

DISCUSSION PAPER NO. 19

**GENDER EQUALITY IN EMPLOYMENT:
THE LEGAL FRAMEWORK IN THE CASE
OF ZIMBABWE**

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FOREWORD

Founded as part of the Versailles Peace Treaty in 1919, the International Labour Organization (ILO) is the oldest member and the first specialized agency of United Nations (UN) family of organizations. The mandate of the ILO is the promotion of safe and decent work for women and men, in conditions of freedom, equity, security and human dignity, in all countries of the world. Unlike other specialised UN agencies, the ILO is a tripartite organization, and each country is represented not only by its government but also by representatives of workers' and employers' organizations. Similarly, ILO services are provided to trade unions and employers' associations as well as to governments.

In the global economy, the fulfilment of the ILO's mandate requires new and innovative approaches. To better equip the organization to pursue its mandate in the new millennium, the ILO has set itself four strategic objectives. These are:

- ❖ promoting and realising fundamental principles and rights at work;
- ❖ creating greater opportunities for women and men to secure decent employment and income;
- ❖ enhancing the coverage and effectiveness of social protection for all; and
- ❖ strengthening tripartism and social dialogue.

These objectives are the focus of ILO activities and provide complementary and mutually reinforcing approaches to ensuring decent work for women and men. Respect for fundamental principles and rights is a precondition for the construction of a socially legitimate labour market; social dialogue the means by which workers, employers and their representatives engage in debate and interchange on the means to achieve this. Employment creation is the essential instrument for raising living standards and widening access to incomes, while social protection provides the means to achieve income security and security of the working environment.

The primary goal of the ILO, therefore, is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity. This is a complex goal considering the diversity of forms of work. The fundamental principle is that all those who work, both women and men, have rights at work. This takes into account workers in formal enterprises, and those who are self-employed, casual and informal workers, the hidden, predominantly female workers of the care economy or of the domestic scene. The ILO Declaration on Fundamental Principles and Rights at Work captures vital dimensions of the vision freedom, equity, security and dignity through the principles contained in international standards on: freedom of association, non-discrimination and forced and child labour. Beyond these fundamental rights there are other concerns, such as the safety of the working environment, the duration and intensity of work, the possibilities for personal fulfilment, protection against contingencies and uncertainties. Then, work should be productive, if it is to provide a decent income. And above all, work should be available to those who want and need it.

Gender cuts across all spheres of society: economic, social, political and cultural. It follows therefore, that strategies to promote full and equal participation of women and men require a holistic approach. In this regard, gender perspectives cut across all of the strategic objectives of the ILO with the broad goal being the attainment of gender equality. In line with its international mandate to bring about social justice in the world, the ILO has a role to play as catalyst and advocate of the link between economic efficiency and social justice. Gender equality is a matter of human rights, social justice, economic efficiency and sustainable development.

Pursuing the decent work strategy means bringing together different instruments - legal, economic and institutional. This review of Zimbabwe laws for gender equality is concerned mainly with the legal framework within which women and men work and contribute to their development as well as that of their communities and societies. The review was undertaken in the hope to influence the design of policies to encompass the needs and roles of both women and men, taking into account how gender inequality is built into the functioning of the labour market.

The study is based on reviews of the Laws of Zimbabwe and extensive interviews with ILO Social Partners namely Government, Employers and Workers' Organizations. The study was commissioned by the ILO within the context of the ILO/Government of Zimbabwe project on **Promoting Employment with gender Equality in Zimbabwe**. The findings of the study were a subject of a workshop with Parliamentarians (1999) and most of these findings were endorsed by them and it was recommended that they be pursued as soon as was possible.

The content of this Working Paper Series was prepared by Dr. Lovemore Madhuku, a Consultant who is also a Lecturer in Law at the University of Zimbabwe as well as an Industrial Relations Consultant with the Friedrich Ebert Foundation. Mrs Judica Amri-Makhetha, Senior Gender Specialist in SAMAT edited the manuscript and technical contributions were also made by Antje Berger, Associate Expert in International Labour Standards at SAMAT. Mrs Maria Mutandwa the SAMAT Documentalist applied her usual eye for detail. Thanks are due to Gloria Sitotombe for typing and layout of the document.

I would like to convey a very special word of thank you to the Gender Bureau. This publication would not have been possible without the support of the Gender Bureau of the ILO Geneva. Ms. Jane Zhang the Director of the Gender Bureau has supported the publication of this Working Paper from a technical point of view as well as funding it.

It is my sincere hope that the findings and recommendations of this study will be an added value in the debate on gender-based discrimination and contribute to the promotion of gender equality in Zimbabwe and beyond.

Ullrich Flechsenhar
Director
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CHAPTER 1

EXECUTIVE SUMMARY

1.1 INTRODUCTION

Zimbabwean law does not, as a general rule, expressly discriminate against women in the field of employment. However, on close examination and in the process of implementation (practice), the various laws have a number of aspects which disadvantage women. It is such aspects of the law which are the subject of this analysis.

From a historical perspective, the colonial era saw women alongside black people, being heavily oppressed without consideration for racial or gender equality in employment before independence in 1980. In alluding to historical factors, the report demonstrates that gender equality is a post-independence concern.

The report examines the content of various pieces of legislation as they address issues of prohibition of gender discrimination; protective laws for women; sexual harassment; maternity protection as well as discrimination on the basis of HIV/AIDS. The report further analyses Zimbabwe's position regarding international conventions on gender as well as social attitudes to gender equality. The report ends by drawing conclusions and making important recommendations for legislative improvement.

1.2 ANALYSIS OF LEGISLATION

The report analyses Section 23 of the **Constitution of Zimbabwe**, which makes the provision for equality and concludes that the Section is inadequate because it provides for various exceptions, which permit discrimination against women. The report proceeds to suggest the recasting of Section 23 to provide for full gender equality.

Some aspects of the **Labour Relations Act (Chapter 28:01)** are relevant to gender equality. For example Section 5 of the Act prohibits gender discrimination with regard to access to employment and various other aspects in a very comprehensive manner. It makes discrimination on the basis of sex unlawful per se. However, in addition to not making it easy for the victim to prove discrimination, the Section lacks specificity regarding problems faced by prospective employees, such as being asked irrelevant questions relating to future pregnancy plans. The report analyses the Act as well as the enforcement mechanisms which are not sensitive enough to gender issues.

Moreover, recent regulations under the Labour Relations Act prohibit discrimination on the basis of HIV/AIDS. This regulation counters the gender discrimination inherent in HIV/AIDS related discrimination and therefore enhances gender equality. The report also concludes that domestic workers who are mostly women in the case of Zimbabwe, suffer inferior working conditions which are sanctioned by law and this constitutes a form of gender discrimination.

Protective Laws for women is a controversial subject as it has been seen to hamper the rights of women to choose occupations. Such laws are becoming subject to review even at international

level. In Zimbabwe, there is no provision in the Labour Relations Act expressly protecting women in respect of certain types of work or working conditions. However, section 17 (3) gives the Minister of Labour the power to make such regulations.

There is no provision for sexual harassment in the current Labour Relations Act. Sexual harassment is a form of discrimination against women and the manner in which it is being dealt with through codes of conduct is inconsistent and largely inadequate. The suggested reforms on this aspect incorporated in the Harmonized Labour Bill are also inadequate. The report propagates a systematic approach in addressing sexual harassment at the work place.

In section 18, the Labour Relations Act provides for paid maternity leave although the payment does not amount to a full salary. Maternity leave salary is paid by the employer and this is a potential source of hidden discrimination against women. It is important therefore that the social security scheme covers costs for maternity leave.

Other legislation critically analyzed by the report include: Export Processing Zones (EPZ) Act (Chapter 14:07); Public Service Act (Chapter 16:04); Manpower Planning and Development Act (Chapter 28:02); National Social Security Authority Act (Chapter 17:04) Pension and Provident Funds Act (Chapter 24:09)

While the EPZs (with a substantial number of women employees) have lost the opportunity to benefit from the non-discrimination provisions of the Labour Relations Act, since that Act does not apply to EPZs, the Public Service Act (Chapter 16:04) (the main enabling legislation for labour law for government employment) has some discriminatory aspects regarding maternity leave and sexual harassment. The Manpower Planning and Development Act (Chapter 28:02) which regulates the training of apprentices and the certification of skilled workers, has no provision for promoting access of women to this form of training thereby leading to inequalities in access to employment. The National Social Security Authority Act (Chapter 17:04) is the enabling legislation for two social security schemes: "Pension scheme" and "worker compensation scheme." The two schemes are only discriminating to the extent that they exclude domestic workers and casual workers, many of whom may be women. Finally the Pension and Provident Funds Act (Chapter 24:09) is the enabling legislation for the setting up of private pension schemes. The only gender issue is the concept of "continuous service" which may exclude part-time workers most of whom are women.

Zimbabwe has an impressive record regarding international conventions on gender. By June 2002 Zimbabwe had ratified 20 ILO Conventions including the two core Convention on non-discrimination. Zimbabwe is also signatory to (UN Convention on the Elimination of All Forms of Discrimination Against Women) CEDAW.

The report concludes that legislative reform alone would not be able to achieve equality between men and women in the world of work and that social attitudes have and continue to, play a big role in determining equality. In-built cultural and social prejudices and the historical disadvantages suffered by women are chiefly responsible for the disparities in employment between men and women. It is these aspects which have to be faced through law and other means if gender equality is to be achieved.

1.3 CONCLUSIONS AND RECOMMENDATIONS

In addition to proposing amendments for various legislation to bring them in line with gender equality in employment, Affirmative Action and Employment Equity Legislation are recommended. In this regard, comparative legislation from Uganda, Namibia, Malawi and South Africa is examined alongside the recommendations.

Detailed recommendations are also made regarding sexual harassment. In particular it is proposed that the definition of sexual harassment should be reflected more clearly in the labour relations Act.

Conclusions and recommendations are produced in summary form and appear at the end of the report.

CHAPTER 2

INTRODUCTION

An examination of Zimbabwean law on the subject of gender discrimination in employment shows three critical features. On the face of it, the law does not directly discriminate against women. However, closer examination reveals that the law does not adequately provide for gender equality. Moreover, traditional and social practices and attitudes contribute largely to discrimination against women in employment.

Concerning non-direct discriminatory law mentioned above, it is instructive to note that notwithstanding ratification of the ILO Convention on Employment of Women in Underground Work in Mines of all Kinds, 1935 (Convention No. 45) in 1980, no protective legislation to that effect has been enacted in Zimbabwe. Similarly, there is no legislation regulating night work by women nor is there any legislation directly prohibiting women from access to certain forms of employment. Accordingly, the issues in Zimbabwe are reduced to an examination of the adequacy of the existing laws which imply both gender-neutrality and anti-discrimination.

2.1 HISTORICAL POSITION OF WOMEN UNDER ZIMBABWE'S LABOUR LEGISLATION

The position of women before independence was intricately linked to the colonial oppression of black people in general and women in particular. Legislation explicitly discriminated against women in the field of employment. The governing legislation on individual employment was the Master and Servants Act (Chapter 268), which came into force on 29 November 1901. The legislation did not have any anti-discrimination provision and therefore left it to the common law which allows discrimination on the grounds of sex.

