

South Africa: A Brief on the Implementation of CEDAW Commitments

from Articles 2, 5, 11, 16 and General Recommendation 12

Information for the Committee on the Elimination of Discrimination against Women

77th Pre-Session Working Group, March 2020

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INTRODUCTION

The WORLD Policy Analysis Center, based at the University of California, Los Angeles, captures quantitative policy data on more than 2,000 indicators that matter to equality, health, and well-being. We strive to improve the quantity and quality of globally comparative data available to policymakers, citizens, national governments, intergovernmental organizations, civil society, and researchers for all 193 UN member states. We submit the following brief in advance of the 77th Pre-Sessional Working Group of the Committee on the Elimination of Discrimination against Women.

This brief will focus on the following five areas:

1. Prohibition of Discrimination in Constitutions (Article 2)
2. Non-discrimination in Work and Employment (Article 11)
3. Sexual Harassment in Work and Employment (General Recommendation 12)
4. Paid Maternity and Paternity Leave (Articles 11, 5)
5. Child Marriage (Articles 16, 2)

We have collected and analyzed information on rights, laws, and policies in these areas for all 193 UN member states using a variety of sources, including primary national legal sources (e.g. original legislation and constitutions), national reports on policies and laws to the United Nations and official global and regional bodies, and secondary sources where clarification or corroboration of primary data is needed. Using a rigorous double-coding process, we create original databases which distill thousands of pages of text to highlight the essential features of each right, law, or policy. These original databases are the reference for the following brief. When drafting each brief, we perform a series of additional verifications to ensure the data provided reflects the current constitutional and legal landscape of a country.

In this report, we provide detailed constitutional and legislative excerpts documenting our findings. These findings are followed by suggested questions the Committee may ask South Africa, as well as topics to be addressed by the Committee in their concluding observations. We hope the Committee will recommend that South Africa address any gaps in consultation and collaboration with relevant stakeholders, including civil society organizations.



FINDINGS

While the following review is systematic and rigorous, we recognize that there may be laws or policies governing these areas that we have not captured including, new legislation or policies that have not yet been published globally.

1. Equality and Non-Discrimination in the Constitution (Article 2)

While the entirety of the Convention aims to eliminate discrimination against women in all spheres of life, Article 2(a) of the Convention specifically requires States Parties “To embody the principle of the equality of men and women in their national constitutions”.

Constitutions state the values of a country and describe the rights of people living within the country and profoundly influence norms and practice. In nearly all countries, constitutions take precedence over other sources of law—making them critical tools for delineating and implementing equal rights. New constitutions and new rights guaranteed in constitutions can be used to overturn discriminatory laws as well as to legislate non-discrimination guarantees. Moreover, constitutions can offer protection against policy and legal changes during periods of social and political shifts that may seek to undermine equal rights. For these reasons and others, as the foundational document setting out the rights of all human beings in a country, a constitution and the rights contained therein are essential to realizing equal rights.

We reviewed full text constitutions for all 193 UN member states available from official government sources to determine whether the constitution explicitly guaranteed equality or non-discrimination on the basis of sex and/or gender by prohibiting discrimination, guaranteeing equal rights, guaranteeing equality before the law, or guaranteeing overall equality or equal opportunities.

SOUTH AFRICA’S CONSTITUTIONAL PROVISIONS

Based on our review of full-text constitutions, the constitution of South Africa **prohibits discrimination by the state and individuals against anyone for reasons based on sex and gender**. These rights of non-discrimination are enshrined in Article 9.

9. Equality

1. Everyone is equal before the law and has the right to equal protection and benefit of the law.

[...]

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 (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

2. Non-Discrimination in Work and Employment (Article 11)

Article 11 of the Convention outlines specific measures States Parties shall undertake in order to eliminate discrimination in the field of employment.



We systematically reviewed national labor codes, gender equality, and other relevant legislation available through the International Labor Organization’s NATLEX database for all 193 UN member states to determine whether national legislation prohibited gender discrimination in employment. We examined legal protections across five areas covered by CEDAW:

- employment opportunities or hiring
- equal pay for work of equal value
- vocational training at work
- promotions or demotions
- job security or terminations

We assessed whether women were explicitly protected from discrimination at work in each of these areas and whether the definition of discrimination included both direct and indirect discrimination. We further examined whether there were provisions that protected women from retaliatory action for reporting discrimination. We also examined whether there were explicit protections from discrimination at work for statuses that intersect directly with women’s dual roles as workers and caregivers: marital status, pregnancy, and family status.

SOUTH AFRICA’S LEGISLATIVE PROVISIONS

The *Employment Equity Act* outlines **comprehensive protections from workplace discrimination on the basis of sex and gender**. In addition to guaranteeing equal remuneration for work of equal value, the law explicitly prohibits sex- and gender-based discrimination in recruitment and hiring procedures; training and development; promotions, and demotions or other disciplinary measures; and dismissals. The law further prohibits both indirect and direct forms of discrimination, and protects past, current, and prospective employees from retaliatory action after reporting incidents of discrimination. All the protections above are also guaranteed to workers on the basis of pregnancy, marital status, and family status. The *Labour Relations Act* further reiterates the prohibition of unfair dismissals on these grounds.

