

GENDER AND THE LAW IN NAMIBIA: AN OVERVIEW



**Legal Assistance Centre
2007**

PART 1: THE CONSTITUTION

KEY PROVISIONS ON GENDER

Article 4: Citizenship

The rules on citizenship are the same for children born to Namibian mothers or fathers, and for men or women who marry Namibian citizens.

Article 10: Equality and Freedom from Discrimination

(1) All persons shall be equal before the law.

(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Article 14: Family

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

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 23: Affirmative Action

(2) Nothing contained in Article 10 shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defense force, and the prison service.

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

Article 66: Customary and Common Law

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

Article 95 [Promotion of the Welfare of the People]

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

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

PART 2: INTERNATIONAL CONVENTIONS

KEY INTERNATIONAL AGREEMENTS ON WOMEN AND CHILDREN

GENERAL

Universal Declaration of Human Rights

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

African Charter for Human and People's Rights

WOMEN

Convention on the Elimination of All Forms of Discrimination Against Women

Beijing Platform for Action (non-binding)

Protocol to the African Charter for Human and People's Rights on the Rights of Women in Africa

SADC Declaration on Gender and Development (non-binding)

SADC Addendum on the Prevention and Eradication of Violence against Women and Children (non-binding)

draft SADC Protocol on Gender and Development

CHILDREN

Convention on the Rights of the Child (including the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography)

African Charter on the Rights and Welfare of the Child

ILO Convention 182 on the Prohibition and Immediate Elimination of the Worst Forms of Child Labour

PART 3: LAW REFORM

(1) AFFIRMATIVE ACTION

(a) Political Sphere

Local Authorities Act 23 of 1992

This law applied affirmative action for women to local government elections, which had the effect of dramatically increasing women's presence on local councils.

Beginning in 2001, the Namibia Women's Manifesto Network spearheaded a campaign for a 50/50 Bill which would require equal representation of men and women in Local Councils, Regional Councils, the National Council and the National Assembly. This initiative has not yet been successful, but SADC has now adopted a target of 50% women.

In 2002, the Namibia Elected Women's Forum brought together women in local and regional councils with women parliamentarians for strategic planning on how to promote women's political participation. The meeting adopted the achievement of gender balance in elected positions of government as its vision and resolved to lobby for 'zebra lists' (alternating women and men on candidate lists) in the forthcoming elections.

affirmative action provisions reserving positions for women on statutory bodies & boards

There are many examples, including the Social Security Commission, Namibia Sports Commission and National Council for Higher Education. But most laws which set up bodies and boards do *not* reserve seats for women.

The practice of ensuring female representation on such bodies seems to have become *less* common in recent years.

Traditional Authorities Act 17 of 1995

Traditional authorities must "promote affirmative action amongst the members of that community", particularly "by promoting women to positions of leadership".

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Traditional Authorities Act 25 of 2000

Traditional authorities must "promote affirmative action amongst the members of that community", particularly "promoting gender equality with regard to positions of leadership"

Following a pattern which is becoming more pronounced in recent years, the specific reference to "women" was deleted in favour of a more neutral reference to "promoting gender equality with regard to positions of leadership" when the 1995 Act was replaced by the ***Traditional Authorities Act 25 of 2000***.

QUESTION FOR DISCUSSION: Do you think that it was a good idea to change the reference to women in the 1995 law to a reference to gender in the 2000 law? Why or why not?

(b) Economic Sphere

Co-operatives Act 23 of 1996

Any co-operative with a substantial number of women members must ensure that there is at least one woman on its board, as a means to increase the representation of women in management positions. The law also provides for women-only co-operatives, as a way to help women become more comfortable with business management.

Affirmative Action (Employment) Act 29 of 1998

This law attempts to improve the representation of blacks, women and disabled persons in the formal workforce by requiring employers with more than 50 employees (25 employees since 2007) to prepare affirmative action plans for increasing the presence of these designated groups.

Other law reforms in the field of labour have been aimed at removing discrimination and ensuring that women are not disadvantaged in the labour market by their role in childbearing.

Labour Act 6 of 1992

This law 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. It also provides for three months of maternity leave for any woman who has been employed for at least one year by the same employer. (The new Labour Act now under consideration is expected to provide stronger provisions on sexual harassment and maternity leave.)

These gender-related law reforms have proved to be relatively uncontroversial, in comparison with the law reforms which touch upon intersections between gender, sexuality and family life.

(2) GENDER-BASED VIOLENCE

Combating of Rape Act 8 of 2000

This is one of the most progressive laws on rape in the world.