Under the Act, a married woman could not validly enter into a contract of employment without the consent of her husband. Section 16 of the Act provided that:

“All contracts of service stipulating for the service of a married woman shall be made and executed by her as well as by her husband, except where she is living apart from her husband, in which case her signature or consent alone shall suffice.”

The powers of the husband were so compelling that on marriage, a husband could terminate the contract of employment. This was provided for in section 28 of the Act in the following words:

“If any female servant marries during the contract of service, her husband may at any time subsequent to the marriage and by giving seven day's notice to the master, dissolve the contract and remove his wife from her master's service...”

The Master and Servants Act remained the law until after independence when it was repealed by the Employment Act 1980, (Act NO. 13 of 1980). However, this Act did not contain any anti-discrimination provisions. Instead, it only contemplated what it termed “special conditions” for female employees by giving the Minister the power to make regulations relating to employment including any regulations providing for:

“Special conditions for female and juvenile employees including prohibition of the employment of persons below a specified age.”¹

The legislation merely contemplated protective legislation for women, such as prohibiting them from night work or underground work and there was no question of promotion of gender equality in employment. The only discrimination on the grounds of gender, which was expressly prohibited, was in respect of payment of wages and this was contained in section 8 of the Minimum Wages Act, 1980 (Act No. 4 1980). Section 8 (i) provided as follows:

“Notwithstanding the provisions of any contract or of any agreement, determination or regulation made in terms of any enactment relating to the employment of an employee, no employer shall discriminate in the payment of wages to an employee on the grounds of race, sex or age and every such contract, agreement, determination or regulation which provides to the contrary shall, to such extent, be of no force or effect.”

It was only through the Labour Relations Act, 1985 that gender discrimination in employment was comprehensively prohibited.

A significant feature of all legislation before 1985 was the non-provision for maternity protection. Absence of maternity leave protection meant that women had to rely on the individual contract of employment (sometimes supplemented by a collective bargaining agreement). Inevitably, a female employee could be dismissed on account of pregnancy or be given the option to go on unpaid maternity leave. It was not uncommon for a female employee to lose seniority rights as a result of pregnancy. In the Public Service, maternity leave was introduced in 1986 with statutory instrument 347 of 1986.

Gender equality law in the field of employment is therefore a recent phenomenon in Zimbabwe.

¹ See section 5 (3) of the Employment Act, 1980.

CHAPTER 3

ANALYSIS OF LEGISLATION ON GENDER EQUALITY AND EMPLOYMENT

3.1 BACKGROUND

The Study analyzes several pieces of legislation in relation to equality of women and men in employment. These include the Constitution of Zimbabwe, Labour Relations Act; Export Processing Zones (EPZ) Act; Public Service Act; Manpower Planning and Development Act; and Pension and Provident Fund Act. The Study also examines the international obligations of Zimbabwe as dictated by various instruments including ILO Conventions ratified by Zimbabwe. The Study looks beyond the law and acknowledges the role played by social and cultural norms.

The Constitution of Zimbabwe is the supreme law of the land. In terms of section 3 thereof, any law inconsistent with the constitution is void to the extent of the inconsistency.

The Labour Relations Act is the principal piece of legislation on employment law for all workers outside the public service. Public service workers are governed by separate legislation which is examined below. The Act was originally passed as Act No. 16 of 1985 and has been substantially amended only once².

It should be noted that unlike in a number of other countries, the Act deals with both collective labour law (i.e labour relations strictly so called) and individual employment law. Its title “Labour Relations Act” could therefore be misleading.

From a historical perspective, the Labour Relations Act (Chapter 28:01) is the first comprehensive piece of legislation covering the majority of workers in Zimbabwe. In colonial times, the Master and Servants Act³ was the dominant piece of legislation and concepts such as gender equality were alien to it. This was immediately repealed after independence by the Employment Act 1980 (Act No. 13 of 1980). However, this latter Act did not introduce any anti-discrimination provisions. The current Act has introduced anti-discrimination provisions.

The Export Processing Zones Act was passed at the end of 1994 as part of government’s efforts to attract foreign investment. The Act forms part of intended “incentives” for foreign investment. As will be shown in the study report, the EPZ Act ran contrary to the Labour Relations Act.

Zimbabwe still makes a distinction between government employees and those outside government employment. The latter are governed by the Labour Relations Act whose relevant provisions have

² The amendments were effected in 1992 by the Labour Relations Amendment Act, 1992 (Act No. 12 of 1992). However, there were some inconsequential amendments made by section 19 of the General Laws Amendment Act, No. 20 of 1994.

³ Chapter 268 and was passed in 1902.

already been noted. Government workers are currently governed by the Constitution of Zimbabwe and the Public Service Act (chapter 16:04). The relevant provisions of the Constitution have already been noted. The Public Service Act does not itself set out terms and conditions of service. It sets out the mechanism through which these conditions are established. Conditions of service, including conditions of access to employment in the public service are set by the Public Service Commission.

The purpose of the Manpower Planning and Development Act is to inter alia regulate the training of apprentices and the certification of skilled workers. The Act regulates access to certain forms of employment which are designated as requiring certain skills. In terms of section 32 of the Act, the Minister may declare any trade to be a “designated trade”. Once such a declaration has been made, it allows the Minister to prescribe the requisite apprenticeship training for jobs in the trade. The importance of the Minister’s prescriptions is underscored by section 33 which provides as follows;-

Subject to subsection (2), where trade has been designated in terms of section thirty-two as one that requires apprenticeship training or skilled worker certification, no employer shall employ a person in that designated trade, and no person shall work in that designated trade, unless that person-

Is the holder of a certificate of apprenticeship or a certified of skilled worker qualification in the designated trade; or

Is indentured in terms of this Act as an apprentice in the designated trade; or

Is undergoing a form of technical training approved in terms of this Act.

The **National Social Security Authority Act** is the enabling legislation for two important social security schemes, namely the “Pension Scheme,” and the “Workers Compensation Scheme.” The gender discrimination dimensions of this legislation arise from the coverage of the schemes. The pension scheme does not apply to domestic workers, most of whom are women. The “workers compensation scheme” does not apply to “casual employees”. Although it cannot be said that the majority of “casual employees” are women, it is clear, however, that a substantial component of casual workers are women.

The **Pension and Provident Funds Act** is the enabling legislation for the setting up of private pension schemes. The Act is supplemented by the Pension and Provident Funds Regulations, 1991 (SI 323/91).

3.2 ANTI-DISCRIMINATION PROVISIONS IN LEGISLATION

3.2.1 THE CONSTITUTION OF ZIMBABWE

When the Constitution of Zimbabwe came into force in 1980 it did not outlaw discrimination on the basis of sex or gender. The Constitutional amendment (Act No. 14 of 1996), which eventually included gender in section 23 of the Constitution provided in part as follows:

Subject to the provisions of this section-

- (a) no law shall make any provision that is discriminatory either of itself or in its effect; and*
- (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.*

For the purpose of subsection (1), a law shall be regarded as making a provision that is discriminatory and a discriminatory manner if, as a result of that law or treatment, person of a particular description by race, tribe, place of origin, political opinions, colour or creed are prejudice-

- (a) by being subject to a condition, restriction or disability to which other persons of another such description are not made subject; or
- (b) by the according to persons of another such description of a privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour or creed of the persons concerned.

It is clear that gender was missing as a discriminatory ground and this was a cause of discomfort for a long time. In 1996, through the Constitutional amendment No. 14 (No. 14) gender was added as a ground for discrimination. However, a number of points need to be made about this constitutional provision. The Constitution creates exceptions to the provision on discrimination. First, a law shall not be held to be discriminatory, even on the grounds of gender, if it relates to inter alia

- (a) adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
- (b) the application of African customary law in any case involving Africans or an African and one or more persons who are not Africans such persons have consented to the application of African customary law in that case.

Although this exception does not relate to the area of employment, it has legally sanctioned gender discrimination under customary law in ways that perpetuate negative attitudes towards women. Such negative attitudes permeate invisibly into the employment field. The argument is that as long as the Constitution allows gender discrimination in one sphere of life, such as customary law, it promotes the perception of women's inferiority and creates a psychological basis for their discrimination in employment, albeit in a hidden form. The way in which customary law has developed since 1982 is instructive. In 1982, government passed the Legal Age of Majority Act (Act No. 15 of 1982) which accorded majority status to all persons on reaching the age of 18 years and specifically provided that it applied to customary law as well. The Supreme Court immediately took an activist approach in solidifying gender equality in personal law by outlawing some of the oppressive aspects of customary law. In a case called *Katekwe v Muchabaiwa*⁴ the Supreme Court held that the father of an African female who had reached the age of majority, no longer had the right to sue for seduction damages in respect of that daughter. It was up to the daughter herself to sue or not to sue. In 1987, in a case called *Chihowa v Mangwende*,⁵ the court went further to liberate women from the fetters of customary law by holding that a female child can be appointed an intestate heiress of her father's estate under customary law. However, this trend was short lived. In 1990, in case *Vareta v Vareta*,⁶ the Supreme court qualified its position in *Chihowa v Mangwende* and held that the right of a female child to be appointed intestate heiress of her father's estate does not exist where there is a male child, even where the latter is younger than his sister. This was because the male child was the "preferred and natural choice" of customary law. This position was recently endorsed in the controversial Supreme Court case of *Magaya v Magaya*⁷ where the court went further to hold that its previous decisions in *Katekwe v Muchabaiwa* and *Chihowa v Mangwende* were wrongly decided. A striking feature of the reasoning in this latest decision is the use of the Constitution to defend the inferiority of women under customary law. Muचेchete JA had this to say:

⁴ 1984 (2) Zimbabwe Law Reports 112.

⁵ 1987 (1) Zimbabwe Law Reports 228.

⁶ SC-126-90.

⁷ SC-210-98.

“However, it seems to me that these provisions [section 23 (1) of the Constitution] do not forbid discrimination based on sex. But even if they did on account of Zimbabwe’s adherence to gender equality enshrined in international human rights instruments, there are exceptions to the provisions. The relevant exceptions are contained in sub sections (3) (a) and 3 (b) of section 23 of the constitution. In my understanding of the above provisions, matters involving succession are exempted from the discrimination provisions, firstly because they relate to “devolution of property on death or other matters of personal law,” and secondly in this case because they relate to customary law being applied between Africans. The application of customary law generally is sanctioned under section 89 of the Constitution.”⁸

It is submitted that the perpetuation of the concept of the inferiority of women under customary law, which is sanctioned by the Constitution, promotes a cultural attitude against gender equality which has the effect of providing a psychological excuse for gender discrimination in employment.

There is a second exception in the Constitution which is directly related to employment. Section 23 (3) (c) provides that a law shall not be regarded as discriminatory if it provides for restrictions on entry into or employment in Zimbabwe by persons who are neither citizens nor non-residents.