3. Sexual Harassment in Work and Employment (General Recommendation 12)

Referencing Articles 2, 5, 11, 12, and 16 of the Convention, General Recommendation 12 further recommends that States parties implement legislation protecting women from sexual harassment in the workplace.

We systematically reviewed national labor codes, penal codes, equal opportunity, and other relevant legislation available through the International Labor Organization’s NATLEX database for all 193 UN member states to determine whether national legislation prohibited sexual harassment at work. We examined whether protections from sexual harassment at work were in line with international agreement of what constitutes key components on sexual harassment. Namely, do laws define sexual harassment to cover quid pro quo and the creation of a hostile work environment; include sex-based harassment as well as sexual-behavior based harassment; protect workers from harassment by co-



workers and other actors in the workplace, as well as supervisors; and ensure workers are protected from retaliation for reporting sexual harassment?

SOUTH AFRICA'S LEGISLATIVE PROVISIONS

A 2014 amendment to the *Employment Equity Act* suggests that **workplace sexual harassment is considered a form of unfair discrimination, and therefore prohibited**. Persons who do report cases of sexual harassment are protected from retaliation through the general application of Article 51 in the *Employment Equity Act*, which protects employees from discrimination while conferring any rights from the Act. **However, the Act fails to include additional key anti-sexual harassment provisions, including a definition of sexual harassment and a clear protection from harassment by colleagues and third-parties as well as supervisors**. While the Minister of Labour has issued a *Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace*, which does address these issues, we are concerned that the Code does not carry the same legal status as law, and therefore may not be equally enforceable.

Employment Equity Act

10. Disputes concerning this Chapter

(6) If the dispute remains unresolved after conciliation-

(a) any party to the dispute may refer it to the Labour Court for adjudication

(aA) an employee may refer the dispute to the CCMA for arbitration if—

(i) The employee alleges unfair discrimination on the grounds of sexual harassment

51. Protection of employee rights

(1) No person may discriminate against an employee who exercises any right conferred by this Act.

4. Paid Maternity and Paternity Leave (Articles 11, 5)

Article 11.2 of the Convention states that:

In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances;

Further, Article 5(b) of the Convention emphasizes the importance of including men in the upbringing of children:

To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing



and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

We systematically reviewed national labor codes and social security laws to assess the availability paid maternity and paternity leave. We relied primarily on legislation downloaded through the International Labor Organization’s NATLEX database. Additionally, for confirmation or clarification on legal provisions, we consulted trusted secondary sources including the Social Security Programs throughout the World (SSPTW) database, and the International Review of Leave Policies.

SOUTH AFRICA’S LEGISLATIVE PROVISIONS

In South Africa, the *Basic Conditions of Employment Act* provides **four months of paid maternity leave** to all working mothers (Section 25), and **three days of paid paternity leave** to working fathers who meet the eligibility criteria (Section 27). While the Labor Relations Act protects mothers from unfair dismissals during maternity leave, we found no equivalent protections for fathers during paternity leave.

5. Child Marriage (Articles 16, 2)

Child marriage disproportionately affects girls, often leading to social, economic, educational, and health inequalities, which States Parties have committed to eliminating. Article 16.2 of the Convention calls on States Parties to legislate a minimum age of marriage and prohibit the marriage of children. Additionally, disparities in the legal minimum age of marriage between girls and boys contravenes Article 2(a) of the Convention, which commits States Parties to “embody the principle of the equality of men and women” in their “national constitutions or other appropriate legislation”.

We systematically reviewed national civil codes and child-related legislation for all 193 UN member states to determine whether national legislation established a minimum age of marriage for both girls and boys generally, with parental consent, and under religious and customary law. We reviewed all legislation available through the Lexadin World Law Guide, Foreign Law Guide, International Labor Organization’s NATLEX database, regional sources, and official country websites.

SOUTH AFRICA’S LEGISLATIVE PROVISIONS

The *Children’s Act* of South Africa **establishes a minimum age of marriage of 18 years for both boys and girls**. However, the *Marriage Act* and the *Recognition of Customary Marriages Act* outline exceptions to this standard. The *Marriage Act* allows **girls to be married at the age of 15 with parental consent but maintains the minimum age of 18 for boys**, creating a gender disparity in the minimum age for marriages occurring with parental consent. The *Recognition of Customary Marriages Act* further **allows minors to enter into customary marriages with parental consent, without specifying a minimum age limit for boys or girls**.

Children’s Act

1. Interpretation

***(1) In this Act, unless the context indicates otherwise-
“child” means a person under the age of 18 years;***



“marriage” means a marriage-

- (a) recognised in terms of South African law or customary law; or*
- (b) concluded in accordance with a system of religious law subject to specified procedures,*

12. Social, cultural and religious practices

(1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being.

