

The protection of children's rights in Namibia: Law and policy

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Introduction

Children's rights are the human rights of children, with particular attention to the rights of special protection and care afforded to the young, including their right to –

- association with both biological parents
- human identity
- have their basic needs met for food, universal state-paid education and health care, and
- criminal laws appropriate for their age and development.

Interpretations of children's rights range from allowing children the capacity for autonomous action to the enforcement of children being physically, mentally and emotionally free from abuse. The question that was the subject of the research study, of which this paper is a reduced reflection, is what protection is accorded to children in Namibia?

On 2 October 2009, the front page of *The Namibian*, the country's most widely read daily newspaper, bore a headline stating that –¹

[o]ur children face murder, rape and abuse on a daily basis.

The author of the newspaper article informs us that at least 200 children, from newborns to teenagers of 16 years, have been murdered, raped or assaulted in Namibia so far this year, or have died under suspicious circumstances. Horror stories of children being stabbed to death, pushed into animal burrows and left to die, gang-raped, burnt to death, and drowned while unattended, as well as babies being dumped by their mothers have filled the daily crime reports released by the Police since the beginning of the year.²

The newspaper article continues as follows:³

[T]hese reports are generally regarded as being only the tip of the iceberg, as many crimes are left unreported or aren't reflected in the official statistics. Against this backdrop, the country

1 Duddy (2009).

2 (ibid.).

3 (ibid.).

this week 'celebrated' its 10th Day of the Namibian Child. The theme suited the gloomy predicament Namibia's children increasingly find themselves in – 'Namibia fit for children: Call for accelerated action towards their protection against violence and all forms of child labour'. According to Police records, at least 66 children have been raped so far this year. The youngest was three. At least 11 were murdered. The youngest, a little boy of three months. At least 28 children drowned. The youngest, a baby of nine months from the Omusati Region. At least five children took their own lives. The youngest only ten. Willem Nghilifavali Shiweda hanged himself by a shoelace from a tree at Eshii village near Eenhana on March 28. At least seven newborn babies were dumped by their mothers – some lived, some [did] not. Martinus Swartbooi was only three months old when kicks to his face allegedly killed him on June 11. He died in his mother's arms in Block E at Rehoboth. Simon Nandume Gabathuler was four months old when a man (39) allegedly set their house at Outjo on fire after a quarrel with his girlfriend on April 5. Simon and his sibling, Seondele (3), burnt to death. Tangeni-Omwene Mudjanima Kamudulunge was eight months old when he was allegedly stabbed seven times with a knife in his chest before his attacker set their hut on fire in a village in Ohangwena on January 18. Hosea Uushona was one year old when a stray bullet hit him in the head and killed him in Okuryangava in Windhoek at 17h30 on May 9. The bullet was allegedly fired by a man (30) from a nearby shack. At Mariental, Anton Saal (12) was left to die in the reeds near Hardap after he was hit by a LM5 bullet, allegedly fired by a security guard on January 6 when he and three friends stole grapes and ran away. His body was only discovered three days later. After several blows to his head, Santiago Klainus (6) from Outapi died in the Oshakati State Hospital on August 28. The Police reports also contain several nameless victims, like the baby girl of four months who was found abandoned in the bush near Uukuulamba village in Omusati. The villagers didn't take her to the hospital or Police in time and she died on January 12. In March, a couple strolling on the beach near Mile 4 at Swakopmund discovered the body of a baby boy of two weeks. Attempted murder cases were opened after two baby girls were found in animal burrows in the Omusati region. On April 14, passers-by found the first baby near Onandjaba Town, where her mother had left her to die. In the second case, a woman (26) was arrested after allegedly forcing her baby down a burrow to drown. At Okakarara, a baby of one month was allegedly beaten with sticks on his head on January 13. He suffered serious injuries. A little boy of six months old was seriously injured after he was beaten with a stone on June, 14 in Ohangwena. In another attempted murder, a woman (20) was arrested on August 22 after she allegedly threw her baby boy into a toilet. The baby was rescued and taken to the Onandjoke Lutheran Hospital. Two fetuses were found at the Otjomuise sewerage works behind the Goreangab Dam – one on April 24 and one on August 3. One day later, a newborn baby boy was found wrapped in a towel and a plastic bag in a dustbin in Windhoek. Also in the city, a newborn baby girl was found in the field at Cimbebasia on the morning on April 3. At the end of March, a girl of 13 allegedly aborted her foetus on her way home from school at the Oshifo village near Ruacana. Her guardian allegedly helped her to fetch the body and bury it at her homestead. On June 21, the decomposed body of a newborn was found buried in a mahangu field in the Oshana region. Nearly a month later, on July 14, dogs brought body parts of a newborn to the home of Shifafurw Wataliu at Geigeo South near Rundu.

More statistics bear out the following sad stories:⁴

The highest teenage pregnancy rate of between 12 and 18 per cent was recorded at Keetmanshoop, followed by Karasburg with between eight and nine per cent, while Lüderitz

4 Cloete (2009).

recorded the lowest rate of eight per cent. Statistics revealed that three mothers died of childbirth complications in the Karas Region between 2004 and 2007, while 144 newborns died in the past three years. Keetmanshoop recorded 121 deaths of newborns, followed by Lüderitz with 21 deaths, while Karasburg recorded only two deaths. Statistics further revealed that 218 children under the age of five died in the region between 2004 and 2007. At Karasburg 93 deaths were recorded, followed by Keetmanshoop with 76 while Lüderitz recorded 49 deaths. The number of deaths of children under one year in the region stood at 134 for the past three years. At Lüderitz 60 deaths were recorded, followed by Keetmanshoop with 50, while 24 deaths were recorded at Karasburg. Slow foetal growth, premature birth, malnutrition, respiratory disorders, diarrhoea, pneumonia and other infections were the leading causes of child deaths.

Namibia is a nation that is said to be a constitutional democracy or *Rechtsstaat*.⁵ Through both empirical and documentary research, the current paper examined the nature of children's rights, particularly the manner in which these rights are legally protected in Namibia. Since Independence in 1990, the Government of Namibia has made various efforts to strengthen children's rights. One such effort was to establish a Ministry of Gender Equality and Child Welfare in 2000 with the objective, inter alia, of ensuring the empowerment of children, and their full participation in political, legal, social, cultural and economic development. Hence, the objectives of the Child Welfare Directorate include the following:⁶

- To improve the quality of life of all children, including those affected by HIV/AIDS, and to keep them within their families and communities
- To ensure the implementation and monitoring of policies, legislation and programmes that are geared towards effective service delivery, and
- To ensure capacity-building and development among staff in the Directorate as well as other stakeholders.

A *child* – defined as being every human below the age of 18 years unless, under the law applicable to the child, majority is attained earlier⁷ – has human rights as a child. The interpretation of children's rights ranges from allowing children the capacity for autonomous action to enforce the rights of those being physically, mentally and emotionally subjected to abuse, and to give them a chance to be heard both under the international and domestic environment. The Convention on the Rights of the Child (CRC) stipulates that children's rights are to be respected and protected without discrimination of any kind, irrespective of the child's or his or her parents' or legal guardian's race; colour; sex; language; religion; political or other opinion; national, ethnic or social origin; or property, disability, birth, or other status.⁸

5 This German term is used internationally to describe a constitutional state that observes the rule of law.

6 <http://www.mgecw.gov.na>; last accessed 13 September 2009.