Although there is no legislation specifically discriminating against women in the field of employment on the basis that they are non-citizens, it is important that attention be drawn to the existence of such a legal provision which can be used in that manner. A more fundamental point to make on this provision is the indirect discrimination it may pose on women citizens of Zimbabwe who marry non- Zimbabweans. If a law is passed to discriminate against non-citizens as regards access to employment, it may have the effect of forcing foreign husbands to leave Zimbabwe, thereby forcing their wives to leave the country as well. This form of discrimination becomes clear when one considers the reasoning of Supreme Court in *Rattigan & Others v Chief Immigration Officer*⁹. In that case, the Supreme Court held that refusing to grant a foreign husband the right to reside in Zimbabwe amounts to denying the citizen wife the right to reside in Zimbabwe contrary to section 22 of the Constitution of Zimbabwe. The following extracts from the judgment make the point clearer:

“The case made by the wives is that the refusal of the Chief Immigration Officer to issue a residence permit to each husband in terms of s 17 (1) (a) of the Immigration Regulations 1979 (RGN 373/79), or an alien’s permit pursuant to s 38 (1) thereof, and the consequent requirement that they leave the country circumscribe their fundamental and unqualified right as citizens to freedom of movement. If the husbands are compelled to depart (an actuality in respect of Mr Rattigan) the right of the wives to reside in Zimbabwe is directly affected. In essence, the freedom of movement of the wives is determined by what happens to their husbands, for in order to secure and maintain the marital relationship they would have to accompany them... Marriage is a juristic act sui generis. It gives rise to a physical, moral and spiritual community of life – a consortium omnis vitae. It obliges the husband and wife to live together for life (more realistically, for as long as the marriage endures) and to confer sexual privileges exclusively upon each other. Conjugal love embraces three components: (i) eros (passion); (ii) philia (companionship); and (iii) agape (self-governing brotherly love)... The duties of cohabitation, loyalty, fidelity, and mutual assistance and support, flow from the marital relationship. To live together as spouses in community of life, to afford each other marital privileges and to be ever faithful, are the inherent commands which lie at the very heart of marriage... I reach the conclusion that to prohibit the husbands from residing in Zimbabwe and so disable them from living with their wives in the country of which they are citizens and to which they owe allegiance, is in effect to undermine and devalue the protection of freedom of movement accorded to each of the wives as a member of a family unit”.

⁸ See page 5-6- of the judgment.

⁹ 1994 (2) Zimbabwe Law Reports 54.

A third exception to discrimination was inserted by the Constitutional amendment No. 14 of 1996 and this exception only relates to gender discrimination. Section 23 (5) provides as follows:

“Nothing contained in or done under the authority of any law that discriminates between persons on the ground of their gender shall be held to be in contravention of subsection (1) (a) or (b) to the extent that the law in question-

(a) gives effect to section 7 (2) or any other provision of this Constitution; or

(b) takes due account of physiological differences between persons of different gender; or

(c) make provisions in the interests of defence, public safety or public morality;

except in so far as that law or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”

The problem with this provision is that paragraphs (b) and (c) are vague and would justify the passing of law that is discriminatory against women on spurious grounds. For instance, prohibition of women from underground work and night work can easily be defended either on the basis of “physiological differences” or being in the interests of “public morality”. Such vague provisions should be avoided to remove avenues through which discriminatory laws may be enacted.

3.2.2 LABOUR RELATIONS ACT (CHAPTER 28:01)

Section 5 of the Labour Relations Act seeks to comprehensively deal with the question of gender discrimination in employment. It prohibits an employer from discriminating, inter alia on the grounds of sex in relation to: -

- ❖ Advertisement for employment
- ❖ Recruitment for employment
- ❖ Creation or abolition of jobs or posts
- ❖ Determination or allocation of wages or other benefits
- ❖ Selection of persons for jobs, training, transfer or promotion
- ❖ Provisions of facilities related to or concerned with employment
- ❖ Any other matter related to employment

The last aspect, “any other matter related to employment” was clearly added *ex-abundanti cautella* (out of abundance of caution) to cover any other aspects which may fall out of the coverage of those listed. It is, however, difficult to conceive of any aspects which are not covered by the above wide list. It should also be noted that the section does not apply only to existing employees of the employer, but also covers “prospective employees” hence the prohibitions relating to recruitment for employment and selection of persons for jobs.

The prohibitions do not apply to employers only, but extend in section 5 (2) to any other person engaged in the recruitment of employees. This covers employment agencies and human resources consultants. In specific terms, section 5 (2) prohibits discrimination inter-alia, on the grounds of sex in relation to: -

- ❖ Advertising for employment
- ❖ Recruitment of persons
- ❖ Introduction of prospective employees for jobs or posts

To ensure that the above provisions are adhered to, the Act creates two forms of remedies which are intended to be ways of enforcement of the provisions. First, discrimination by the employer or person targeted by section 5 (2) is made a criminal offence for which one may be liable to a fine of up to Z\$2 000 (approximately USD36¹⁰) or to imprisonment for up to 1 (one) year or to both a fine and imprisonment. Secondly it provides for civil remedies. As against an employer, the victim of the discrimination is entitled to be awarded damages for any loss caused directly or indirectly by the discrimination and / or an order of specific performance directing the employer to employ, promote, or select for training, as the case may be.

As against employment agencies and other persons in that category, the victim of the discrimination is entitled to be awarded damages for any loss arising from the discrimination and/or an order for redress of the contravention.

Another provision worth noting is section 5 (8) where the Act refuses to accept as defences, inter alia any of the following; -

- ❖ That in any event, the employee would not have been taken into employment for another lawful reason
- ❖ The employee has already left employment
- ❖ The employee has subsequently been taken into employment
- ❖ It was in the business interest of the employer to discriminate
- ❖ The main basis of section 5 (8) is that discrimination on the basis of gender is unlawful and unacceptable and defences of the nature outlined should not be allowed to stand in the way of gender equality.

This broad outline of the anti-discrimination provisions of the Act shows clearly that the intention of the legislature was to outlaw every conceivable form of discrimination. It is easy to say why as early as 1985 such a broad sweep against gender discrimination in employment could be achieved in Zimbabwe. The 1985 Act was a post-independence attack on racial discrimination in employment. Section 5 of the Act prohibits discrimination on the basis of inter alia, race, tribe, political origin and sex.

Sex is merely one of the (many) prohibited grounds of discrimination. In view of the post-independence push for black advancement, it is clearly conceivable that the legislature's main target was racial discrimination and this accounts for most of the strong points in Zimbabwe's gender law on employment.

There are a number of problems arising from the above position of the law, which tend to undermine any claim of it being effective as a gender equality law. First, the test for discrimination makes it difficult for a victim to prove it successfully. The test is contained in section 5 (6) which provides as follows:

For the purposes of this section, a person shall be deemed to have discriminated if his act or omission causes or is likely to cause persons of a particular race, tribe, place of origin, political opinion, colour, creed or sex to be treated (a) less favourably; or (b) more favourably than persons of another race, tribe, place of origin, political opinion, colour, creed or sex, unless it is shown that such act or omission was not attributable wholly or mainly to the race, tribe, place of origin, political opinion, colour, creed or sex of the persons concerned.

¹⁰ At the rate of Z\$55 to USD1 (Nov 2001)

The main defect of this provision is that to prove discrimination, it is essential that comparison be made with a male equivalent in order to show that there has been “less favourable” treatment. This is most unsatisfactory. For instance, where an employer makes a choice between two female employees on the basis that one is of child bearing age (and therefore unsuitable) while the other is not (and therefore suitable) a charge of sex discrimination may be difficult to sustain. In any event, it has been adequately demonstrated by a number of writers that a test for discrimination based on the “male equivalent” is unsatisfactory.

There is another problematic aspect of the above provision. It is a defence to a charge of discrimination to show that the act complained of “was not attributable wholly or mainly to the sex of the persons concerned.” The legal impact of this is not in doubt: some element of discrimination is acceptable as long as it was not the main reason for a particular decision. This allows the following reasoning: “Well, I would not like to employ this woman. In any event, she is less qualified for the job than her male competitor, so she loses and the man gets it.”

It is difficult to understand why this defence was incorporated. In principle, the only defence to a charge of discrimination should be that there was no discrimination at all. In other words, that the element of sex was not one of the features, no matter how minor, which influenced the making of a particular decision. In any event, the inclusion of the defence serves to undermine the effectiveness of the provision of the law and should be discarded.

The second problem arising from the gender equality law as enshrined in the Act is the lack of specificity in relation to some of the more common manifestations of discrimination in the recruitment of employees. One common problem relates to questions posed to prospective employees relating to future plans regarding pregnancy or flexibility as regards transfers or working away from home. Such questions obviously impact negatively on women should the employer be concerned about such aspects as maternity leave or inflexibility arising from family commitments. There is much to be said for the approach where the law specifically prohibits employers from extracting certain personal details from employees which tend to disadvantage women. This lack of clarity on such issues has been acknowledged by the policy makers in the Ministry of Labour and in the proposed amendments to the Act contained in the Labour Relations Amendment Bill, (H.B. 19, 2001)

“add pregnancy and gender, next to HIV/AIDS status and disability, to the prohibited grounds of discrimination (Clause 7)”.

This addition would enhance the current anti- discrimination provision in the Act, by making it clear that any discrimination based on pregnancy is contrary to the spirit of the Act.

Thirdly, the Act should define “prospective employee” so as to make it clear that it goes beyond persons who are being interviewed for a job. Although the courts have not yet had occasion to consider who is a “prospective employee,” it is conceivable that the courts can limit the concept to that group of persons who have either been short-listed for a job or have applied for it. A person who has not applied for a job because he/she has failed to meet the requirements as communicated to him/ her may be held not to be a “prospective employee.” Such a result would be unsatisfactory as persons should be able to challenge the very initial step of setting up requirements for a job which are already discriminatory.

The fourth issue concerns the enforcement institutions which are not designed with special sensitivity to women’s issues. In terms of section 5 (4) and 5 (5), a complainant is required to make her claim under Part XII of the Act. Part XII deals with labour dispute settlement in general and provides that

a dispute be referred to a labour relations officer for resolution.¹¹ The labour officer is, in turn, given a wide discretion on what to do with the complaint. He/she may (i) conciliate or mediate or (ii) with the agreement of the parties, refer it to arbitration or (iii) give a binding determination. However, this discretion of the labour officer is limited where the Minister directs a particular way of resolution of the dispute, in which event, the labour officer is obliged to resort to the method directed by the Minister.¹²

It can hardly be disputed that referring gender equality disputes, particularly charges of sex discrimination to an official who is heavily involved in other labour disputes, leads to the inevitable result of such matters not being accorded the speciality and seriousness that they deserve. Moreover, given that the majority of labour officers are male, the system easily lends itself to solutions dictated by the prejudices of a male dominated society.

Furthermore, there are other features which show the unsuitability of dealing with such matters under Part XII of the Act. The labour officer has up to twelve months to resolve the dispute¹³, a time frame which will make it almost impossible to have a remedy such as ordering specific performance. In addition, decisions of the labour officer are subject to appeal to a senior labour officer and thereafter to the Labour Relations Tribunal and the Supreme Court. The backlog of cases in the Labour Relations Tribunal is a notorious feature of Zimbabwe's labour relations system. This means that a speedy resolution of gender discrimination complaints is out of the question and the effect of this is to discourage complainants from either launching complaints or pursuing them once an appeal has been made. The foregoing should make it self-evident that a special dispute resolution system should be created for gender discrimination issues.