- It contains a broad, gender-neutral definition of rape which covers a range of sexual acts committed in “coercive circumstances”
- It relies on proof of coercion rather than absence of consent, thus moving away from approach which often made the rape survivor feel as if she were the one on trial
- It sets stiff minimum sentences for rape.

Combating of Domestic Violence Act 4 of 2003.

This law provides protection against many types of domestic violence.

- It covers physical violence, sexual abuse, harassment, intimidation, economic abuse and psychological abuse
- It covers violence between husbands and wives, parents and children, boyfriends and girlfriends, and close family members.
- It provides a procedure for getting a protection order from a magistrate’s court as an alternative to laying criminal charges. (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.)

- It creates no new crimes, but classifies existing crimes between persons in a domestic relationship as “domestic violence offences”. It encourages input from victims of these offences on bail and sentencing, and gives special protection to victim’s privacy.

QUESTION FOR DISCUSSION: The issues which inspired the most heated debate in Parliamentary were (1) can there be such a thing as rape in marriage? and (2) will the domestic violence law give police the power to interfere with “bedroom affairs”? Why do you think that male MPs were particularly worried about these issues?

(3) FAMILY LAW

The earliest law reforms relating to the more 'private' spheres involved laws which contained blatant gender discrimination and would certainly have been ruled unconstitutional.

amendments to the *Income Tax Act 24 of 1981* in 1991 and 1992

These amendments removed discrimination against married women in the tax rules.

first family law reform took place at the intersection of the 'public' sphere of work and the 'private' sphere of the family

Married Persons Equality Act 1 of 1996

This law eliminated the discriminatory Roman-Dutch law concept of marital power previously applicable to civil marriages in Namibia, which placed wives in a similar position as minors, while husbands had the right to administer the property of both spouses.

- Husbands and wives married 'in community of property' must now consult each other on most major financial transactions and have identical powers and restraints.
- Husbands and wives married 'out of community of property' now have the right to deal with their separate property independently.

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 husbands and wives in civil marriages are henceforth equal in the eyes of the law. The most controversial aspect of this law reform – both inside and outside Parliament – was a provision stating that the law will no longer recognise the husband in a civil marriage as the "head of the household". In fact, debate on this point was so fierce that additional language was added to the original Bill to emphasise the fact that the removal of the legal status of men as heads of household would not interfere with a family's right to treat the male as the head of the household privately. The original Bill stated that "the common law position of the husband as head of the family is abolished". A subsequent proviso states that "nothing herein shall be construed to prevent a husband and wife from agreeing between themselves to assign to one of them, or both, any particular role or responsibility within the family." (section 3(b)).

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.

Communal Land Reform Act 5 of 2002

This law helps protect widows' rights to communal land tenure. It is the only major law reform to date in respect of customary law.

- If a husband dies, his widow has a right to remain on the land if she wishes. She is entitled to keep the land even if she re-marries.
- 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.

The law is actually worded in gender-neutral fashion, but widowers were not historically forced off the land when their wives died.

Maintenance Act 9 of 2003

This law makes the maintenance system more efficient.

- It provides for the first time for the sharing of expenses incurred during pregnancy.
- It gives clear guidelines for deciding on how much maintenance should be paid for children's basic needs
- It provides new methods of enforcement to use when maintenance orders are not obeyed.
- It makes it clear that husbands and wives, and parents and children, owe each other a duty of support "notwithstanding anything to the contrary at customary law".
- It makes it clear that other "primary caretakers" (such as grandmothers) can apply for maintenance from one or both parents.

How does the Maintenance Act relate to gender equality? Who usually take care of children in Namibia if they are not living with both of their parents? Who tends to get better jobs and better wages, men or women?

Can you guess what one of the biggest concerns was in Parliament when the Maintenance Act was debated? Fears that women would abuse maintenance money – ie male suspicion of the implications of increased gender equality. .

Children's Status Act 6 of 2006 (not yet in force in July 2007)

This law deals with the position of children born outside of marriage, and provides a simple procedure for appointing a guardian for any child whose legal custodian or guardian has died.

- rules for children born outside marriage
 - old law: Mothers had sole custody and guardianship, and fathers had no clear rights. Children could not inherit from their fathers without a written will naming them.
 - new law: Mothers and fathers must decide who will take care of the child on a daily basis. If the parents cannot agree, a court will decide. The other parent has an automatic right of access to the child. Children born outside of marriage can inherit from both parents without a will
- rules for any child where the parent or guardian dies
 - old law: Without a will, only the High Court could name a guardian, so many children were left without guardians. Some adults also wanted to care for orphans just to get control of the child's money or property.
 - new law: There is a simple, cost-free procedure for appointing guardians, and a simple procedure for complaints in cases where a child's guardian is not acting in the best interests of the child.