7 CRC, Article 1.

8 CRC, Article 2(1).

Signatories to the CRC have an obligation to undertake all appropriate legislative, administrative and other measures to implement the rights recognised under the CRC. With regard to economic, social and cultural rights, –⁹

[s]tates parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

The states parties can enforce, or fail to enforce, the Articles of the CRC at various levels, namely in their constitutions, in enacted legislation, in policies, as well as through programmes which affect children.¹⁰

In September 1990, Namibia became a signatory to the CRC. As such, the country is now obliged to observe the provisions of the CRC. In 2002, Namibia also signed the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, and the Optional Protocol on the Involvement of Children in Armed Conflict.

This paper aims to determine the extent to which the country has complied with its obligations and the various institutions and statutory enactments aimed at affording the necessary respect for and protection of children's rights domestically. The starting point for the paper comprised research within the Human Rights and Documentation Centre¹¹ of the University of Namibia's Faculty of Law in 2009.

The legal framework relating to children's issues in Namibia is wide-ranging. But is it also effective? As stated by Coomer, –¹²

[a]pproximately 60 per cent of people in Namibia are under the age of 25. Nearly 40 per cent of the population is under the age of 15. The fact that children make up such a large proportion of the population is reason enough to support the need for robust legislation on the care and protection of children. But there are more reasons. Many more. Children cannot care for themselves in the same way that adults can. Children cannot make decisions for themselves in the same way that adults can. Children cannot protect themselves from harm in the same way that adults can. There is an urgent need for all countries, including Namibia, to ensure that they have legislation in place that provides the basis for the care and protection of children.

9 CRC, Article 4.

10 Adkisson (1995:3).

11 The HRDC is a semi-autonomous component of the Faculty of Law. It serves the central mission of creating and cultivating a sustainable culture of human rights and democracy in Namibia. Focusing on this mission, the HRDC promotes the implementation of human rights by organising workshops, seminars and conferences, and by reviewing the human rights situation in Namibia as well as the southern African region. The HRDC also organises and conducts training programmes for the broadest possible variety of target groups, and prepares and disseminates materials and information on human rights and related issues. See Ruppel (2008a:131–140).

12 Coomer (2009).

The Namibian children's rights protection system

The Constitution of the Republic of Namibia

The Republic of Namibia, as the country is known today, was declared a German Protectorate in 1884 and a Crown Colony in 1890. Prior to Independence in 1990, the territory was known as *Deutsch-Südwestafrika*, *South West Africa* and *South West Africa/Namibia* under the German and South African regimes. The territory remained a German colony until 1915, when it was occupied by South African forces. From 1920 onwards, the territory became a protectorate, i.e. a mandated territory under the protection of South Africa in terms of the Treaty of Versailles. Significant local and international resistance to South Africa's continued domination of the country emerged in the late 1950s and early 1960s.¹³

In the wake of the substantial repression of an incipient nationalist movement within South West Africa, the South West African People's Organisation (SWAPO) was formed in exile in 1960 under the leadership of Sam Nujoma. The organisation committed itself to working through international bodies, such as the United Nations (UN), to pressurise the South African Government, and took up an armed struggle against the latter. Political and social unrest within Namibia increased markedly during the 1970s, and was often met with repression at the hands of the colonial administration. In 1978, the UN Security Council passed Resolution 435 and authorised the creation of a transition assistance group to monitor the country's transition to independence. In April 1989, the UN began to supervise this transition process, part of which entailed supervising elections for a constituent assembly to be charged with drafting a constitution for the country. After more than a century of domination by other countries, Namibia finally achieved its independence in 1990 after a long struggle on both diplomatic and military fronts.¹⁴

The 1990 Constitution of the Republic of Namibia is the fundamental and supreme law of the land. The Namibian Constitution is hailed by some as being among the most liberal and democratic in the world. It enjoys hierarchical primacy amongst the sources of law by virtue of its Article 1(6). It is thematically organised into 21 chapters which contain 148 Articles that relate to the respective chapter title. Together, they organise the state and outline the rights and freedoms of people in Namibia.¹⁵

The Preamble of the Constitution provides the following, inter alia:

Whereas the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace ...

The inherent dignity is not only applicable to adults, but also to children. This is the first

13 Amoo & Skeffers (2008:17).

14 (ibid.).

15 Ruppel (2008b:208).

protection that is accorded to children by the Constitution. However, in reality, it often seems as if only adults enjoy this protection. This may be attributable to the following factors:

- Children do not know their rights.
- The protection system (policing and legal system) is not friendly to children.
- Society is quick to stigmatise any child who wants to ensure that his/her rights are recognised.
- Some cultural practices are hostile to children.
- There is a lack of information available on the rights of children.
- The protection of children is applied selectively.

The Preamble further states that –

[w]hereas the said rights include the right of the individual to life, liberty and the pursuit of happiness, regardless of race, colour, ethnic origin, sex, religion, creed or social or economic status; ...

The right to life as provided for by the Constitution must be read in conjunction with Article 6, which provides, inter alia, that “the right to life shall be respected and protected”. Under Article 8(2)(b), children are not allowed to be subjected to any form of torture, inhuman, cruel or degrading treatment or punishment, both in the national or domestic environment. Children’s protection rights are afforded to all children, including those without families, and those who are disabled.¹⁶

However, how does one explain a situation where children die as a result of malnutrition or the lack of proper medical health care, 19 years after independence? Children need to be protected from situations where they die from hunger and health-related sicknesses. Is it now questionable whether government has put in place all necessary and adequate measures to take care of children, no matter in what circumstances they find themselves.

The Preamble asserts that –

[w]hereas we the people of Namibia ... are determined to adopt a Constitution which expresses for ourselves and our children our resolve to cherish and protect the gains of our long struggle; ...

One can see the desire on the part of the drafters of the Constitution not to neglect children as the nation emerged from under the imposed echelons of apartheid. The Preamble makes it unambiguous that children are meant to be protected as the nation progresses. As mentioned previously, this progress and the protection of children is a must. However, today, children still lag behind and appear to be treated like second-class citizens regardless of these constitutional provisions.

¹⁶ Namibian Constitution, Article 10.

There is a need to break the barriers of silence as far as children's rights are concerned. Only when the protection system is effective and the perpetrators of crimes against children are treated with the contempt they deserve can one say that the nation is moving towards achieving the said right provided for by the Preamble.

Moreover, Article 10 of the Constitution guarantees the following:

- (1) All persons are equal before the law.
- (2) No person shall be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

In addition, respect for human dignity as well as equality and freedom from discrimination on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status are recognised within Chapter 3 of the Constitution as fundamental rights to be upheld by the executive, legislature and judiciary and all other organs of government, as well as by all natural and legal persons in Namibia.¹⁷

Article 13 of the Constitution protects the right to be free from interference in the privacy of the home, correspondence or communications. Exceptions are made concerning –

... the interest of national security, public safety, the economic well-being of the country, the protection of health and morals, the prevention of disorder or crime, and the protection of the rights or freedoms of others.

The child's right of protection against "arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation", as expressed in Article 16(1) of the CRC, is protected by Namibia's laws on defamation.¹⁸

The responsibility for state television and radio services rests with the Namibian Broadcasting Corporation (NBC), which, inter alia, is required to contribute to the education, unity and peacefulness of the nation by disseminating information relevant to the country's socio-economic development. In support of such responsibility, the regulations of the Namibian Communication Commission Act¹⁹ forbid the advertisement of alcohol or tobacco during children's programmes. Additionally, the control of obscene and pornographic material is regulated by the Indecent or Obscene Photographic Matter Act²⁰ and the Publications Act.²¹

17 Articles 5, 8 and 10, respectively.

18 *Actio iniuriarum*.