(2) A child-

(a) below the minimum age set by law for a valid marriage may not be given out in marriage or engagement; and

(b) above that minimum age may not be given out in marriage or engagement without his or her consent.

Marriage Act

24. Marriage of minors

(1) No marriage officer shall solemnize a marriage between parties of whom one or both are minors unless the consent to the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing.

26. Prohibition of marriage of persons under certain age

(1) No boy under the age of 18 years and no girl under the age of 15 years shall be capable of contracting a valid marriage except with the written permission of the Minister or any officer in the public service authorized thereto by him, which he may grant in any particular case in which he considers such marriage desirable: Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law: Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge or court having jurisdiction in the matter is necessary and has been granted.

[...]

34. Religious rules and regulations

Nothing in this Act contained shall prevent -

(a) the making by any religious denomination or organization of such rules or regulations in connection with the religious blessing of marriages as may be in conformity with the religious views of such denomination or organization or the exercise of church discipline in any such case;

Recognition of Customary Marriages Act

3. Requirements for validity of customary marriages

(1) For a customary marriage entered into after the commencement of this Act to be valid -

(a) the prospective spouses -

(i) must both be above the age of 18 years; and

(ii) must both consent to be married to each other under customary law; and

(b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

[...]

(3)(a) If either of the prospective spouses is a minor, both his or her parents, or if he or she has no parents, his or her legal guardian, must consent to the marriage.



(b) If the consent of the parent or legal guardian cannot be obtained, section 25 of the Marriage Act, 1961, applies.

(4)(a) Despite subsection (1)(a)(i), the Minister or any officer in the public service authorised in writing thereto by him or her, may grant written permission to a person under the age of 18 years to enter into a customary marriage if the Minister or the said officer considers such marriage desirable and in the interests of the parties in question.

(b) Such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all the other requirements prescribed by law.

RECOMMENDED QUESTIONS FOR THE LIST OF ISSUES AND CONCLUDING OBSERVATIONS

We hope the Committee will:

Equality and Non-Discrimination in the Constitution (Article 2)

- In its list of issues, ask South Africa: Can South Africa outline how constitutional guarantees of non-discrimination based on sex and gender are being implemented?
 - Where South Africa is not fully implementing these guarantees, recommend in its concluding observations that South Africa explore how to fully and effectively implement these guarantees.

Non-discrimination in Work and Employment (Article 11)

- In its list of issues, ask South Africa: Can South Africa outline how it is enforcing protections from gender- and sex-based discrimination and retaliation at work?
 - Where South Africa is not fully implementing these protections, recommend in its concluding observations that South Africa develop a timely, detailed plan to fully and effectively implement these protections.
- In its list of issues, ask South Africa: Can South Africa demonstrate whether all women, regardless of income or social status, have access to an effective reporting process?
 - If insufficient evidence is provided to demonstrate effective and inclusive reporting procedures, recommend in its concluding observations that South Africa outline how it will improve implementation of the reporting process for all women.



Sexual Harassment in Work and Employment (General Recommendation 12)

- In its list of issues, ask South Africa: Can South Africa demonstrate whether the details outlined in the *Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* can be legally enforced?
 - If the *Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* is not legally enforceable, recommend in its concluding observations that South Africa pass and implement legislation that explicitly develops a comprehensive anti-sexual harassment law which includes the following:
 - An explicit prohibition of sexual harassment that extends to anyone in the workplace, including supervisors, co-workers, and third-parties, such as customers, clients, or contractors.
 - A clear definition of sexual harassment behaviors, including quid pro quo, conduct that creates a hostile work environment, and sex-based harassment.
 - A prohibition of retaliatory actions against persons who report cases of workplace sexual harassment.
 - An effective and inclusive reporting process that ensures all women, regardless of income or social status, have legal recourse.

Paid Maternity and Paternity Leave (Articles 11, 5)

- In its list of issues, ask South Africa: Can South Africa demonstrate how paid maternity and paternity leave provisions are being implemented to be inclusive of all workers, including part-time or self-employed workers, as well as workers working from the informal economy?
 - If South Africa is not fully implementing these guarantees to be inclusive of all workers, recommend in its concluding observations that South Africa develop a specific plan for fully and effectively expanding these guarantees to do so.
- In its concluding observations, recommend that South Africa increase the length of paid paternity leave. Increasing the feasibility of taking adequately long paid paternity leave is foundational to increasing gender equality and caregiving for children as well as to gender equality at work.

Child Marriage (Articles 16, 2)

- In its list of issues, ask South Africa: Can South Africa outline any concrete, near-term plans to pass legislation that establishes a minimum age for marriage of 18 years old for both girls and boys with and without parental consent?



- If concrete, near-term plans are not in place, recommend in its concluding observations that South Africa pass and implement legislation that establishes a minimum age for marriage with and without parental consent of 18 years old for both girls and boys.
- In its concluding observations, also recommend that South Africa work to address gender differences in the law that give boys more protection from early marriage than girls, and to ensure that girls' protections are raised.