(4) FAMILY LAW STILL IN NEED OF REFORM

(a) CUSTOMARY MARRIAGE

There is a need to provide for the recognition of customary marriage, and to give husbands and wives equal powers during marriage. Law reform in this area must also address lobola and polygamy, both of which are likely to be controversial topics.

2007: Law Reform and Development Commission recommendations made in 2004 still under consideration by Minister of Justice.

The need to develop a system for formal legal recognition of customary marriages was emphasised by the CEDAW committee in response to Namibia's first CEDAW report presented in 1997, but this was not sufficient to move the topic forward on the political agenda.

(b) DIVORCE

There is a need for new rules and procedures for divorce in customary marriage and civil marriage.

2007: Law Reform and Development Commission recommendations made in 2004 still under consideration by Minister of Justice.

(c) MARITAL PROPERTY

There is a need to revise marital property schemes for civil and customary marriage, and to give better protection for both husbands and wives against wrongdoing by the other spouse.

2007: Law Reform and Development Commission subcommittee currently drafting bill for consideration by full Commission.

(d) INHERITANCE

There is a need to reform customary law and general law rules on inheritance which discriminate on the basis of race, sex or order of birth.

2007: Law Reform and Development Commission subcommittee in process of setting up subcommittee to propose law reforms on this topic; the only law reforms enacted so far concern procedural issues only.

THE BACKGROUND TO LAW REFORM ON INHERITANCE

Berendt v Stuurman (2003)

- Namibian statutes inherited from the colonial days apply different rules on inheritance to people of different races, depending partly on whether they are married under civil law or customary law.
- High Court ruled that these race-based rules were unconstitutional and gave Parliament a deadline to repeal the unconstitutional sections

Estates and Succession Amendment Act 15 of 2005

- Parliament passed a law intended to comply with this court order just before the deadline expired, but the law did not really change any of the rules on inheritance
- It says that the unconstitutional provisions of Namibian law are repealed, but

that *the rules contained in those laws will continue to apply to the same people as before, just as if they had not been repealed.*

- The only real change made by the law reform was to harmonise procedural issues for persons of all races, with the administrative process for handling deceased estates (estate supervised by magistrate or by the Office of the Master of the High Court) now depending on the value of the estate instead of on the race of the deceased.

“it was very political”.

(e) COHABITATION

There is a need for rules about rights and responsibilities where couples have been living together as husband and wife for significant periods of time without being formally married.

2007: Law Reform and Development Commission making plans on investigation of this topic.

This issue can be complex as one man can have a wife in a rural area and a partner whom he regularly stays with in an urban area at the same time – what rights should each woman have to share in this man's property.

(f) CHILDREN

The draft Child Care and Protection Bill is expected to give increased protection to children who are being abused or neglected in their home environment. It will also include new rules on adoption and increased protection against the exploitation of children.

2007: This Bill has been with legal drafters in the Ministry of Justice for several years now.

(g) SURNAMES

The current rules on surnames are contained in the Births, Deaths and Registration Act 81 of 1963 (as amended). In addition to being insensitive to Namibia's cultural diversity, these rules do not provide for hyphenated surnames which allow husbands and wives to share their surnames or children to combine the surnames of both their parents.

2007: A few small amendments were proposed in an early draft of the Children's Status Bill. These were removed at an early stage in discussions around this Bill, with the Ministry of Gender Equality and Child Welfare promising a more comprehensive examination of needed amendments to the law on surnames at a later stage.

(5) CONTROVERSIAL GENDER-RELATED TOPICS

(a) ABORTION

Abortion is currently legal only where the pregnancy endangers the mother's life or poses a serious threat to her physical or mental health; there is a serious risk that the child will suffer from a serious, permanent physical or mental defect; or the pregnancy results from rape or incest.

Problem: current law encourages dangerous "backstreet abortions" and infanticide and affects poor women disproportionately as women with means to travel to South Africa can get a legal, safe abortion

2006: meeting of convened by the Ministry of Gender Equality and Child Welfare recommended that the legalisation of abortion should be put on the agenda of the Cabinet for discussion again, to stop baby-dumping and backstreet abortions.