19 No. 4 of 1992.

20 No. 37 of 1967, as amended by the SWA Indecent or Obscene Photographic Matter Amendment Act, 1985 (No. 4 of 1985).

21 No. 42 of 1974. Adkisson (1995:159).

The family, as the natural and fundamental group unit of society, is accorded special protection in Article 14 of the Constitution. This Article also bars child marriages, and states that men and women have “equal rights as to marriage, during marriage, and at its dissolution”. In addition, the Constitution also gives special emphasis to women in the provision which authorises affirmative action.²² Furthermore, the Constitution puts boys and girls in an identical position with respect to citizenship.²³

Another vital preservation of child rights is found in Article 15(1) of the Constitution, which provides as follows:

Children shall have the right from birth to a name, the right to acquire nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.

The legal norms of constitutional interpretation in Namibia have been settled in the following cases, to mention but a few: *S v Acheson*,²⁴ *Minister of Defence v Mwandhingi*,²⁵ and *In Re: Corporal Punishment by the Organs of the State*.²⁶ These cases have stated that the Constitution is a mirror reflecting the national soul. Thus, the word *shall* in the context of the Constitution where a person's right is concerned requires exact compliance. In other words, the right has to be strictly adhered to, as provided for in the Constitution. The word *shall* puts the onus on the state to ensure that every child indeed has those rights.

Article 15(1) provides for a clear protection system that is constitutionally guaranteed. However, the research underlying this paper has shown that most children do not know about the Constitution or what it contains. In addition, the percentage of children who do not have birth certificates, national identity cards or passports shows traces of a failing child protection system. The birth certificate is an essential document to prove that a person exists in the eyes of the law, and it contributes to creating safer, healthier and more prosperous societies. It was estimated that 4 out of 10 children do not have a birth certificate. Therefore, in October 2008, the Namibian government, in collaboration with the United Nations Children's Fund (UNICEF), launched a project to ensure that all children born at hospital are registered at birth and receive a birth certificate recognising their existence as Namibian citizens.²⁷

Article 15(2) further states the following:

Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education,

22 Article 23(3), Namibian Constitution.

23 Article 4, Namibian Constitution.

24 *S v Acheson*, 1991 NLR 1.

25 *Minister of Defence v Mwandhingi*, 1993 NLR 63.

26 *In Re: Corporal Punishment by the Organs of the State*, 1991 NLR 178.

27 Cf. e.g. MGECW (2009a).

or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of this sub-Article children shall be persons under the age of sixteen (16) years.

This is another way in which the rights of the children are protected by the Constitution. In order to fully understand this particular provision's protection, it is important to deal with certain aspects on a case-by-case basis, i.e. –

- protection from the economic system
- protection from hazardous work
- protection from interference in education, and
- health protection.

The Constitution makes it categorically clear that no child is permitted to be exploited by anyone for economic benefit. Others prefer to call it *child labour*. Research has shown that most children work mainly as a result of poverty or family disintegration. Today, the issue of HIV/AIDS has exacerbated children's plight. The child may have been born HIV-positive, or the same poverty and family breakdown scenario forces the child to become involved in promiscuous acts that affect his/her welfare.

Moreover, observations have revealed that, in various supermarkets and private businesses in Namibia today, children are seen packing items at till points. In most cases, their remuneration is a customer's loose change. Is this not also a form of economic exploitation that is prohibited by Article 15(2)? This Article must be read in conjunction with Article 15(3), which provides the following, inter alia:

No children under the age of fourteen (14) shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament ...

Even if the government is fully committed to ensuring that children are protected from all forms of economic exploitation, a child's plight cannot improve significantly if other stakeholders do not complement government efforts. Furthermore, the situation regarding the protection of children from exploitation as labourers on farms appears to be more deplorable than that in urban areas. It is difficult to monitor the illegal employment of children on farms, where it is nonetheless well known that children under the age of 16 are often employed for all kinds of labour. This exposes some shortcomings in terms of Article 15(2). Others argue that, if these children did not perform those menial jobs, they would suffer hunger. Therefore, in as much as Articles 15(2) and (3) protect children from economic exploitation, the practical reality seems little affected by such protection.

Further protection to children is provided under Article 15(4), as follows:

Any arrangement or scheme employed on any farm or other undertaking, the object or effect which is to compel the minor children of an employee to work for or in the interest of the employer or such employee ...

Our courts are yet to firmly ascertain what the phrase *compel the minor children* entails. For instance, a minor boy may find himself in a situation where his parents or guardians are working on a farm, but they are sick or they cannot afford to take proper care of him. The child may see an opportunity to improve his welfare by working at the farm. The question is whether the minor working under these conditions could be interpreted as him being compelling to work for his employer. This kind of a scenario is what appears to be practical on many farms in Namibia, i.e. that a minor finds him-/herself working on a farm out of necessity despite the provisions of Article 15(4).

One of the most talked about issues is the protection of minor children detained in holding cells.²⁸ A starting point here is to examine the protection accorded to children by the Constitution. For example, Article 15(5) provides as follows:

No law authorising preventive detention shall permit children under the age of sixteen (16) years to be detained.

This constitutional provision has to be broadly, purposively and liberally interpreted in order to clothe the children with the protection emanating from this right. However, research has shown that children under the age of 16 are still being detained in various holding cells.²⁹

The best interests of the child are the primary considerations in detaining children. The child's own views – where s/he is able to express them – must be taken into account in all matters concerning such detention. Article 15(5) read in conjunction with Article 40 of the CRC and the UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) recommends that a set of rules be developed for the administration of child justice in order to protect the fundamental rights of children in conflict with the law.³⁰

Article 20(1) states that –

[a]ll persons shall have the right to education.

Research has shown that, out of 60% of children that are meant to be enrolled at schools throughout the country, only 30% are said to be going to school. This state of affairs cannot go unchallenged 19 years after independence. The majority of children, especially those in the rural areas and those that are physically handicapped, find it difficult to attend school. This could be explained by the fact that schools in rural areas are not built close to the communities they serve. Children have to travel long distances in order to go school. This is exacerbated by the fact that there is rampant poverty in most rural areas.

28 See Ruppel & Groenewaldt (2008).

29 (ibid.).

30 See the paper by Stefan Schulz elsewhere in this volume.

Thus, walking long distances to get to school hampers a child's right to education.³¹

Article 20(2) stipulates, inter alia, that –

[p]rimary education shall be compulsory and the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining state schools at which primary education will be provided free of charge.

Article 20(1), read in conjunction with Article 20(2), sets a perfect platform for holding the government accountable to fulfil its constitutional obligations of the right to education. In as much as the right to education is conferred upon the children by the Constitution, the government needs to have a concrete plan that is monitored from a legal perspective if the majority of the children in Namibia are to enjoy this right.

On the same note, Article 20(3) states that –

[c]hildren shall not be allowed to leave school until they have completed their primary education ...

This constitutional provision also specifically addresses children's plight. It acknowledges that certain circumstances may force children to leave school before completing their primary education. However, what needs to be addressed is what happens when children leave primary education because of poor health, failure by their parents to provide school materials, unavailability of trained teachers, schools that are far from their communities, and HIV/AIDS, to name but a few of the issues preventing children from completing primary school. The government is responsible for addressing issues that, in contravention of Article 20(3), may force children to abandon their primary education. The game of blaming one another at ministerial level does not resolve the challenges Namibian children face in terms of their right to education. The time has come for this constitutionally protected right to be turned into a dream come true. Wherever the blame lies, children in Namibia suffer the consequences of a violation of Article 20(3).