On the fifth account, the Act does not shed light on the quantum of damages to be awarded for gender discrimination. What is the appropriate measure of damages? Sections 5 (4) and 5(5) simply provide for "damages for any loss caused." The general principle of law in the calculation of delictual damages is that the plaintiff should be placed in the position she would have occupied had the delict not been committed. In this particular case, the woman would either have been employed or promoted or trained, as the case may be. Thus, in the case of non-employment due to discrimination, the position she would have occupied is that of earning a salary and attendant benefits up to the end of the contract period (in the case of a fixed term job) or up to retirement (in the case of an indefinite contract).

The capacity of the courts to intervene in such situations is well documented. In the absence of some indication in the Act on the method of calculating damages, the courts are likely to award the proverbial "reasonable damages," with the real danger of awards being so meaningless as to make complaining worthless. Furthermore, it is a well established principle of the common law that the plaintiff must mitigate his/her losses. In cases of unlawful dismissal, the Zimbabwean Supreme Court has already endorsed the view that a person who has been unlawfully dismissed should not sit back but should look for, and accept, reasonable offers of employment¹⁴. Such an approach, in the absence of clear provisions in the Act to the contrary, is likely to be invoked in cases of gender discrimination.

The sixth issue has to do with the order of specific performance authorized by section 5 (4) which appears subject to the discretion of the courts, to refuse the remedy where it may be considered

¹¹ See section 93 of the Act.

¹² See proviso to section 93 (1).

¹³ See section 93 (4) of the Act.

¹⁴ *Gauntlet Security Services (Pvt) Ltd v Leonard* 1997 (1) ZLR 583 (S) and *Charles Ambali v Bata Shoe Company Limited* S.C. 6/99.

inequitable to do so. This is in view of the wording of the section which does not direct the court what to do, but merely entitles the complainant to seek the relevant order. Since this is an employment relationship, note should be taken of what the Supreme Court recently affirmed in *Nicholas Hama v National Railways of Zimbabwe*¹⁵. In that case, the Supreme court overruled its previous decision in *United Bottlers v Murwisi*¹⁶ in which it had accepted a statutory limitation of its discretion to refuse reinstatement and held that the right of an employer to “reinstatement or damages” was so deeply embedded in the common law that nothing short of clear words to that effect would lead a court to conclude that the right had been taken away. Although the issue of reinstatement does not arise in matters of non-employment due to unlawful discrimination, the principle that the courts should not force an employer to stay with an employee he/she does not like, is likely to be adopted by the courts in this regard. In this instant, the statutory remedy of specific performance on gender discrimination cases will be largely unavailable, thus undermining the intent of the legislation. To avoid such an eventuality, clear provisions limiting the discretion of the courts in this regard would be required.

The seventh dilemma relates to criminal sanctions provided for in section 5 (3). The main difficulty is that criminal penalties in labour law are ineffective for the sole reason that state authorities responsible for the criminal justice system are reluctant to pursue labour matters. To start with, the police rarely investigate labour matters, let alone prefer charges against offending employers. Furthermore, it is not clear what the attitudes of the courts are to breaches of labour legislation. As the Act seems to rely on these criminal sanctions for the enforcement of anti discrimination law, it is important to employ a re-think in this regard with a view to coming up with a more comprehensive enforcement package. Criminal sanctions are obviously unavoidable but these should complement other mechanisms such as a more realistic order for specific performance and/or substantial damages.

The last point arises from section 5 (7) a (ii) which provides as follows:

Notwithstanding subsections (1) and (2), no person shall be deemed to have discriminated against another person:

On the grounds of sex where in accordance with this Act or any other law, or in the interests of decency or propriety, he distinguishes between employees of different sexes.

Although no specific cases have arisen from this provision the implications of the “interests of decency or propriety” are not clear. Presumably it cannot be invoked to exclude women from jobs they would otherwise be qualified to do on the grounds that the environment is so male dominated that the “interests of decency or propriety” require their exclusion. However, the danger of such usage exists. Yet, one wonders what perceived dangers the legislators had in mind in adding a provision such as section 5 (7) (a) (ii). It is submitted that such a provision can simply be removed without creating any problem for the law and this seems to be the better approach.

3.2.2.1 Discrimination on the basis of HIV and AIDS

While HIV and AIDS know no sex, allowing discrimination on the basis of HIV status may end up weighing heavily against women either where, as a matter of statistics, it is established that more women than men have HIV or where societal attitudes show more sympathy towards men than women. Accordingly, gender equality laws should also focus on discrimination based on HIV and AIDS.

¹⁵ 1996 (1) Zimbabwe Law Reports 664.

¹⁶ 1995 (1) Zimbabwe Law Reports 246.

In Zimbabwe, up to mid-1998, there were no specific laws on HIV and AIDS discrimination. In response to the SADC initiative which involved the passing of a Regional Code on AIDS and Employment, in September 1997 Zimbabwe enacted ministerial regulations under section 17 of the Labour Relations Act. These regulations are known as Labour Relations (HIV and AIDS) Regulations, 1998 (SI 202 of 1998). The regulations seek to protect both existing and prospective employees. As regards existing employees, its prohibition of discrimination is absolute in respect of aspects like testing HIV, disclosure of HIV status, termination of employment, promotion and training. Sections 5 and 6 of the Regulations are worth reproducing to show the extent of the protection:

- 5 (1) *It shall not be compulsory for any employee to undergo, directly or indirectly, any testing for HIV.*
- (2) *No employer shall require any employee, and it shall not be compulsory for any employee, to disclose, in respect of any matter whatsoever in connection with his employment, his HIV status.*
- (3) *No person shall, except with the written consent of the employee to whom the information relates, disclose any information relating to the HIV status of any employee acquired by that person in the course of his duties unless the information is required to be disclosed in terms of any other law.*
- 6 (1) *No employer shall terminate the employment of an employee on the grounds of that employee's HIV status alone.*
- (2) *No employee shall be prejudiced in relation to –*
- (a) *promotion or;*
 - (b) *transfer or;*
 - (c) *subject to any other law to the contrary, any training or other employee development programme; or*
 - (d) *status;*
- or in any other way be discriminated against on the grounds of his HIV status alone.”*

With respect to discrimination with access to employment, the regulations are not water-tight. Section 4 provides as follows:

- (1) *No employer shall require, whether directly or indirectly, any person to undergo any form of testing for HIV as a precondition to the offer of employment.*
- (2) *Subsection (1) shall not prevent the medical testing of persons for fitness for work as a precondition to the offer of employment.*

The medical testing of persons for fitness of work may in no case involve testing for HIV, even if the latter is regarded as relevant to fitness for work. However, if the medical test for fitness for work might bring the medical practitioner to the HIV status of the prospective employee, this knowledge may reach the employer and lead to an unpronounced discrimination on the basis of HIV. Although the regulations widen the definition of “testing” to include “any indirect method, other than the testing of blood or other body fluid, through which an inference is made as to the presence of HIV.” And this would presumably cover an inference drawn merely from the physical appearance of an employee or prospective employee, or questionnaires on risk behavior, no specific mechanism is provided for handling complaints on breaches of the regulations and a victim of discrimination has to utilize the general dispute resolution mechanisms, raising the problems already raised with such mechanisms.

Another weakness of the regulations arises from section 8 which provides that “any employee suffering from HIV or AIDS shall be subject to the same conditions relating to sick leave as those applicable to any other employee in terms of the Act.” In relation to employees suffering from HIV

or AIDS, this provision is inadequate because section 14 of the Act which grants paid sick leave up to 26 working days also entitles an employer to terminate the services of the employee if owing to illness he/ she is unable to report for work for a period exceeding one month. Although it has been held by the Supreme Court that the employer has to obtain the permission of the Ministry of Labour in terms of SI 371/85 before terminating employment under section 14 of the Act, there is little doubt that many employees suffering from HIV or AIDS will lose employment under the section. This may constitute discrimination on the basis of HIV or AIDS.

In response to the HIV/AIDS pandemic in Zimbabwe – by end of 2001, it is estimated that more than 38% of the population aged 15-49 is HIV positive – the new Labour Relations Amendment Bill (H.B. 15, 2001) defines the HIV/AIDS status and includes it as one of the prohibited grounds of discrimination under section 5.

Furthermore, the Bill takes on board the sick leave provisions of the Public Service Regulations, 2000 (Statutory Instrument 1/2000), proposing ninety day's sick leave on full pay and ninety day's sick leave on half pay, in order to provide for the many employees suffering from AIDS related illnesses. On the first glimpse, this proposal seems to be very positive from a workers point of view. However, to shift the whole burden on the side of the employer is not very far looking. Employers are already complaining about high labour costs. If this provision becomes law, employers are bound to get rid of all workers who might get sick and will discriminate on the ground of the known or presumed HIV status. What is needed is a medical scheme sharing the costs and the risks between employer and workers.

It is a well known fact that the heavy burden of care falls unequally on women, making HIV/AIDS a major threat to the goal of gender equality in employment. In the absence of legislation to guarantee that family responsibilities do not cost workers their employment, more women are likely to be forced to leave the formal sector jobs due to their care taking responsibilities.

3.2.2.2 Domestic Workers

There is little doubt that most domestic workers are women. The law on domestic workers is therefore an important plank of any discussion on gender and employment. Domestic workers are, like all private sector employees, governed by the Labour Relations Act. However, as this Act does not provide detailed conditions of service contained in collective bargaining agreements of other sectors, special regulations had to be promulgated to deal with domestic workers. It is submitted that to the extent that those regulations provide conditions of work which are inferior to those obtained in the majority of the other industries, they are discriminating on the basis of gender. The current regulations are contained in statutory instrument 377 of 1992. In terms of those regulations, it is apparent that domestic workers have inferior working conditions with regard to hours of work (see section 5); vacation leave (see section 13), sick leave (see section 15) and gratuities (section 20).

3.2.3 EXPORT PROCESSING ZONES (EPZ) ACT (CHAPTER 14:07)

The EPZ was passed at the end of 1994 as part of government's efforts to attract foreign investment. From a labour law perspective, a disturbing feature is section 56 of the Act which provides as follows:

“The Labour Relations Act (Chapter 28:01) shall not apply in relation to licensed investors operating and employees employed in an export processing zone.

The Authority may, in consultation with the Minister responsible for the administration of the Labour Relations Act (Chapter 28:01) provide rules for conditions of service, termination of service, dismissal from service and disciplinary proceedings that apply in export processing zones”.

This section implies the negation of all the positive features of the main labour law in the country and leaves the regulation of EPZ work to be dealt with under common law. The common law knows no equality between sexes and has no mandatory provision in respect of minimum wages, sick leave, termination of employment, maternity leave, discrimination on a variety of grounds and so on. Without the application of the Labour Relations Act and in the absence of a specific labour law applying to EPZs, it is permissible for an employer to refuse to employ a person solely on the grounds of gender or to terminate the services of an employee who is on maternity leave. Given that EPZ's are known to employ a substantial number of women, this exclusion of the Labour Relations Act is a clear subjection of women to inferior terms and conditions of employment.

It is therefore hoped that Labour Relations amendment Bill (H.B. 19, 2001) when it becomes laws will retain its proposal to repeal Section 56 of the Export Processing Zones Act , thus including EPZ workers in the audit of the Labour Relations act.