(b) COMMERCIAL SEX WORK

The *Combating of Immoral Practices Act 21 of 1980* criminalises a range of activities around prostitution without making sex for reward directly illegal. Although the laws in force could technically be used against clients as well as sex workers, only sex workers – who are predominately women – are prosecuted in practice. Municipal regulations forbidding soliciting and "loitering" are also directed against sex workers from time to time, sometimes selectively applied as a form of police harassment. A High Court judgment in the 2002 *Hendricks* case found some of the legal prohibitions on sex work to be unconstitutional, but left the essential prohibitions intact.

Problem: Studies in Namibia indicate that most sex workers enter the trade out of economic desperation. The illegality of sex work makes sex workers vulnerable to abuse by clients and police, and makes it harder to target sex workers for interventions such as HIV education and prevention efforts and training which could enable them to find other work.

2005: The National Council held hearings on sex work and suggested that that "if" sex work were legalised, this would make it easier for public health intervention to minimise the spread of HIV through sex work; after protests from the full Council, further consideration of the issue was deferred.

(c) SEXUAL ORIENTATION

The *Labour Act 6 of 1992* prohibits discrimination or harassment on the basis of sexual orientation (amongst other grounds), but this point is not contained in the current Labour Bill. The *Combating of Domestic Violence Act 4 of 2003* does not apply to violence within gay and lesbian relationships.

Problem: Gays and lesbians often suffer stigma and discrimination in Namibia because they are in a minority and because some do not approve of this kind of relationship. The fact that permanent gay and lesbian relationships have no legal status causes many practical problems.

2007: No legal changes currently on the horizon.

PART 4: COURT CASES ON GENDER

KEY NAMIBIAN COURT CASES

(1) *Müller v President of the Republic of Namibia (1999)*

The question: Is it unconstitutional to make it harder for husbands to take on their wives surnames than it is for wives to take on their husbands' surnames?

When Mr Müller married Ms Engelhard, he wanted to adopt 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's answer: No, different rules for husband and wives on name changes are constitutional.

Reasons for the decision:

- The complainant was a white male, and not a member of a prior disadvantaged group.
- The aim of the name change formalities was not to impair the dignity of males or to disadvantage them.
- The impact of the different rules was minimal since My Muller could adopt his wife's surname by a procedure involving only minor inconvenience.
- It is a “long-standing tradition” in Namibia that the wife normally assumes the surname of the husband”, and the government was not aware of any other husband in Namibia who wanted to assume the surname of his wife.

QUESTIONS FOR DISCUSSION

- Does the rule about surnames discriminate against wives in any way?
- Is it good to uphold different rules for men and women just because they are “long-standing traditions”?

The next step in the Muller case: The case was referred to the United Nations Committee which oversees the International Covenant on Civil and Political Rights.

The Committee's answer (March 2002): The different procedures for dealing with surnames *do* amount to unfair sex discrimination in terms of the International Covenant. A “long-standing tradition” is not a justification for different rules for different sexes. The Namibian government must report on what it has done to change the discriminatory rules within 90 days.

What happened in the end? Mr Müller had already changed his name to Mr Engelhard by that stage (under the laws of his home country of Germany). As of 2007, the underlying Namibian law has not yet been changed to remove the sex discrimination.

(2) *Frank v Chairperson of the Immigration Selection Board* (1999; 2001)

The question: Is it unconstitutional not to give a lesbian relationship equal status with the relationships of men and women who are legally married in an application for permanent residence of one of the partners?

Ms Frank applied for permanent residence in Namibia. In support of her application, she cited her permanent lesbian relationship with a Namibia citizen. If they had been able to marry like men and women can, then she would have been automatically entitled to Namibia citizenship.

The Supreme Court's answer: No, it is permissible to treat a lesbian relationship differently from a marriage.

Reasons for the decision:

- The Court must look to the “moral standards, established beliefs, social conditions, experiences and perceptions of the Namibian people” (Parliament, tribal authorities, political parties, news media, trade unions, churches, community-based organisations) as long as this public opinion is based on “reason and true facts”. Public opinion does not approve of the recognition of same-sex relationships in Namibia (citing statement by the President and one male Member of Parliament).
- The Namibian Constitution makes no provision for the recognition of homosexual relationships as being equivalent to marriage. “Equality before the law for each person does not mean equality before the law for each person’s sexual relationships.”
- However, the court also said nothing in its judgement “justifies discrimination against homosexuals as individuals”.

What happened in the end? The Immigration Board re-considered the application and granted permanent residence to Ms Frank on the grounds that she had skills needed in Namibia, without taking her lesbian relationship into account one way or the other.

QUESTIONS FOR DISCUSSION

- What would happen in future gender-related cases if the courts always relied on public opinion?
- Do you see any gender problems with the sources of public opinion cited by the court?