Another provision aimed at enhancing children's rights is contained in the Constitution's Article 95(b). According to the provision concerned, the state is called to enact –

... legislation to ensure that the health and strength of the workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age and strength.

The phrase *tender age of children [is] not abused* should be highlighted here. Directly related to this constitutional provision is the admission that children in Namibia are subjected to numerous challenges – as borne out in this publication by various authors.

31 Farrell & Isaacs (2007).

These challenges include rape, a lack of adequate health facilities, a lack of education, child labour, sexual abuse, HIV/AIDS, a lack of facilities for physically challenged children, a lack of victim-friendly courts, and a lack of proper juvenile detention and rehabilitation centres.

The National Gender Policy³² addresses various areas of concern, such as gender, poverty and rural development, gender and reproductive health, and violence against women and children – to name but a few. With regard to children, in the context of providing strategies to address issues related to women and health, the Policy calls on government to enact legislation to combat and protect women against socio-cultural practices that make them susceptible to HIV/AIDS and contribute to the spread of HIV/AIDS.³³ Reference to traditional practices harmful to girls is also made within the Policy's chapter on violence against women and children, as follows:³⁴

[V]iolence against women and girls originates essentially from cultural and traditional patterns and harmful practices, language or religion that [perpetuate] the lower status accorded to women

In view of the aforementioned, the role of the High Court as the ultimate guardian of children must be emphasised in judicial decision-making in terms of Article 80 of the Constitution. This passive stance by the High Court has so far not helped the plight of children in Namibia. In this regard one needs to remember that the children of today are Namibia's most valuable resource; thus, if the goals of Vision 2030 are to be attained, it is recommended that the protection system for children is fully functional and effective.

The High Court, as the ultimate guardian of children, should play its part not only by way of its judgments, but also by using its powers as far as its lawmaking authority function is concerned to ensure that it promotes laws that protect our most vulnerable resource – the children of Namibia.

Constitutional recognition of customary law and cultural rights, and its impact on children

Constitutional recognition of customary law

Most of Namibia's population still live according to customary law. It regulates marriage, divorce, inheritance and land tenure, amongst other things, for many communities. *Customary law* is a body of norms, customs and beliefs that is relevant for most Namibians. However, despite its relevance, customary law was ignored or marginalised under colonial rule. In response to these external influences, along with many others – including internal pressures, the dynamic, complex system that is customary law

32 MWACW (1998).

33 Section 5.8.15, National Gender Policy.

34 Section 6.6, National Gender Policy.

has constantly evolved.³⁵ All evidence alluding to the living reality of customary law shows that the law has developed ways and means of preserving its essence in spite of impairment. Today, Article 66(1) of the Constitution reads as follows:

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

Therefore, Article 66(1) puts customary law on the same footing as any other law of the country as far as its constitutionality is concerned. It also implies that customary law cannot contravene the Constitution, particularly the provisions of Chapter 3, which contains fundamental human rights and freedoms. Thus, although the constitutional recognition of customary law protects it against arbitrary inroads, it simultaneously places a legal duty upon national lawmakers to treat customary law like any other law when it comes to being repealed or amended.³⁶

Constitutional recognition of cultural rights

When it comes to cultural rights, Article 19 of the Constitution provides the rudiments of a new cultural approach to customary law:

Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

This constitutional guarantee to the right to culture is enhanced by a similar guarantee in terms of Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In terms of these two legal obligations, the government is required to take legislative and administrative measures to ensure the fulfilment of cultural rights, but also to ensure such rights do not contravene the basic tenets of the Constitution.

For example, the right to profess, maintain and promote a language arose in the case of *Government of the Republic of Namibia v Cultura 2000 & Another*.³⁷ The respondents – an association for the preservation of the cultural activities of white Namibians – argued, inter alia, that the State Repudiation Act,³⁸ whereby the government had sought to deprive the respondents of certain monies and property allocated to them by the previous administration, was unconstitutional since it was repugnant to Article 19. The Supreme Court rejected this argument without examining it in great detail, holding that the repudiation effected by section 2(1) of the Act was lawful in terms of Article 140(3) of the Constitution. The judgment in this case makes it clear that the right to

35 Hinz (2003).

36 (ibid.).

37 1994 (1) SA 407 (NmS).

38 No. 32 of 1992.

culture is not absolute: it is subject to the provisions of the Constitution and, thus, cannot impinge on the rights of others or the national interest. This qualification is important because the right to cultural life and traditions – given that many traditional practices are discriminatory – could potentially clash with constitutional rights on non-discrimination and with children's rights.³⁹

Impacts on children's rights

Under customary law, very little appears to have been done when it comes to the recognition of the rights of the child. From a traditional point of view, children in rural areas do not belong only to their biological father and mother: a child belongs to the whole community once s/he is born. Every member of the community is involved in one way or another in raising the child.⁴⁰ The result is that children in most rural areas tend to respect and submit to the elders of their community. Some elders take advantage of the close relationship that they have with children. Children are sexually abused and, these days, they are likely to be infected with HIV/AIDS as a result. Due to the values instilled in children, this type of abuse may go on and on without being detected. In some instances, the abuse is never reported; so the culprit goes unpunished and continues his wicked actions with the next child victim. In other circumstances, the abuse is shrouded in secrecy, once again protecting the perpetrator for the sake of community relations and at the expense of the child. This is typical of most rural communities.⁴¹

Perhaps Namibia could take a leaf out of its neighbour's book here. South Africa set up a Commission on the effect of customary law and the protection of individual children's rights under the South African Constitution of 1996. In summary, there can be no doubt that the latter Constitution recognises the importance of customary law to the majority of South Africans. Indeed, the Commission also accepted that customary law and practices were important for a very large portion of that country's population.⁴² However, it also noted that customary law was recognised as a system of law only if it operated within the broad principles of the country's Constitution. Given that, according to section 28 of that Constitution, the principle of serving the child's best interests is paramount, and considering the individualistic nature of human rights protection, it would seem that the right of an individual child supersedes that of the cultural or religious group. The same should be made to apply to the Namibian context.

The perception of corporal punishment under customary law

Customary law and practice enfold various dangers regarding the rights of children. Initiation rites, circumcision practices, discrimination against children, an acceptance of child labour, and other processes violating human – and, thus, children's rights – will be discussed in other passages of this article and elsewhere in this volume.

39 Naldi (1995:96).

40 See the contribution by Gugulethu Nkosi elsewhere in this volume.

41 See also Bennett (1999:96ff).

42 Landford (2008:9–14).

The following passage uses an example to shed some light on the perception of corporal punishment under customary law. *Corporal punishment* is the deliberate infliction of pain intended to discipline or reform a wrongdoer or change a person's 'bad' attitude or 'bad' behaviour. The types of corporal punishment that exist are parental/domestic, school, and judicial.