However, in December 1998, the EPZ Authority promulgated employment regulations applying in EPZ's. The following section is devoted to the examination of these regulations.¹⁷

Section 5 of the Regulations provides as follows:

“No employee shall be discriminated against on the grounds of race, tribe, place or origin, political opinion, colour, creed, gender, physical condition, health or social origin in relation to any matter related to employment:

Provided that an employee shall not be deemed to have been discriminated against on the grounds of gender where these rules or any other law provide for special conditions for female employees.”

It should be apparent that this provision is a far cry from the wide provisions found in section 5 of the Labour Relations Act. Its most serious defect is that it only refers to an “employee” and this means that prospective employees are not covered. Thus, it does not guarantee equal access to employment as prospective employees who are discriminated on the basis of sex have no recourse to the law. Furthermore, although the section refers to “any matter related to employment”, the absence of specific reference to such matters as advertisement for jobs, promotion, selection for training and abolition of posts is prone to misinterpretation. The Labour Boards set up in terms of the regulations need not necessarily be composed of legally trained people and the expression “any matter related to employment” may not be given the breadth it deserves. Accordingly, some matters such as selection processes for training may find themselves outside the desired protection. It is submitted that section 5 of the Regulations is inadequate as an anti-discrimination provision in the field of gender and at the very least provisions similar to those under the Labour Relations Act should be inserted in the Regulations. It should also be noted that unlike in the Labour Relations Act, there is no provision entitling the complainant to seek an order of specific performance from an employer who has breached the provision. The unfair labour practice of the Labour Boards do not oblige them to order specific performance.

3.2.4 Public Service Act (CHAPTER 16:04)

Section 18 of the Public Service Act requires that there be no discrimination on the basis of gender when either appointing or promoting employees in the Public Service. It provides as follows:

¹⁷ These regulations are known as Export Processing Zones. (Employment Rules), 1998 (SI 372/98).

When considering candidates for appointment to or promotion within the Public Service, the Commission shall:-

- (a) “have regard to the merit principle, that is, the principle that preference should be given to the person who, in the Commission’s opinion, is the most efficient and suitable for appointment to the office, post or grade concerned; and
- (b) ensure that there is no discrimination on the ground of race, tribe, place of origin, political opinions, colour, creed, gender or physical disability.”

Three main weaknesses of this provision should be noted. First, it does not comprehensively prohibit discrimination regarding other features such as selection for training and abolition of posts. Secondly, unlike the Labour Relations Act, it does not create any specific mechanism of enforcement of the anti-discrimination provisions by a complainant. Presumably, recourse is available in the High Court, but this is a far cry from the more accessible labour dispute settlement system enshrined in the Labour Relations Act. In the High Court, access to a legal practitioner, although not a legal requirement, is a practical requirement if one wants to achieve some reasonable degree of success. Furthermore, the High Court is at liberty as to the appropriate remedy, which may end up as nominal damages. Thirdly, regard to the “merit principle” which is juxtaposed against the anti-discrimination provision may be used as an excuse for excluding women, who have been historically disadvantaged in access to education and training.

3.2.5 PENSION AND PROVIDENT FUNDS ACT (CHAPTER 24:09)

Pension schemes have no explicit gender discrimination provisions. However, there is one concept which, in practice, has adverse effects against women. This is the concept of “continuous service”. In general, the minimum period required for one to get benefits under the scheme is “five years of continuous service” which means that (i) part-time workers (many of whom may be women) require a much longer period to qualify for benefits under the scheme and (ii) workers who have to change jobs from time to time may not easily qualify for benefits.

3.2.5.1 Pension scheme

The Pension scheme is provided for in terms of the National Social Security (Pensions and other Benefits scheme) Notice, 1993 (SI 393/93).

The NSSA scheme is compulsory for all employees covered by it, who are all required to be registered and make monthly contributions to the scheme. There are seven benefits from the scheme, namely (i) invalidity pension, (ii) invalidity grant, (iii) retirement pension, (iv) retirement grant, (v) survivors pension, (vi) survivors grant and (vii) funeral grant.

An *invalidity pension* is paid to an employee who has not yet attained the age of 60 years, who is considered permanently incapable of work as a result of any disease or bodily or mental disablement and has made contributions for at least sixty months. An employee who is meeting the other conditions but has paid contributions for less than sixty months shall be entitled only to an *invalidity grant* instead. A *retirement pension* is paid to an employee who has attained the age of 60 years and has retired from employment and has made contributions for at least 120 months. An employee who meets the other conditions but has contributed for less than 120 months is entitled to a *retirement grant* instead. A *survivor’s pension* is payable to the widow or widower or any dependant of a deceased who was entitled to either an invalidity or retirement pension. A *survivor’s grant* is payable to a dependant of an employee who, at the time of his / her death would have been entitled to an invalidity grant or retirement grant. A *funeral grant* is payable in respect of a deceased

who was in receipt of an invalidity or retirement or retirement pension or who had made contributions for not less than 60 months.

3.2.5.2 Workers Compensation Scheme

This is provided for in terms of the National Social Security (Accident Prevention and Workers Compensation Scheme) Notice, 1990 (SI 68/90).

“Any worker who is injured or dies from an accident arising out of and in the course of employment, shall be entitled to compensation under the scheme (the Accident Prevention Workers Compensation scheme).

However, no compensation is payable if the accident is due to the employee’s willful misconduct unless the accident results in serious disablement nor is compensation payable if death occurs more than twelve months after the accident, unless it is shown that the accident directly caused death. The scheme takes away any common law right of the worker to sue the employer for the injury except where negligence is proved”.

3.3 PROTECTIVE LAWS FOR WOMEN

3.3.1 THE LABOUR RELATIONS ACT

It has already been noted that Zimbabwe does not have specific protective laws for women, such as those regulating nightwork or work in mines. However, the Labour Relations Act provides a framework within which such laws may be made through ministerial statutory instruments under section 17 of the Act. It is provided in terms of section 17 (3) that the Minister may make regulations, *inter alia*, for

“the special conditions that shall be applicable to female, juvenile and disabled employees, including the prohibition of the employment of persons below the age of sixteen years and the restriction on the employment of juveniles and pregnant women in specified types and categories of employment or at specified hours, and the rights and privileges of mothers with suckling infants.”

Although no regulations have been made under the section, it is sufficient to observe that the law makers in Zimbabwe saw it fit to provide a mechanism through which such laws may be made. There have been heated controversies over the appropriateness of protective legislation. The better view seems to be that protective legislation, particularly that prohibiting women from certain forms of work, is unnecessary and breeds the kind of stereotyping which has been responsible for discrimination against women. For that reason, the legislative framework provided by section 17 (3) regarding the powers to make protective legislation may need to be removed.

3.4 SEXUAL HARRASSMENT

3.4.1 LABOUR RELATIONS ACT

It is now accepted that sexual harassment is a form of discrimination against women and its occurrence creates serious impediments to women’s access to employment. For instance, a sexually harassed woman may find resignation as the only way out and subsequently hesitate to take on another job.

The **Labour Relations Act** does not have any specific provisions on sexual harassment except to the extent that a form of such harassment may constitute a discrimination clearly contrary to section 5. This omission means that sexual harassment goes on unheeded and to that extent, the Labour Relations Act creates impediments to women's access to employment. Sexual harassment should be understood in two senses: Where the victim reasonably believes that her objection disadvantages her in relation to employment, such as where she fails to get a job or where she loses a chance to be promoted [the quid pro quo theory] as well as where harassment creates a hostile working environment.

Notwithstanding the absence of a specific reference to sexual harassment, it is important to note that through the system of codes of conduct, enterprises may make provision for sexual harassment as a form of misconduct for which culprits may be punished through dismissal, supervision or demotion.¹⁸

It is important to note that there is no uniform treatment of sexual harassment in codes of conduct. In some, it is simply not mentioned, while others make provision for it but without defining its scope. Be that as it may, the fundamental weakness of dealing with sexual harassment through codes of conduct is that, top employees, who are the "employer" are not affected: a code of conduct only arises if the alleged violator of the rule is an "employee". For instance, a managing director is not an "employee" in most codes of conduct which leaves them unaffected by the rules governing the conduct of employees.

The government has now proposed some amendments to the Labour Relations Act to accommodate sexual harassment. However, the first proposals, contained in the Labour Relations Amendment Bill of 2000 only covered the quid pro quo form of sexual harassment. The proposals amend section 8 of the Act and make it an unfair labour practice for an "employer or any other person" to demand from any employee or prospective employee any sexual favour as a condition of –

- (i) *the recruitment for employment; or*
- (ii) *the creation, classification or abolition of jobs or posts; or*
- (iii) *the improvement of the remuneration or other conditions of employment of the employee; or*
- (iv) *the choice of persons for jobs or posts, training, advancement, apprenticeships, transfer, promotion or retrenchment; or*
- (v) *the provision of facilities related to or concerned with employment; or*
- (vi) *any other matter related to employment.*

New developments have been recorded with the Labour Relations Tribunal first decision on sexual harassment, *Frederick Mwenye v. Textile Investment Company* of 7 May 2001¹⁹. The company dismissed the appellant because he was alleged to have sexually harassed a female colleague. In the absence of any legal provisions on sexual harassment in Zimbabwe, the Tribunal used the definition entailed in the Convention's on Elimination of All Forms of Discrimination Against Women (CEDAW) General Recommendation Number 19 of 1992, which reads:

"Sexual harassment includes such unwelcome sexually determined behavior as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions."

¹⁸ For a detailed treatment of sexual harassment at the workplace, see various excellent studies carried out by Naira Khan and her colleagues.

¹⁹ Judgement No. LRT/MT/11/01, Case No. LRT/MT/34/94.

The Tribunal concluded that the man's behaviour can be subsumed under this definition and ruled that the dismissal was fair.

In consequence, a similar description was included in the subsequent version of the Labour Relations Amendment Bill (H.B. 19, 2001), proposing an unfair labour practice if an employer or any other person:

“engages in unwelcome sexually-determined behavior towards any employee, whether verbal or otherwise, such as making physical contact or advances, or sexually-coloured remarks, or displaying pornographic material in the workplace.”

This addition is a positive step. However, the term “sexual harassment” is still not mentioned in the Bill. It should be clearly defined in the interpretation section of the Act.

Another issue arising from the proposal is the question of “unfair labour practice.” As repeatedly indicated in this paper the commission of unfair labour practice merely entitles the complainant to refer the matter to a labour relations officer for resolution and the problems raised above in relation to gender discrimination in general apply here as well.

3.4.2 Public Service Act

As described above, there is no protection against sexual harassment under the Labour Relations Act and proposals are currently being made to provide such protection. However, in the Public Service there is one reference to “sexual harassment” in the Public Service (Disciplines) Regulations, 1992. It is an act of “misconduct” for any officer of the Public Service to be engaged in “improper, threatening, insubordinate or *discourteous behaviour including sexual harassment*, during the course of duty, towards any member of the Public Service or any member of the Public”

The regulations do not define what “sexual harassment” is, but it is significant to note that it is categorized as discourteous behaviour. It is important to observe the main defect of this approach in the public service. Sexual harassment is treated as misconduct by the employee and cannot therefore be committed by the employer who *ex hypothesi* cannot be charged of misconduct. Accordingly, the only form of sexual harassment contemplated by the regulations is the “hostile environment” as the “quid pro quo” form presupposes conduct by an employer or his representative. Yet in matters of either access to employment opportunities for training or promotion, sexual harassment is an issue which is mainly relevant with the employer's conduct. This aspect is not catered for at all in the Public Service and should be revisited.