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 mutually-reinforcing dialogue between the courts and Parliament; the courts 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. In a South African case similar to the *Frank* case, the court said that it is especially important to afford constitutional protection to those who are already vulnerable because of societal stereotyping or prejudice.

(3) *Myburgh v Commercial Bank of Namibia (2000)*

The question: Is a husband's marital power over his wife unconstitutional?

The facts of the case were complicated. To simplify a bit, a bank sued Ms Myburgh for a debt which was owed, and her defence was that she could not be sued because she was married in community of property and did not have the capacity to act without her husband's assistance. She essentially argued that the bank should have sued her husband instead of her.

The Supreme Court's answer: Yes, marital power is unconstitutional sex discrimination. Marital power was invalid from the time the Constitution came into force, even before it was overruled by Parliament with the *Married Persons Equality Act 1 of 1996*.

Reasons for the decision:

- The different rules for husbands and wives are clearly unconstitutional. There is no need to consult public opinion to make a "value judgement".
- The different rules for husbands and wives are based on stereotyping which does not acknowledge "the equal worth of women". "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."
- The different rules impair the dignity of women as individuals and as a group.

What happened in the end? Because the court said that marital power was unconstitutional, Ms Myburgh could not use that argument as a defence in the case brought against her by the bank.

QUESTION FOR DISCUSSION: How can the courts tell the difference between a "stereotype" and a value judgement supported by public opinion?

FORMAL VERSUS SUBSTANTIVE EQUALITY

Formal equality = gender-blind rules which eliminate all gender distinctions

Formal equality ignores actual social and economic disparities between people and constructs standards that appear to be neutral, but this can end up giving too much weight to the status quo.

Substantive equality = looking at laws in their social context – which has been shaped by former race, sex and class inequalities – to see what approach will best advance meaningful equality.

Substantive equality says that you must examine the actual economic and social and political conditions of groups and individuals and decide what sort of approach will advance meaningful equality.

This is why we have affirmative action in employment. Parliament agrees that simply “leveling the playing field” by removing discrimination in access to jobs and economic opportunities is not sufficient to remove past imbalances.

The *Hugo* case and the *Fraser* case from South Africa also illustrate situations where substantive equality is involved.

(1) *President of the Republic of South Africa v Hugo (South Africa-1997)*

The question: Is it unconstitutional to provide a blanket pardon to mothers with children under age 12 but not to fathers with children under age 12?

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.

The Constitutional Court’s answer: No, different rules for pardons for mothers and fathers are permissible because the circumstances of mothers and fathers are different in South African society.

Reasons for the decision:

- Male prisoners outnumber female prisoners almost fifty-fold, so it was not practical to release all parents of children under age 12. That might have produced a public outcry.
- Because fathers generally 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.
- The President’s pardon did not restrict the rights of any fathers permanently. Any father could have made an individual application to the President for early release on the basis of his personal circumstances.
- Ideally, social responsibilities for child rearing would be more fairly shared between fathers and mothers. However, the social fact is that at present mothers carry greater burdens than fathers in the rearing of children, and it is permissible to take this social reality into account.

One justice disagreed, for these reasons:

- 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.
- Focusing on women as the primary care-givers for children relegates them to a subservient and inferior role and may discourage men from becoming more involved with their children.
- Treating mothers and fathers differently for purposes of the pardon reinforces existing “gender scripts”.

(2) *Fraser v Children’s Court, Pretoria North and Others* (South Africa-1997)

The question: Is it unconstitutional to have a law saying that married mothers and fathers must both give consent to put their child up for adoption, but only the mother’s consent is required in cases where the parents of the child were never married?

The Constitutional Court’s answer: Yes. A rule that denies consent to all unmarried fathers violates the Constitution, BUT a blanket rule which treats all parents equally would not be a good solution.

What would be a good approach? The court said that a better law might have to consider factors like the duration and the stability of the relationship between the parents, the age of the child, the relationship between each parent and the child, the reasons why the relationship between the parents was not formalised by marriage and the best interests of the child.

“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 support to the child to be adopted?”

QUESTION FOR DISCUSSION

Some people have suggested that Namibia’s Woman and Child Protection Units should be re-named because the current name excludes men, who can also be the victims of rape and domestic violence. Give some arguments for and against re-naming the units.

CONCLUSION: NO “ONE-SIZE-FITS-ALL”

There is no single approach which can be used to produce equality between men and women.

It is not always enough to remove gender discrimination or to make sure that all laws treat men and women equally. It is often necessary to take existing conditions as a starting point and then use creative approaches to promote more meaningful equality. You must consider the circumstances of each situation.