Under customary law, corporal punishment is viewed as the only effective means of instilling discipline: it symbolises a belief in a good and proper life, restores and maintains peace in community, and teaches people to behave themselves. Corporal punishment intends to convey the message to others contemplating similar misconduct that they will be dealt with in the same way.⁴³

Apart from the above, corporal punishment is used as a means to teach and maintain children's respect towards their elders. It is traditionally believed that, if children are not beaten when they do wrong, they will not respect their elders and will keep misbehaving since they believe nothing will happen to them. Parent or elders are therefore obliged to beat children in order to obtain the respect they feel is due to them from children. The limits of a parent's power to correct his/her child are culturally defined. However, what may be seen as reasonable under customary law could well be regarded as inhuman and degrading treatment under common law and the new constitutional regime.⁴⁴

African thinking on parental power tends to be conditioned by a belief that children are wayward and irresponsible and, hence, in need of discipline. By contrast, Western thinking emphasises the vulnerability of children with a consequent need for protection, and a child's right to self-determination. Common law accordingly interprets parental powers restrictively in favour of the child. It follows in the opinion of these schools of thought that a child's best interest should always be the overriding consideration, and a child who is old enough should be allowed to express a considered opinion to decide his or her own future. The question now arises whether the fundamental rights violated by corporal punishment are interpreted to express these common-law views in preference to African ideas about a "proper upbringing of the child".⁴⁵

For the first time in Namibia's history, the status and application of customary law in the country were placed on the same footing as common law as one of the sources of law, by being upheld in the Constitution of the Republic of Namibia after independence in 1990. However, the constitutional provisions that recognise the application of customary law in Namibia impose the precondition that admissibility of such law cannot be in conflict with the Constitution or any other statutory law.⁴⁶ For example, in the case of *S v Sipula*,⁴⁷ which, inter alia, discussed the issue of the application of corporal punishment by a traditional court, O'Linn J stated the following:

43 See Bennett (1999:108f).

44 (ibid.).

45 (ibid.:93).

46 Article 66(1).

47 1994 NR 41 (HC).

The native law and custom providing for corporal punishment was not expressly declared unconstitutional by the aforesaid decision of the Supreme Court.

It can be argued that Articles 140(1) and 25(1)(b) of the Namibian Constitution envisage and require an express and pertinent order from a competent court to declare a specific law or a specific part of it unconstitutional. For argument's sake, however, it can be assumed that, for the purpose of the judgment, it will suffice if the judgment, by necessary implication, declares such law or a specific part of it unconstitutional.

The constitutionality of a principle of law under common law was also discussed in the case of *Myburgh v Commercial Bank of Namibia*,⁴⁸ where the court determined whether or not such principle of law had fallen foul of the Constitution or any other statute. This decision was given with respect to the recognition of common law, but the same argument would apply equally well with respect to the admissibility of customary law in the context of Article 66(1) of the Constitution.

However, in order to determine the unconstitutionality of corporal punishment under customary law in Namibia, one needs to take a closer look at the leading case on the matter, namely *Ex Parte: Attorney-General, In Re: CP by Organs of State*.⁴⁹ In this case, the Attorney General, under the powers vested in him by Article 87(c) read with Article 79(2) of the Constitution, referred the constitutional request to the Supreme Court in order for it to determine –

... whether the imposition and infliction of corporal punishment by or on the authority of any organ of state contemplated in legislation is per se; or in respect of certain categories of persons; or in respect of certain crimes or offences or misbehaviours; or in respect of the procedures employed during the inflictions therefore in conflict with any of the provisions in Chapter 3 of the Namibian Constitution and[,] more in particular, Article 8 thereof.

Article 8(2)(b) of the Constitution prohibits punishment or treatment that constitutes torture, or is cruel, inhuman, or degrading. Secondly, in deciding what was inhuman or degrading, the court made a value judgment by looking at the present values of the Namibian people as expressed in its Constitution.⁵⁰ The court also looked at the values of the civilised international community, of which Namibia is a part.⁵¹

48 *Myburgh v Commercial Bank of Namibia*, 2000 NR 255 (SC).

49 NR 178 (SC); 1991 (3) SA 78 (Nms).

50 The general interpretation of the Constitution in the words of the verdict of this judgment is as follows:

The Namibian Constitution seeks to articulate the aspirations and values of the new Namibian nation following upon independence. It expresses the commitment of the Namibian people to the creation of a democratic society based on respect for human dignity, protection of liberty and the rule of law. Practices and values which are [inconsistent] with or which might subvert this commitment are vigorously rejected. Because of the past[,] colonialism as well as the practice and ideology of apartheid from which the majority of the Namibian people have suffered for so long are firmly repudiated. Article 8 must not be read alone.

51 Article 144, Namibian Constitution.

The court concluded that corporal punishment, whether directed at adults or juveniles, was inhuman or degrading punishment and, therefore, conflicted with Article 8 of the Constitution. Regarding the corporal punishment of school children, the court further found that such practice was also in conflict with Article 8, but it did not clearly state that it was torture, cruel, inhuman or degrading punishment. Apart from the ambiguity of its final declaration, in its judgement the Supreme Court expressed many arguments in favour of banning corporal punishment and, therefore, declared it unconstitutional.

In the decision of *S v Sipula*,⁵² however, the High Court held that the aforementioned judgment failed to clearly state or display whether or not it applied to the use of corporal punishment used in a traditional setting. In other words, does *traditional authority* fall under the terms *judicial* or *quasi-judicial authority*?⁵³

The CRC requires states to protect children from all forms of physical and mental violence while in the care of parents and others.⁵⁴ It further recommends that all states should implement legal reforms to prohibit all corporal punishment. The reason for this is manifold: corporal punishment is violent and unnecessary; it may lower self-esteem; and it is liable to instil hostility and rage without reducing the undesirable behaviour. For example, corporal and humiliating punishment allows parents to express their frustration and anger, but it does not teach the child about the logical consequences of their behaviour. It results in fear, resentment and a breakdown of the relationship of trust with parents. Secondly, children who have been humiliated and hit are more likely to do the same to other children. It is also likely to train children to use physical violence. Because corporal punishment is generally ineffective in teaching self-discipline and responsibility, it tends to escalate over time: small slaps become more serious hidings, and so on. Parents charged with assault often say that they were 'disciplining' their children.

Many traditionalists would argue that, in their culture, they punish children physically and they will be denied their right to culture⁵⁵ by being prohibited from doing what their forebears did in the disciplining of their children. Their argument is based on their right protected under Article 19 of the Constitution, which provides as follows:

Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion ...

However, although everyone has a right to culture, a limitation is attached to this right. The same Article that protects one's right to culture further states that this right is –

52 1994 NR 41 (HC).

53 (ibid.).

54 Article 19, CRC.

55 Article 19, Namibian Constitution.

... subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.

This is reflected in what has been stated by Ruppel, namely that –⁵⁶

[c]ulture can strengthen and validate human rights perspectives; however, certain cultural practices may also violate human rights principles. Cultural aspects of customary law that are inhuman and discriminatory should not endanger the existence of customary law as a system of laws that governs the way of life of most Africans. The solution is not to abolish customary law, but rather to have such law ascertained. One should not be too hasty, making sweeping judgements of customary practices from the outside; rather, one should try to see the customs from the viewpoints of the people who practise them on a daily basis. The abolition of customary law would mean erasing the modus operandi of various ethnic groups from the broad spectrum of Namibian society. Instead, one should identify the sensitive aspects under customary practices that do not conform to the constitutional principles of equality, fairness, and justice, and apply law reform.

Violence is a grave social problem in Namibia. It has been acknowledged to be rooted in traditional attitudes and culture, and even sometimes underpinned by religion.⁵⁷ But a practice which violates basic human rights cannot be said to be owned by any culture in Namibia, because, in terms of Article 24(3) of the Constitution, no one is permitted to derogate from another person's right to dignity and freedom. What may have been traditionally acceptable as a just form of punishment some decades ago appears to be manifestly inhuman and degrading today.⁵⁸

As stated earlier, hitting a child may stop its offensive behaviour immediately, but it does not necessarily stop a child from repeating that behaviour in future. This is because children are less likely to learn from this punishment and more likely to resist the parent and find ways to avoid getting caught. Parents are to exercise their authority and customary rights only to protect or nurture their children. They need to bear in mind that discipline is not the same as punishment. Real discipline is not based on force, as traditionally believed, but grows from understanding, mutual respect and tolerance.