3.5 MATERNITY PROTECTION

3.5.1 Labour Relations Act

Maternity leave plays a critical role in gender equality law. The extent of protection of women who take maternity leave is a key determinant of the adequacy of gender equality laws. Zimbabwe has not yet ratified ILO Convention on Maternity Protection²⁰. However, its maternity leave provisions in the Labour Relations Act are reasonably adequate. The following features of maternity leave law are worth outlining:

²⁰ Maternity Protection Convention, 2000 (No. 183); this Convention revises Maternity Protection (Revised) Convention, 152 (No. 103).

- ❖ The period of maternity leave permitted by the law is ninety days, which is approximately 13 weeks.
- ❖ During her period of maternity leave, a female employee is entitled to be paid 75% of her salary provided she forfeits her annual leave, otherwise she gets only 60% of her salary.
- ❖ There is a limitation on the entitlement to paid maternity leave; this is a requirement that maternity leave be spaced at the rate of once every 24 months and in any event only three maternity leaves are permissible with any one employer. Any maternity leave outside this limitation may be unpaid.
- ❖ In general, a female employee is entitled to choose the precise moment she takes her maternity leave. However, this is subject to two conditions:
 - (i) leave cannot be taken more than 45 days before the birth of the child; and
 - (ii) it is mandatory for leave to be taken at least 14 days before the birth of the child.
- ❖ The 90-day maternity leave period may be extended in two circumstances, in both of which the leave will be unpaid:
 - (i) where the birth of a child takes place more than 45 days after the woman has taken maternity leave and contrary to the specification of the medical certificate issued for purposes of the woman's application for leave and
 - (ii) where, as a result of complications accompanying the birth of the child, the mother requires some extra time to convalesce, provided there is a certificate to that effect by a medical practitioner.
- ❖ During the period of maternity leave, the female employee is entitled to all her normal benefits including her right to seniority. The period of maternity leave cannot be regarded as an interruption for purposes of any continuous service required for promotion or seniority.

The law on maternity leave still raises some disputable issues which may require re-examination for gender equality purposes. First, the cost of maternity leave is borne exclusively by the employer. There is no social security or social insurance system catering for maternity benefits and the employer is obliged by law to pay the employees' salary as aforesaid. Article 4 of the old Maternity Convention 103 of 1952 and article 6 (8) of the new revised Maternity Convention 183 of 2000 outlaw this approach by providing that under no circumstances should an employer be individually liable for the costs of maternity benefits for his/her employees. The rationale behind this ILO Convention is the need to eliminate the obvious disincentive to the employment of women when the costs are borne by the employer.

While the current approach of making the employer individually liable seems unavoidable in view of the absence of a well developed social security system in Zimbabwe, there can be little doubt that the approach affects women in so far as some employers take into account this cost element in preferring the employment of men to that of women. In this event, it limits women's access to employment. Needless to mention, this form of discrimination by employers goes unnoticed because it is neither pronounced nor is it easy to prove. Some employers interviewed for this project confirmed that the cost of maternity benefits is a relevant factor in deciding whether or not to employ a woman.

It is suggested that serious consideration be given to the transfer of liability for maternity benefits to a social security system under which, for a start, contributions could be made by employers only. Given that the employer may be wholly liable to contributions to a relevant social security scheme, this is markedly different from the current approach in that this suggested change removes the disincentive already identified as all employers will be required to contribute to the scheme

whether or not they are employing women in their establishments. In the long term, a compulsory social insurance scheme contributed by both employers and employees (both male and female) should be introduced.

Secondly, provision (i) of section 18 (1) is clearly discriminatory. This provision reads as follows:

“Where a female employee who has benefited from paragraph (a) or (b) fails, for any reason other than death, or dismissal by the employer, to return to the employer’s service for a period at least as long as that during which she was on maternity leave and on terms not less favourable than she enjoyed prior to going on such leave, she shall be liable for the re-payment to the employer of all the wages and benefits she received from the employer in consideration of such leave”.

It is difficult to understand why this proviso was found necessary because it limits the freedom of female employees to change jobs during or immediately after maternity leave. It also belittles the employee’s entitlement to leave as this proviso paints maternity leave as a gift from the employer. As already noted, the main effect of the proviso is to force women to return to work even in circumstances where they would have found better paying jobs considering that the repayment of maternity benefits may be a hindrance. On a positive note, the proposed Labour Relations amendment Bill (H.B. 19, 2001) repeals this section.

On the third account, while the entitlement to 75% of her wages might be described as adequate, a satisfactory gender equality law should aim at ensuring that women suffer no loss of salary or benefits while on maternity leave. In addition, the requirement that the employee should forfeit her annual leave in order to qualify for the 75% entitlement is inconsistent with the whole basis of maternity leave. The latter is a special form of leave which is based on the woman’s unique reproductive role and should not, in principle, be linked to the entitlement to annual leave which is granted on an entirely different basis. The effect of the requirement is to force most women to forfeit their annual leave so as to qualify for the higher rate of 75% and this is clearly discriminatory. However, there is a proposal in the Labour Relations Amendment Bill, (H.B. 19, 2001) to abolish the aspect of linking maternity leave to annual leave and to entitle female employees to *full pay* while on maternity leave. This represents a fundamental shift and would make Zimbabwean law on this aspect among some of the best regimes on maternity leave.

The fourth issue of contention is the requirement that maternity leave be spaced at the rate of every 24 months. This appears to be unnecessary in view of the overall limit of 3 maternity leaves with any one employer. While the latter limitation appears sensible from a demographic standpoint, the same cannot be said for the former. Most women interviewed for this project confirmed that different women had different reasons for the length of spacing they have for their children and that it would be unfair and discriminatory to insist on strict adherence to the statutory position. This criticism is justified and once a ceiling of 3 maternity leaves is imposed, there is no sound reason why further restrictions should be imposed as this would prejudice all those women who, out of design or otherwise, fail to adhere to the statutory spacing period. Unfortunately, the Labour Relations amendment Bill (H.B. 19, 2001) wicks to this provision.

The fifth issue of disquiet is that unlike other sections of the Act, contraventions of the maternity leave provisions do not create a criminal offence but only amount to an unfair labour practice. The legal significance of an “unfair labour practice” is that it entitles the aggrieved party to refer the matter to a labour relations officer under Part XII of the Act. In other sections of the Act, most contraventions lead to both civil remedies and criminal penalties, but this is not the case in this instance and it is argued that this is inadequate. A comparison with another section will make this point clearer. As regards maternity leave, section 18 (5) simply provides”

“Any person who contravenes this section shall be guilty of an unfair labour practice”.

On the other hand, section 20 (3) on the contravention of minimum wages notices provides:

“Any person who contravenes a notice issued in terms of subsection (1) shall -

- (a) commit an unfair labour practice for which redress may be sought in terms of Part XII; and
- (b) be guilty of an offence and liable to a fine not exceeding two thousand dollars or to imprisonment for a period not exceeding one year or to both such fine and imprisonment.”

The final problematic area is section 18 (6) on a female employee’s entitlement to nursing breaks. It is provided therein that the provision of nursing breaks shall be subject to “the exigencies of her employment and nothing done to prevent any disruption of normal production process or any interference with the efficient running of an undertaking or industry shall be held to be an infringement of the woman’s right to nursing breaks”. This is evidently so vague as to allow all sorts of spurious reasons to be given in justification of denying a woman her right to nursing breaks and is a potential source of unfair discrimination against women. More fundamentally, a female employee who may reasonably refuse to follow an order denying her right to a nursing break on the vague basis of the “exigencies of her employment” may be dismissed for “willful disobedience to a lawful order”, no matter how morally right she may feel. The Supreme Court has emphasized that a disobedience is no less “willful” simply because the reasons behind it are morally unassailable. Justice Gubbay (as he then was) said in *Matereke v C.T. Bowring*²¹. “The existence of a moral excuse for such disobedience will not make the disobedience any less”. It is unfortunate that the Labour Relations amendment Bill (H.B. 19, 2001) does not repeal this section.

The Labour Relations Amendment Bill, 2000 introduces a problematic aspect which represents retrogression in so far as Zimbabwean law is concerned. It proposes that a female employee be only entitled to maternity leave after serving at least one year of service with the employer. Such a restriction is new and would justify employers seeking directly or indirectly to ascertain the pregnancy status of prospective employees. Further, it is not clear whether this service has to be continuous, for if it is, employers can effectively deny women the right to go on maternity leave by employing them on short term contracts with some convenient breaks in between. Even though the term “continuous service” does not appear in the legislation, a court can easily read it into the Act on the basis that the very act of insisting on a minimum period of service means that the law makers were anxious to grant maternity benefits only to some “permanent “ employees. More fundamentally, the requirement of a one year service raises problems with part-time workers who work less hours in a week than full-time employees. When is the one year completed? Is it after completing the requisite aggregate number of hours for a year, which would possibly take them up to three years? Or is it merely after the completion of one Calendar year? If the interpretation be that it is the aggregate hours which count, this provision becomes clearly discriminatory as most women are employed in part-time jobs.

3.5.2 EXPORT PROCESSING ZONES (EPZ) ACT (CHAPTER 14:07)

Section 16 of the Regulations provides for maternity benefits with some provisions which are more favourable to women than those under the Labour Relations Act. First, the female employee need not get a certificate from a medical practitioner indicating her expected date of delivery and the date of her going on maternity leave is that specified by her. In this respect, section 16 (1) provides:

²¹ 1987 (1) ZLR 206 at 212:

A female employee who is pregnant and has been working for at least one full year shall, on application, be granted maternity leave from a date specified by her, for a period of ninety days at seventy-five per cent of her normal pay.

Secondly, all employees on maternity leave are entitled to 75% pay and there is no requirement that annual leave be forfeited to qualify for this. Thirdly, it is made clear in the regulations that a female employee who fails to qualify for maternity leave under the rule requiring at least one year's service with the employer shall be entitled to unpaid leave and to resuming her job at the completion of the leave period.

However, there are some complexities arising from the maternity leave provisions. First, to qualify for maternity leave, the employee should have worked for at least 1 year. The problems already raised in relation to the similar provision in the Labour Relations Amendment Bill, (H.B. 19, 2001) equally apply. Secondly, there is no provision for nursing breaks in the period immediately after the end of the maternity leave. Thirdly, there is no provision for an extension to maternity leave in the event either that the birth of the child has occurred much later than originally expected or that owing to complications accompanying the birth of the child, the mother requires more time and is unable to resume work at the end of the 90-day period.

