not available to the public until it was actually tabled in Parliament, and no one knew in advance when this would be.

The next stage of the process was a very transparent one. The Combating of Rape Bill, like other bills, was referred to a Parliamentary Committee for public hearings. These hearings were announced in the local newspapers about one week in advance, and any member of the public was free to make a written or oral submission. Shortly before the hearings were held, the LAC convened a preparatory workshop for NGOs with the goal of developing a joint strategy on the public hearings. The group attending this workshop discussed the bill section by section. The points of common agreement were recorded to form a group submission to the Parliamentary Committee, on the theory that a single strong input would be more strategic than a number of individual ones which the Committee would have to reconcile and integrate. At the subsequent public hearing in Windhoek, this group submission was in fact the *only* one presented to the Parliamentary Committee. The next step in the process will most likely be regional committee hearings.

Whilst the concept of Parliamentary hearings is a very positive one, there is a question mark over the strength of the committee influence. Up to now, it is fairly rare for bills to be amended once they reach Parliament – perhaps partly because the ruling party controls a two-thirds majority of the seats in the National Assembly. We are very eager to follow the progress of the Combating of Rape Bill; we know that the committee was persuaded on many of the points presented, and we hope that the strategy of making a single united submission from a broad range of groups will help to strengthen the committee's hand in proposing revisions to the bill.

However, what is difficult about the overall process is that the most crucial portions of it – the movement between the original draft bill and the bill which is ultimately tabled in Parliament – is so inaccessible. Once a bill is tabled, and thus available to the public once again, the time for action is short and it is more difficult to re-open genuine debate on points that are in some respects already “decided”.

More accessible information about law reform proposals

There is a huge public hunger for information about existing and proposed laws. The Legal Assistance Centre produces a great deal of educational material and runs community workshops nation-wide, but these efforts have not been sufficient to satisfy the desire for more accessible information. Furthermore, the provision of information about the law alone is not enough – there is a need for accessible background information about the issues addressed by proposed laws and for assistance in mobilising local groups for lobbying purposes.

For example, one of the most controversial draft laws to be circulated in Namibia was a new Abortion and Sterilization Act that would have allowed abortion on demand during the early stages of pregnancy. The LAC prepared a discussion document on this law which

summarised the existing legal position and the proposed law, as well as providing some comparative information on the situation in other countries and statistics on abortion in Namibia. The demand for this simple photocopied document was enormous, and we were told that it was even used as a study document in some school classes. The bill was eventually withdrawn by the Ministry of Health, on the grounds that the majority of Namibians are not in favour of a liberalised abortion law – although this conclusion was not supported by any opinion poll or sample survey. However, whether members of the public support or oppose a draft law, it is helpful if they do so on the basis of a clear and accurate understanding of the issue.

Another approach we have taken to the provision of information is to use newspaper articles. This is an avenue which we believe is useful for informing the policy-makers themselves, as well as the general public. For example, we publish a “gender scorecard” on legal developments at the end of each year. We also publish a semi-regular series of articles on topical law reform issues such as rape and domestic violence. Many of these articles have been circulated directly to policy-makers as well as appearing in the newspaper, and their brevity and accessibility has made them quite popular.

For the Combating of Rape Bill, we believe that it was very useful to bring together representatives of the NGO community and go through the bill line by line so that those who attended would in turn be able to explain the bill their own memberships and communities. Furthermore, it is probable that a number of the groups which participated actively in debating the joint submission might have been hesitant to approach the Committee individually, because they were unsure of their ability to articulate their concerns effectively or because they felt uncomfortable with the formal procedures.

We also provided the Parliamentary Committee, at their request, with a document giving extensive background on the existing legal position on rape, as well as statistics on the number of reported rapes, the ages of rape victims and the sentences imposed for rape in Namibia. We believed that this form of information-sharing helped the Committee to be more receptive to the reasoning behind our proposals for amendments.

The Legal Assistance Centre has for some time now been working together with the National Democratic Institute to prepare bill summaries for Parliamentarians for all pieces of legislation which are of significant public interest. These summaries are brief overviews which explain the key provisions of the proposed law. However, recent feedback indicates that what is really desired is far more information – a deeper background on the issues in question, a more thorough explanation of the need for law reform, and, most importantly, examples of how the proposed law would work in practice. Assembling this kind of information effectively would be a very time-consuming task, and the LAC does not presently have the human resources to undertake it.

At the moment, we are trying to spread out the responsibility for helping the public understand the law by strengthening our community education programme. We already train community volunteers who can serve as resource persons in their communities, and we make extensive use of radio. We also have pilot programmes on human rights training

in some of the schools, and we hope to prepare a series of training manuals on legal topics together with a local publisher for incorporation into the school curriculum.

The scope for expanding this kind of endeavour is huge, and must involve a broad range of organisations. The goal is to encourage more people to have the confidence to present informed opinions on law reform proposals, and to ensure that people understand their rights under the laws which are already in force. The LAC will continue to search for more innovative ways to use our own capacity effectively in this area, as well as helping to increase the capacity of other organisations to advance these objectives.

Access to a good law library

Some of the developments which would aid the law reform process in respect of gender issues are complex factors which may be impossible to achieve. But one need is a straightforward one which should be possible to realise. Our work would be immeasurably strengthened if we had access to a good international law library.

The Internet has been an absolutely invaluable tool in this regard, but it has a bias towards material from developed countries. And, in Namibia, what is often more persuasive in lobbying terms is the ability to point to comparisons from small developing countries, and particularly from other African countries.

Another difficulty is that sometimes information is needed very quickly. Sometimes specific issues come up unexpectedly, and it is difficult to provide appropriate information in time to feed into the relevant decision-making process. A recent example was an unexpected proposal from the Chairperson of the Law Reform & Development Commission about the use of mediation in domestic violence cases. It was only with the kind assistance of a lawyer based in Moscow who emailed and couriered important law review articles and persuasive statements from international experts that we were able to marshal a timely and hopefully persuasive argument against this approach.

We have tried repeatedly to make institutional connections both regionally and abroad for this purpose, but so far none of these have worked out. For example, Columbia Law School in the United States has a formal programme which is set up along the lines of a student law clinic, specifically to provide legal reference material from their well-stocked library to developing countries. We have made several requests for information to this programme but have yet to receive a single document. Efforts at linkages within Southern Africa have been similarly fruitless. The only approach which has been successful so far is to rely on a few committed individuals. For several years, we relied on the good will of a young Canadian lawyer who faxed us journal articles on request and we can point to several projects which would have been complete failures without her help. It has also been useful to utilise student interns from overseas law schools who can research a topic in advance and bring research materials with them when they come.

This problem has been a continuing source of frustration, for it is difficult to believe that it is not possible to establish a reliable institutional connection to deal with such a straightforward need.

CONCLUSION

Someone who works for Namibia's Law Reform & Development Commission once said to me, "It is not good to give the public too much information, it just confuses them." This is the kind of attitude the Legal Assistance Centre is committed to countering. We believe that it is not possible for there to be "too much information" about the law reform process – information about how the process works, information about what items are on the agenda, information about each stage of the decision-making process, information that makes law reform proposals more accessible to the public, information about how members of the public can influence the law reform process and information which enables Namibia to learn from the experience of other countries. At the moment, strengthening the flow of these various types of information is in my opinion one of the key issues on gender and governance in Namibia.

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