Discipline needs to be administered humanely in the way that is consistent with the child's dignity, and children have to be protected from violence and abuse. Instituting the necessary legal changes is not expensive; what is required is the explicit and well-publicised removal of any defences which – either culturally or otherwise – currently justify physically assaulting children. In this way, children will be ensured of equal protection under the law. The focus of law reform should be on prevention and early intervention in order to protect children; the focus should not be on prosecuting parents – unless the assault is violent. The prosecution of parents is seldom in the best interest

56 Ruppel (2008c:23).

57 Ruppel et al. (2008:119ff).

58 *Ex Parte Attorney-General, In Re: Corporal Punishment by Organs of State*, 1991 (3) SA 76.

of the child: it is more important for systems to be available for the family to receive support. Diversion to parenting programmes can be used to achieve this. The promotion of positive discipline can also be built into other health promotion, education and early child development programmes.

In conclusion, it can be observed that the corporal punishment of children – also under customary law, whether in the home setting by a parent or otherwise – is in conflict with the Namibian Constitution.

Notable omissions in the Constitution?

The right to inheritance

The Constitution appears to treat certain children's rights only very obliquely. For example, it does not expressly state how the right to inheritance can be guaranteed. It is common that, in the event of death, whether the deceased had a will or not, inheritance can become a contentious issue. In this context, two scenarios will be examined: the right of a child born outside marriage to inherit, and the similar right of a child born inside marriage.

The Constitution does not cover the right of children born outside marriage as far as inheritance is concerned. Secondly, the right of children born inside marriage to inherit largely depends on whether the deceased died intestate or not. When the deceased dies intestate, the problem regarding children's inheritance becomes more complicated. This complication stems from the fact that the deceased's estate is usually distributed according to customary law or practices and, as explained earlier, such laws and customary practices are largely skewed against children. Thus, children either do not inherit at all, which might be contrary to the deceased's wishes; even if they are given something, their guardians assume control over them as well as over their inherited property.

If the deceased died testate, the validity of a will can be challenged in court – especially when it comes to the right of the child to inherit because it is specifically provided for in a will. This is reflected in the cases like *Magreth Berendt v Claudius Stuurman & Others*⁵⁹ and *Lotta Frans v Inge Paschke*.⁶⁰

In *Lotta Frans v Inge Paschke*⁶¹ the court had to decide whether illegitimate children could inherit by disregarding the common law presumption, taking into account the spirit and tenor of the Constitution instead. The court arrived at the conclusion that illegitimate children could inherit from their parents despite their status in society.

59 Case No. (P) A 105/2003.

60 Case No. (P) I 1548/2005.

61 Case No. (P) I 1548/2005.

In its findings, the court also dealt with another issue of discrimination, namely that inherent in certain aspects of customary law. Article 10(2) of the Namibian Constitution is relevant in this context, and provides as follows:

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

In the authoritative judgment of the Supreme Court in *Muller v President of the Republic of Namibia*,⁶² Strydom CJ, as he then was, dealt with Article 10(2) by stating that there seemed to be no basis, on the strength of the sub-Article, to qualify the extent of its impact and to save legislation which discriminates on one of the enumerated grounds from unconstitutionality on the basis of a rational connection and legitimate legislative object test. In the Chief Justice's words, "there is no room in a modern Namibia to permit legislation or customary law practices or indeed any practice that overrides the constitutional protection of non-discrimination".⁶³

The right to health

Another significant omission from the Constitution is the lack of a provision that entitles children to the right to health. In modern Namibia, with the scourge of HIV/AIDS, it is regrettable that such an omission has not yet been legally challenged. At present, the onus of addressing the challenges of children who are HIV-positive or are affected by the pandemic in other ways has been placed squarely on the shoulders of the Ministry of Health and Social Services and the Ministry of Gender Equality and Child Welfare. Results on the ground show that these Ministries are doing reasonably well despite insufficient fund allocations by the Ministry of Finance. However, the lack of a legal regulatory framework that can be used in a court of law to challenge the slow progress of the child's right to health needs to be addressed.

In this regard, Article 24 of the CRC provides the following:

States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right to access to such health care services.

This is what is missing from the Namibian Constitution: a clear and express commitment to protect and guarantee the child's right to good health as well as access to health care facilities.

Moreover, Articles 24(2) and (3) of the CRC impose the obligation on States Parties to –

62 1999 NR 190(SC).

63 (ibid.).

- diminish infant and child mortality
- ensure the provision of the necessary medical assistance
- combat disease and malnutrition
- ensure appropriate pre-natal and post-natal health care for mothers
- ensure that both parents and children to have access to education, and
- abolish traditional practices prejudicial to children's health.

The statutory framework

According to Namibia's initial report⁶⁴ to the Committee on the Rights of the Child in 1994, the principal issues in the country ranged from contradictions in national legislation with respect to the definition of *child* to discrimination against children born outside marriage and children with disabilities. Additionally, teenage pregnancies, high rates of school dropouts, incidents of child labour, the high number of households headed by a single person, and the apparent lack of understanding among parents of their joint parental responsibilities were other important concerns.

The Committee recommended that Namibia reconstruct or improve the legal framework so as to cater for the rights of children.⁶⁵ This included the implementation of the Children's Act,⁶⁶ which would fully take into account the principles and provisions of the CRC. The Committee further urged the government to involve civil society, youth and school councils, and non-governmental organisations (NGOs) in activities to promote and protect the rights of the child, particularly against cultural practices which tended to discriminate against children born outside marriage and those with disabilities. With regard to educational matters, the Committee encouraged the development of initiatives to provide more training to school teachers as a means of improving the quality of education and providing an opportunity to raise awareness within this profession of the right of the child. Furthermore, the administration of juvenile justice needed to be guided by the provisions of Articles 37 and 40 of the CRC, and measures were recommended to be taken to train law enforcement officers, judges, personnel working in detention centres, and councillors of young offenders about international standards on the administration of juvenile justice.⁶⁷

The Children's Act

The Children's Act, in force since 1960, has been subject to amendment by means of the Children's Status Act⁶⁸ and the recent Child Care and Protection Bill.⁶⁹ The Children's Act provides for –

64 CRC/C/3/Add.12 (1994).

65 Committee on the Rights of the Child (1994).

66 No. 33 of 1960.

67 (ibid).

68 No. 6 of 2006.

69 MGECW (2009b).

- the appointment of commissioners of child welfare
- the establishment of children's courts
- the protection and welfare of certain children and their supervision
- the establishment or recognition of certain institutions for the reception of children and juveniles
- the treatment of children and juveniles after their reception in such institutions
- the contribution by certain persons towards the maintenance of certain children and juveniles
- the adoption of children
- the amendment of the Adoption Validation Act,⁷⁰ the Criminal Procedure Act,⁷¹ the General Law Amendment Act,⁷² and the Prisons Act,⁷³ and
- other incidental matters.