3.5.3 Public Service Act (CHAPTER 16:04)

Maternity leave in the public service is granted in terms of the Public Services (General Leave) Regulations, 1978 (RGN 42 of 1978) as amended by the Public Services (General Leave) (Amendment) Regulations, 1986 (No.4.) SI 347 of 1986)

The main aspects of maternity leave law in the public service are as follows:

- ❖ The employee should have served a minimum of one year's service with the government in order to qualify for maternity leave.
- ❖ The length of the leave period is 90 days.
- ❖ The employee is entitled to 75% of her salary and should continue to get her normal benefits.
- ❖ The maternity leave should be spaced at the rate of once every two years and there is a limit of such leaves during the employees' total service with the state.
- ❖ The criticisms already given in respect of the above features under the Labour Relations Act equally apply. There are some features in the public service maternity leave law which are problematic and need to be examined in the light of gender equality law. First, there is a provision where the employer can send a female employee on maternity leave against her will in circumstances which are degrading to the employee concerned. This is in terms of section 25 A (5) which provides as follows:

"A head of office may, with the approval of the Head of Ministry, require a pregnant woman to cease work prior to the commencement of the period stipulated in subsection (1) if he considers this to be in the best interest of this office and may request a medical certificate relating to woman's fitness to remain at work."

It is difficult to understand what the "best interest of this office" entails and this vague expression can be abused. Furthermore, not only is the employee forced to go on maternity leave before her stipulated date, but she will also be forced to utilize her annual leave or vacation days without pay to cover the additional period. In short, she is forced to forfeit the benefits which normally go with annual leave merely because of her pregnancy and there can be no better illustration of

discrimination on the basis of gender. Secondly, where an extension to a maternity leave period becomes unavoidable, due to a delay in the estimated date of delivery, the law does not grant the employee unpaid leave, but requires her to utilize her accrued annual leave or annual leave but without pay. This is also difficult to understand. Ordinarily, annual leave is on full pay. However, the moment it is taken because of the need to extend a period of maternity leave, it becomes unpaid and the link is difficult to draw. Employees take their leave days for a variety of reason and it should not matter that leave has become necessary in order to extend a period of maternity leave, as the latter is based on different considerations. Thirdly, when a woman has had the misfortune of having a miscarriage while on maternity leave, she is required to resume work as soon as a medical practitioner says she is fit to return to work and cannot, if she considers it desirable, exhaust the remainder of her maternity leave period. There is a potential for abuse here. Medical fitness to resume work might fall short of the moral and psychological considerations militating against going back to work immediately. It is conceivable that from a medical point of view, a woman who has had a miscarriage requires a matter of days before being fit to resume work. However, such an approach is an affront to the respect due to female employees and has detrimental effects on their enthusiasm for work.

CHAPTER 4

ZIMBABWE AND INTERNATIONAL INSTRUMENTS ON GENDER EQUALITY

Zimbabwe is party to a number of international instruments which entrench gender equality. Chief among these are the:

- (i) International Covenant on Civil and Political Rights, 1966.
- (ii) International Covenant on Social, Economic and Cultural Rights, 1996.
- (iii) African Charter on Human and People's Rights, 1981.
- (iv) Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), 1979.
- (v) International Labour Conventions (see annex).

The legal position, however, is that an international treaty or convention, even if ratified, does not become part of the law of Zimbabwe unless it has been incorporated into national law by or under an Act of Parliament.²² But a rule of international law, such as prohibition of discrimination on the basis of gender, may become so established as to be described as part of customary international law and such a rule is automatically part of the law of Zimbabwe as long as it does not conflict with domestic law.²³ In the field of gender and employment, the ILO instruments are the most important. The legal effect of ratifying an ILO Convention is as stated above but the ILO has the added advantage of providing a forum through which a government can be pressured, through the report and complaint procedures, to comply with instruments it has ratified.

By May 2002, Zimbabwe had ratified twenty ILO Conventions, among them the two core Conventions on non-discrimination, the Equal Remuneration Convention, 1951 (No. 100) which stipulates the principle of equal pay for men and women for work of equal value and the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), which regulates not only discrimination on the ground of sex, but includes race, colour, religion, political opinion, national extraction, social origin, and any other ground determined by member States.²⁴ **The full profile of ILO Conventions ratified by Zimbabwe** is annexed this review.

Zimbabwe has also ratified the Underground Work (Women) Convention, 1935 (No. 45). However, the prohibition of underground work for women is a contestable instrument and dated at the

²² See section 111B (1) of the Constitution of Zimbabwe.

²³ *Barker McCormack v Government of Kenya* 1983 (1) Zimbabwe Law Reports 137.

²⁴ The ILO has eight core Conventions, also called fundamental Conventions. The other six are the Freedom of Association and the Protection of the Right to Organize Convention, 1948 (No. 87), the Right to Organize and Collective Bargaining Convention, 1948 (No. 98), Forced Labour Convention, 1930 (No. 29), Abolition of Forced Labour Convention, 1957 (No. 105), Minimum Age Convention, 1973 (No. 138), and the Worst Forms of Child Labour Convention, 1999 (No. 182).

beginning of this century when there was a clear notion that women needed to be protected from underground work. They were paid less than men, were exploited and worked in unsafe working conditions for long hours, and it was feared that they would jeopardize their reproductive health. However, the situation has changed and women feel that they are discriminated against by being denied the opportunity to work in mines, and call the Underground Work (Women) Convention “overprotective” and not in line with the principles of equality between men and women in employment. Fortunately, Zimbabwe has not enacted protective legislation for women.

Other Conventions do not address gender issues in particular but are very relevant for achieving gender equality. This is particularly the case with regards to the Freedom of Association and the Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1948 (No. 98).²⁵ It is of major importance that women workers are allowed to organise themselves and engage in collective bargaining.

The new Worst Forms of Child Labour Convention, 1999 (No. 182), already ratified by Zimbabwe in 2000, expressly requires to “take into account the special situation of girls”.

Zimbabwe has not ratified the Workers with Family Responsibilities Convention, 1975 (No. 156). This Convention advocates equality between men and women and non-discrimination at the workplace due to family responsibility.

It is considered progressive that the new section 2 in the Labour Relations Amendment Bill of 2001, not included in previous Bills, encourages the use of ILO Conventions as a means of interpretation, a means of equity, and even as a source of law:

“The purpose of this Act is to advance social justice and democracy in the work place by giving effect to the international obligations of the Republic of Zimbabwe a member State of the International Labour Organisation and as a member of or party to any other international organisation or agreement governing conditions of employment.”

²⁵ Convention No. 98 was ratified by Zimbabwe in 1998. Convention No. 87 is said to be tabled before Parliament in 2001.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 GENERAL

5.1.1 PUBLIC SERVICE ACT (CHAPTER 16:04)

Harmonization of the labour law is recommended to avoid the fragmentation of the workforce between Public Service and Labour Relations Acts. This issue of harmonization has been on the Zimbabwean agenda for many years now. The recommendation is that labour laws should be harmonized and all government workers should fall under the Labour Relations Act, like the rest of the workforce.

5.1.2 SOCIAL ATTITUDES TO GENDER EQUALITY

The above survey of the law shows that to a large extent, legal provisions have not been the major problem in the field of gender and employment. There are not many legal provisions which *expressly* prohibit the entry of women into given forms of employment or *expressly* disadvantage them on given aspects. The main impediments to women's access to employment are in-built social or cultural attitudes²⁶ and historical disadvantages regarding access to education and training.

The law is not everything in the field of gender and employment. A more comprehensive programme designed to fight in-built social or cultural attitudes and historical disadvantages should be devised. Three features to deal with this are: A vigorous conscientising campaign on gender issues; ensuring that women have equal opportunities in education and training; a deliberate affirmative action programme.

5.2 AFFIRMATIVE ACTION LEGISLATION

In view of the fact that not many laws expressly discriminate against women and yet women continue to suffer disadvantages concerning access to employment due to cultural prejudices and historical disadvantages, a deliberate affirmative action programme in employment legislation is desirable as it sends the important signal that gender equality should be taken seriously. In addition, it can be defended on the basis of correcting the historical imbalances women have been subjected to for a long time. In the recommendations which follow, changes to legislation on the basis of affirmative action is recommended alongside other proposals.

²⁶ The writer came across strong views against gender equality in employment among male leaders in industry, commerce, government and trade unions. It is outside the scope of this survey to document these views in any detail, save to record that such attitudes exist in Zimbabwe and are more responsible for the disparities in employment opportunities between men and women than the law. One trade union leader, for instance, felt that when devising a formula for identifying retrenchees, it was not out of order to target women for retrenchment as they were not "bread winners." A social engineering programme, such as affirmative action law is one way of dealing with this.

5.3 GENDER EQUALITY

5.3.1 THE CONSTITUTION OF ZIMBABWE

It has been seen that the Constitution of Zimbabwe Amendment No. 14 was amended in 1996 section 23 to incorporate gender as a ground of discrimination. However, that amendment is inadequate for two reasons. In the first place it leaves various exceptions to the principle of gender equality, such as those relied on in *Magaya v Magaya* and secondly it does not entrench the concept of affirmative action. It is recommended that a completely different formulation of the gender provisions be made and guidance be taken from the provisions in Malawi, Namibia, South Africa and Uganda.

In **Malawi**, the relevant sections of the Constitution are 13 (a) and 24. Section 13 (a) says:

“The state shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals

To obtain gender equality for women with men through-

- (i) full participation of women in all spheres of Malawians society on the basis of equality with men;*
- (ii) the implementation of the principles of non-discrimination and such other measures as may be required; and*
- (iii) the implementation of policies to address social issues such as domestic violence, security of the person, lack of maternity benefits, economic exploitation and rights to property.”*

Section 24 says:

“Women have the right to full and equal protection by the laws, and have the right not to be discriminated against on the basis of their gender or marital status which includes the right;-

- (a) to be accorded the same rights as men in civil law, including equal capacity;*
 - (i) to enter into contracts;*
 - (ii) to acquire and maintain rights in property, independently or in association with others, regardless of their marital status;*
 - (iii) to acquire and retain custody, guardianship and care of children and to have an equal right in the making of decisions that affect their upbringing; and*
 - (iv) to acquire and retain citizenship and nationality.*
- (b) on the dissolution of marriage-*
 - (i) to a fair disposition of property that is held jointly with a husband, and*
 - (ii) to a fair maintenance, taking into consideration all the other circumstances and, in particular, the means of the former husband and the needs of any children.*

Any law that discriminates against women on the basis of gender of marital status shall be invalid and legislation shall be passed to eliminate customs and practices that discriminate against women, particularly practices such as-

- (a) sexual abuse, harassment and violence;*
- (b) discrimination in work, business and public affairs; and*
- (c) deprivation of property, including property obtained by inheritance”.*

In *South Africa*, the relevant Constitutional provisions are in section 9 which provides:

- (1) *“Everyone is equal before the law and has the right to equal protection and benefit of the law.*
- (2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
- (3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
- (4) *No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (2). National legislation must be enacted to prevent or prohibit unfair discrimination.*

In **Uganda**, section 33 of the Constitution says:

- (1) *“Women shall be accorded full and equal dignity of the person with men.*
- (2) *The state shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realize their full potential and advancement.*
- (3) *The state shall protect women and their rights, taking into account their unique status and neutral maternal functions in society.*
- (4) *Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities.*
- (5) *Without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom.*
- (6) *Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this constitution”.*

Furthermore, the **Ugandan** constitution has a clear affirmative action provision in section 32 in the following words:

- (1) *Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them*
- (2) *Parliament shall make relevant laws, including laws for the establishment of an equal opportunities commission, for the purpose of giving full effect to clause (1) of this article.*

The equity provision in the Namibian Constitution is simple and to the point:

“Article 10: Equity and Freedom from Discrimination-

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

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

Namibia also has a constitutional protection for affirmative action in Article 23 and sub-articles (2) and (3) make the point clear as follows:

“Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly

or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.