This Act was criticised for its discriminatory provisions by virtue of Article 10 of the Constitution as it did not allow children born outside marriage to inherit from their parents – particularly their fathers. In an *New Era* article entitled “Child law under revision”,⁷⁴ the Children's Act was said to be outdated and out of keeping with the best interests of the county's children. Speaking on the need to change the Act, Hubbard opined that the abuse of children and the increasing number of orphans was an urgent situation that was not being effectively responded to through existing legislation. Namibia's Child Care and Protection Bill is intended to replace the Children's Act of 1960, which was inherited from South Africa.⁷⁵

Significant improvements have been made since the 1994 country report,⁷⁶ mostly by way of statutory enactments which tend to enhance the promotion and protection of children's rights in Namibia. Major enactments that are relevant when it comes to the issue of children's rights in Namibia include the following, in date order:

- The Constitution of the Republic of Namibia, 1990⁷⁷
- The Combating of Immoral Practices Amendment Act, 2000⁷⁸
- The Combating of Rape Act, 2000⁷⁹
- The Combating of Domestic Violence Act, 2003⁸⁰
- The Maintenance Act, 2003⁸¹

70 No. 30 of 1943.

71 No. 55 of 1956.

72 No. 32 of 1952.

73 No. 8 of 1959.

74 Tjaronda (2009).

75 Hubbard (2009).

76 CRC/C/3/Add.12 (1994).

77 No. 1 of 1990.

78 No. 7 of 2000.

79 No. 8 of 2000.

80 No. 4 of 2003.

81 No. 9 of 2003.

- The Community Courts Act, 2003⁸²
- The Children's Status Act, 2006,⁸³ and
- The Labour Act, 2007.⁸⁴

In addition to the above, the Draft Recognition of Customary Marriages Bill and the Child Care and Protection Bill shall be discussed briefly in the following paragraphs.

The Children's Status Act⁸⁵

The Children's Status Act provides, inter alia, for children born outside marriage to receive the same treatment before the law as those born inside marriage.⁸⁶ Specific reference to customary law is made in the context of inheritance, either intestate or by testamentary disposition. In this specific regard, a person born outside marriage is to be treated in the same manner as a person born inside marriage, despite anything to the contrary contained in any statute, common law or customary law.

The Act also provides for matters relating to custody, access, guardianship and inheritance in relation to children born outside marriage. According to Part 4 of the Act, both parents of a child born outside marriage have equal rights to become the child's custodian. One parent has to be the primary custodian, and both parents may agree on who should be the primary custodian of the child, and that agreement may be verbal or in writing. Where there is no agreement as to who should be the child's primary custodian, either parent can apply to the Children's Court for the appointment of a primary custodian. If the child's parents cannot agree as to who should have primary custody, and there is a possibility that the best interests of the child may be compromised or prejudiced, the person who has physical custody of the child may, in the prescribed form and manner, make an *ex parte* application to court for an interim order of custody. As stated earlier, the person with custody will also be the child's guardian, unless a competent court, on application made to it, directs otherwise. If a parent is a minor, unless a competent court directs otherwise, guardianship of such parent's child vests in the guardian of such parent.⁸⁷

This Act did away with discrimination against illegitimate children, bringing legitimate and illegitimate children on par. However, the Children's Status Act fails to deliver on some key aspects, such as child trafficking and child prostitution. A commendable action that Namibia has taken is its involvement with the Southern African Regional Network against Trafficking and Abuses of Children (SANTAC). SANTAC deals with the issue of human trafficking within the Southern African Development Community (SADC) region, especially the trafficking of children for sexual abuse.⁸⁸

82 No. 10 of 2003.

83 No. 6 of 2006.

84 No. 11 of 2007.

85 No. 6 of 2006.

86 See also the contribution by Felicity !Owoses-/Goagosos elsewhere in this volume.

87 (ibid.).

88 See www.santac.org.

The Combined Second and Third Country Reports by Namibia to the Committee for the Elimination of Discrimination Against Women stated that two girls had reportedly been abducted from Swakopmund while on their way to Windhoek for the holidays.⁸⁹ The girls were apparently held as sex slaves in separate shacks east of Johannesburg. Such incidents should set off alarm bells to legislative bodies as well as the government in order to prevent future incidents of this nature. In addition, the government should look into the adoption laws that are in place in the country.⁹⁰

The Combating of Domestic Violence Act⁹¹

This Act provides for protection measures in domestic violence cases. These include provision for –

- the issuing of protection orders
- matters relating to domestic violence offences
- police duties in respect of domestic violence incidents
- amendment of the Criminal Procedure Act, and
- incidental matters.

The Act defines the terms *domestic violence* and *domestic relationship*. Various relationships are covered, including customary and religious marriages. Whether or not specific traditional practices fall under the definition of *violence* in terms of section 2 of the Act has to be determined on a case-by-case basis. The definition was kept intentionally broad by qualifying acts of physical, sexual, economic, emotional, verbal or psychological abuse as well as acts of intimidation and harassment as domestic violence. This accords a wider protection to children who fall within the definition of *domestic violence* and are subjected to such, as defined.

In the past, the most common response to domestic violence around the world has been that the courts should seek to protect children from the conflict as far as possible. While practices vary between jurisdictions, it is generally very unusual for children to be called to give evidence in parenting proceedings. This is in direct contrast to the situation in criminal trials where the prosecution alleges that a child has been the victim of a crime or has witnessed one. Thus, the adoption of a protective approach to children through the development of family courts and the involvement of professionals in the social sciences in cases involving custody evaluation, conciliation and other such roles as part of the process of court-based dispute resolution, children can be shielded as far as possible from being drawn into the conflict. The accepted practice in modern common law countries relies on the work of trained experts to interview children and to interpret their wishes and feelings to the court.⁹²

89 CEDAW (2005).

90 See the contribution by Oliver Ruppel and Pombili Shipila elsewhere in this volume.

91 No. 4 of 2003.

92 Parkinson & Cashmore (2008:2–3).

This protective approach is also catered for in the Combating of Domestic Violence Act. Accordingly, children are protected against domestic violence through section 4, which allows for minor children to apply for protection orders. In terms of section 4(2) and (3) of the Act, application may be brought on their behalf by any other person who has an interest in the well-being of the complainant, including but not limited to a family member, a police officer, a social worker, a health care provider, a teacher, a traditional leader, a religious leader, or an employer, and such application will be taken to have been made by the complainant.

The Combating of Immoral Practices Amendment Act⁹³

The Combating of Immoral Practices Amendment Act provides for the combating of brothels, prostitution, and other immoral practices, as well as for matters connected with such places or practices. In short, the Act regulates the prohibition of sexual or indecent acts with young people. Section 2 of the Act provides, inter alia, that any person who commits or attempts to commit a sexual act with a child under the age of 16 years or commits or attempts to commit an indecent or immoral act with such a child, or solicits or entices such a child to the commission of a sexual act or an indecent or immoral act, and who is more than three years older than such a child and is not married to such child, –

... shall be guilty of an offence and liable to a fine not exceeding NS\$40,000 or imprisonment for a period not exceeding ten years, or to both such fine and imprisonment.