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

5.3.2 CONSTITUTIONAL PROTECTION OF LABOUR RIGHTS IN GENERAL: A PREREQUISITE

Women cannot fully succeed in the employment field without harnessing the power of the entire labour force. It is therefore important that the constitution adequately protects trade union rights so as to enable women workers to have such weapons as strikes and collective bargaining. The current Constitution of **Zimbabwe** does not adequately entrench trade union rights. The **Malawian** and **South African** provisions are worth reproducing in this regard.

Section 31 of the **Malawian** Constitution provides that:

- (1) *“Every person shall have the right to fair and safe labour practices and to fair remuneration.*
- (2) *All persons shall have the right to form and join trade unions or not to form or join trade unions.*
- (3) *Every person shall be entitled to fair wages and equal remuneration for work of equal value without distinction and discrimination of any kind, in particular on basis of gender, disability or race.*
- (4) *The state shall take measures to ensure the right to withdraw labour.”*

In **South Africa** the relevant section is 23 which provides that:

- (1) *Everyone has the right to fair labour practices.*
- (2) *Every worker has the right-*
 - (a) *to form and join a trade union*
 - (b) *to participate in the activities and programmes of a trade union;*
 - (c) *to strike*
- (3) *Every employer has the right –*
 - (a) *to form and join an employers’ organization; and*
 - (b) *to participate in the activities and programmes of an employer’s organization.*
- (4) *Every trade union and every employers’ organization has the right*
 - (a) *to determine its own administration, programmes and activities*
 - (b) *to organize; and*
 - (c) *to form and join a federation.*
- (5) *Every trade union, employers organization and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36 (1).*

5.4 Anti-discrimination provisions

5.4.1 Labour Relations Act (CHAPTER 28:01)

It has been shown that the anti-discrimination provision in section 5 of the Act is of wide import. However, the following amendments are suggested:

- (i) The test for discrimination in section 5(6) which seems to incorporate the “male equivalent” concept has been shown to be problematic. However, as a general rule, equality presupposes some comparison and therefore some male standard cannot be avoided altogether. What has to be done is to minimize its importance by making it clear in the provision that discrimination may nonetheless be established whether or not there is a male comparison.
- (ii) There is need for more specificity as regards various manifestations of discrimination. Although the Labour Relations Amendment Bill, (H.B. 19, 2001) includes discrimination on the grounds of pregnancy, it does not define ‘pregnancy.’

It is suggested that the following definition of pregnancy be incorporated:

“Pregnancy includes intended pregnancy, termination of pregnancy and any medical circumstances related to pregnancy.”²⁷

- (iii) Disputes arising from gender equality issues should be dealt with, not by ordinary labour officers, but by a specially created Gender Commission and an amendment to that effect should be made. If the creation of a Gender Commission is considered undesirable, the minimum that is recommended is to insist on a special group of labour officers who handle gender issues.
- (iv) Section 5 (4) must make it clear that the order of specific performance is not subject to the discretion of the courts where discrimination has been proved.
- (v) While it is clear that section 5 (2) has a wide coverage of instances in which there may be gender discrimination, the following additional matter should be inserted:

Performance evaluation systems

5.4.1.1 Gender sensitivity in various aspects of the Act

In various aspects of the Labour Relations Act, it may be desirable to insist on women representation in all key institutions such as workers committees, works councils, National Employment Councils, trade unions, labour relations officers, disciplinary committees under codes of conduct and the Labour Relations Tribunal.

Examples of such provisions exist in the Malawian Labour Relations Act, 1996 (Act No. 16 of 1996). Section 13(1)(m) of the Act provides:

“The rules of every registered organization shall include provision for the following:-

positions as officers reserved for women at least in proportion to the female membership of the organization or twenty per cent of the positions, whichever is lower.

²⁷ See South African Employment Equity Act, 1998.

Section 55 provides:

1 *“The Minister shall appoint a Tripartite Labour Advisory Council (in this Part otherwise referred to as the “Council”) consisting of :*

- (a) four persons appointed by Minister;*
- (b) four persons nominated by the most representative trade union or trade unions and appointed by the Minister;*
- (c) four persons nominated by the most representative organization or organizations of employers and appointed by the Minister.*

At least one woman shall be nominated under each of subsection (1) a, b, and c.”

5.4.2 EXPORT PROCESSING ZONES ACT (CHAPTER 14:07)

Section 56 of the EPZ Act should be repealed and the Labour Relations Act should apply to EPZ workers.

5.5 EMPLOYMENT EQUITY

In line with an affirmative action policy, a precedent has been set in South Africa for the state to pass specific legislation compelling employers to ensure that they employ women workers. The South African Employment Equity Act, 1998 (Act No. 55 of 1998) is worth studying. In terms of that Act, every employer is required to take steps to promote equal opportunities. Section 5 of the Act says:

“Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice”.

The Act proceeds to outlaw any form of unfair discrimination in employment practices, including recruitment of employees and places the burden of proof on the employer. Thus, section 11 says:

“Whenever unfair discrimination²⁸ is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair”.

In addition to the general duty of every employer to promote equal opportunity in the workplace, every “designated employee” [one who employs 50 or more workers or has a certain requisite turnover] is required to *implement* certain affirmative action measures which are specified in section 15 of the Act. Section 15 provides:

- (1) “Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.*
- (2) Affirmative action measures implemented by a designated employer must include:*
 - (a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;*
 - (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;*

²⁸ Section 6 (1) lists the following grounds of discrimination: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture.

- (c) *making reasonable accommodation for people from designated groups in order ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer.*
- (d) *Subject to subsection (3), measures to*
 - (i) *ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and*
 - (ii) *retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development”.*

Further, the designated employer must prepare and implement an employment equity plan which “will achieve reasonable progress towards employment equity in that employers’ workforce” (see section 20 of the Act). The Act then creates a COMMISSION FOR EMPLOYMENT EQUITY to ensure an attainment of the objectives of the legislation.

It is recommended that Zimbabwe incorporates some measure of employment equity provisions into current employment legislation particularly requiring all employers to promote equal opportunities and creating a specific committee or commission to monitor equal opportunities in employment.

5.6 MATERNITY PROTECTION

- (i) Serious consideration should be given to shifting the burden of the cost of maternity leave from the exclusive province of the employer. The cost of maternity leave is one of the motivating factors for the ‘hidden’ form of discrimination where men are preferred to women. Small and medium scale enterprises are known for this hidden form of discrimination. A social security scheme providing for maternity benefits is the long term solution to this and should be pursued.
- (ii) Proviso (i) to section 18 (1) should be repealed
- (iii) While the limit of 3 maternity leaves with any one employer is sensible and should be retained, the strict spacing of at least 24 months between maternity leaves is discriminatory and unjustifiable. That restriction should be removed.
- (iv) A provision should be inserted to make it clear that a female employee who fails to comply with statutory requirements, such as exceeding the 3 months maternity leaves provided for, is nevertheless entitled to unpaid leave
- (v) In addition to it being an unfair labour practice, breach of maternity leave provisions should also be a criminal offence. A provision similar to section 20 (3) is therefore necessary.
- (vi) The proviso to section 18 (6) should be repealed.

5.7 SEXUAL HARASSMENT

It is important that a definition of sexual harassment which incorporates the two forms of “quid pro quo” and “hostile environment” be inserted in the Act and it be made clear that an employer may also be a perpetrator of sexual harassment.

The following definition of sexual harassment by the US Equal Employment Opportunity Commission is worth considering and is recommended:

“Unwelcome sexual advances, requests for favours, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:

- 1. submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment,*
- 2. submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individuals, or*
- 3. such conduct has the purpose or effect unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment”.*

Apart from inserting a clear definition in the Act, it is recommended that a more detailed code on sexual harassment be worked out by the social partners to guide persons at the workplace especially regarding procedures of dealing with sexual harassment. A good example of such a code is the Code of Good Practice on the Handling of Sexual Harassment cases in South Africa²⁹, which provides in section 6 as follows:

- 1. “As a first step in expressing concern about and commitment to dealing with the problem of sexual harassment, employers should issue a policy statement stipulating the following:*
 - (a) all employees, job applicants and other persons who have dealings with the business have the right to be treated with dignity*
 - (b) Sexual harassment in the workplace will not be condoned.*
 - (c) Persons who have been or are being subjected to sexual harassment in the workplace have the right to lodge a grievance about it and appropriate action will be taken by the employer.*
- 2. Management should have the positive duty to implement the policy and take disciplinary action against employees who do not comply with the policy.*
- 3. A policy on sexual harassment should also explain the procedure which should be followed by employers who are victims of sexual harassment. The policy should also state the following:*
 - (a) Allegations of sexual harassment will be dealt with seriously expeditiously, sensitively and confidentially.*
 - (b) Employees will be protected against victimization, retaliation for lodging grievances and from false accusations.*
- 4. Policy statements on sexual harassment should be communicated to all employees.*

²⁹ Produced by National Economic, Development and Labour Council (NEDLAC) under Section 203 of the Labour Relations Act 1995.

ANNEX

The full profile of Zimbabwe's ratification of ILO Conventions

Convention	Convention	Ratification date	Status
Convention 14	C14 Weekly Rest (Industry) (Convention), 1921	06:06:80	Ratified
Convention 19	C19 Equality of Treatment (Accident Compensation) Convention, 1925	06:06:80	Ratified
Convention 45	C45 Underground Work (Women) Convention, 1935	06:06:80	Ratified
Convention 100	C100 Equal Remuneration Convention, 1935	14:12:89	Ratified
Convention 144	C144 Tripartite Consultation (International Labour Standards) Convention, 1976	14:12:89	Ratified
Convention 26	C26 Minimum Wage-Fixing Machinery Convention, 1928	16:09:93	Ratified
Convention 81	C81 Labour Inspection Convention, 1947	16:09:93	Ratified
Convention 99	C99 Minimum Wage Fixing Machinery (Agriculture) Convention, 1951	16:09:93	Ratified
Convention 129	C129 Labour Inspection (Agriculture) Convention, 1969	16:09:93	Ratified
	C29 Forced Labour Convention, 1930	27:08:98	Ratified
Convention 98	C98 Right to Organize and Collective Bargaining Convention, 1949	27:08:98	Ratified
Convention 105	C105 Abolition of Forced Labour Convention, 1957	27:08:98	Ratified
Convention 135	C135 Workers' Representatives Convention, 1971	27:08:98	Ratified
Convention 140	C140 Paid Educational Leave Convention, 1974	27:08:98	Ratified
Convention 150	C150 Labour Administration Convention, 1978	27:08:98	Ratified
Convention 159	C159 Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983	27:08:98	Ratified
Convention 170	C170 Chemicals Convention, 1990	27:08:98	Ratified
Convention 111	C111 Discrimination (Employment and Occupation) Convention, 1958	23:06:99	Ratified
Convention 138	C138 Minimum Age Convention, 1973	06:06:00	Ratified
Convention 182	C182 Worst Forms of Child Labour Convention, 1999	11:12:2000	Ratified