The Combating of Rape Act⁹⁴

Rape is by far the most reported crime against children reported to the police. Children throughout Namibia are abused in this way by perpetrators across the age spectrum. According to the Police files, the victims were 10 years and younger in 19 of the reported 66 cases. In two of the cases, the alleged rapists were 85 and 74 years. In the latter, he apparently raped a girl of four at a kindergarten at Walvis Bay. In six of the cases, the alleged rapists were younger than 16. In one of the cases, four boys – aged 11, 12 and 14 – allegedly gang-raped a girl of 12 at Otjiwarongo. In another, a boy of eleven allegedly raped a girl of six at Rehoboth. At least 28 children [drowned] in Namibia so far this year, while at least 46 died under suspicious circumstances. These mostly included burning to death and children dying in their sleep. The Police have also opened 15 cases of culpable homicide to date. Most of these cases relate to car accidents. According to the Police, the youngest child who died in a car crash so far this year, was a baby of 14 months.⁹⁵

The Combating of Rape Act provides for –

- the combating of rape
- the prescription of minimum sentences for rape

93 No. 7 of 2000.

94 No. 8 of 2000.

95 Duddy (2009).

- the abolition of the rule that a boy under the age of 14 years is presumed incapable of sexual intercourse
- the modification of certain rules of evidence applicable to offences of a sexual or indecent nature
- the imposition of special duties on prosecutors in criminal proceedings relating to sexual offences
- the imposition of special duties on members of the Police in respect of certain bail applications
- the amendment of the Criminal Procedure Act⁹⁶
- the rights of a complainant of rape in bail proceedings
- the regulation of the granting of bail to persons charged with rape
- the regulation of the circumstances in which certain criminal proceedings are not permitted to take place in open court
- the extension of the prohibition of the publication of certain information relating to certain offences
- the regulation of the admissibility of evidence relating to similar offences by an accused
- the regulation of the admissibility of evidence relating to the character of a complainant of rape or an offence of an indecent nature, and matters incidental thereto.

The Act provides for protection to victims of rape and sexual abuse, and prescribes stiffer sentence for perpetrators. Prior to the enactment of this piece of legislation, the number of rape cases being reported had been increasing steadily nationwide, indicating either an actual increase in the crime itself or an increase in the number of rapes being reported to the Police. Urgent action was needed, therefore, in order to increase the legal protection of children against all forms of sexual abuse. Areas that needed change included the following:

- Common law set the age of consent – the age at which children are deemed competent to give meaningful consent to sexual activity – at 12 for girls and, unbelievably, 7 for boys
- The offence commonly referred to as statutory rape makes sexual intercourse with a girl under the age of 16 illegal, whether she has consented or not, but there was no such protection for boys
- The definition of rape needed to include circumstances where the complainant was under the age of 14 years and the perpetrator was more than three years older than him/her, and
- Penalties needed to be imposed according to age groups, and in terms of whether the perpetrator was a first offender, second offender, or recidivist.

The age groups now covered in the definition of *rape* include –

- children of 13 years or, by reason of age, exceptionally vulnerable, and
- cases where the complainant is under the age of 18 years and the perpetrator is

⁹⁶ No. 51 of 1977.

the complainant's parent, guardian or caretaker or is otherwise in a position of trust or authority over the complainant.

Section 4 of the Act provides, *inter alia*, that if, in any legal proceedings, the question is in issue whether a male person has had sexual intercourse or has performed an act of a sexual nature with another person or is the father of any child, such question will be determined as a question of fact, and no presumption or rule of law to the effect that a boy under the age of 14 years is incapable of sexual intercourse will operate. The Act protects the boy child under the age of 14 and so creates a platform where perpetrators, whether women or men, can be convicted once it has been established that a crime of rape has been committed. Additionally, the criminal capacity of an accused under the age of 14 years who is charged with an offence of a sexual nature will be determined in the same manner as the criminal capacity of an accused under the age of 14 years who is charged with any other offence.

Section 5 of the Act provides that no court will treat the evidence of any complainant in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature with special caution because the accused is charged with any such offence. Before Independence, the cautionary rule also applied to evidence involving children. To date, the evidence of abused children has been treated as any other type of evidence. Therefore, children's rights are protected by giving them a chance to present evidence – which in turn enables the courts to accord the relevant protection to them.

The Labour Act

The Labour Act gives effect to the constitutional commitment in Chapter 11 to promote and maintain the welfare of the people of Namibia, and to further a policy of labour relations conducive to economic growth, stability and productivity by –⁹⁷

- promoting an orderly system of free collective bargaining
- improving wages and conditions of employment
- advancing individuals who have been disadvantaged by past discriminatory laws and practices
- regulating the conditions of employment of all employees in Namibia without discrimination on the grounds of sex, race, colour, ethnic origin, religion, creed, or social or economic status, in particular ensuring equality of opportunity and terms of employment, maternity leave and job security for women
- promoting sound labour relations and fair employment practices by encouraging freedom of association, particularly the formation of trade unions to protect workers' rights and interests and the formation of employers' organisations
- setting minimum basic conditions of service for all employees
- ensuring the health, safety and welfare of employees at work
- prohibiting, preventing and eliminating the abuse of child labour
- prohibiting, preventing and eliminating forced labour, and

97 Preamble, Labour Act.

- giving effect, if possible, to the conventions and recommendations of the International Labour Organisation.

Chapter 2 of the Act deals specifically with the protection of fundamental rights and protections, especially those of the child. It deals directly and comprehensively with protection of the child as far as the prohibition and restriction of child labour is concerned. Section 3 of the Act states that no one is permitted to employ or require or permit a child to work in any circumstances prohibited in terms of that section. No one may employ a child under the age of 14 years, nor a child aged at least 14 but younger than 16, in any circumstances contemplated in Article 15(2) of the Constitution.⁹⁸

Furthermore, children are not allowed to be employed on any premises where –

- work is done underground or in a mine
- construction or demolition takes place
- goods are manufactured
- electricity is generated, transformed or distributed
- machinery is installed or dismantled, or
- any work-related activities take place that may place the child's health, safety, or physical, mental, spiritual, moral or social development at risk.

In respect of a child who is at least aged 16 but under the age of 18, no person may employ such child in any of the circumstances set out in the conditions above without written approval from the Minister of Labour and Social Welfare.

It is an offence for any person to employ or require or permit a child to work in any circumstances prohibited under the Act. A person who is convicted of the offence is liable to a fine not exceeding N\$20,000 or to imprisonment for a period not exceeding four years, or to both such fine and imprisonment.

The first criticism of the Act included the fact that the Labour Courts, established in terms of the Act, do not have child-friendly court facilities.⁹⁹ Secondly, the monetary fine is not a sufficient deterrent if one takes into account that child labour is prevalent in both mining and commercial farming enterprises. A stiffer monetary sentence or the suspension or cancellation of either the mining or farming licence would have been more appropriate, especially for recidivists.

Thirdly, the Act mentions nothing about the involvement of children in armed conflicts. The Optional Protocol on the Involvement of Children in Armed Conflict (OPAC), which was ratified by Namibia in 2002, aims at preventing the tragedy of children becoming involved in situations relating to armed conflicts.¹⁰⁰ States Parties to OPAC are expected

98 See also the contribution by Clever Mapaure elsewhere in this volume.

99 For the benefits of such facilities, see the contribution by Annel Silungwe elsewhere in this volume.

100 See the contribution by Oliver Ruppel on the protection of children's rights under international law elsewhere in this volume.

to ensure that children are not engaged in armed conflict, and that the places that are significant to a child's welfare, such as schools and hospitals, are not targeted in armed conflicts.¹⁰¹

Article 1 of OPAC deals with States Parties' obligations towards members of their armed forces who are under the age of 18 years, namely that such members do not engage in direct hostilities. Namibia's Defence Act,¹⁰² which regulates, inter alia, the actions and conduct of members of its armed forces during hostilities, is the ideal platform for the country to honour its OPAC obligations. However, in section 7 of the Act, which sets out the requirements and conditions to be met by anyone wishing to join the armed forces, the Act does not lay down the minimum age for recruitment. Moreover, according to section 28 of the Act, any member of the armed forces may be called for mobilisation, while section 30 provides that failure to report for such mobilisation may lead to the recalcitrant member being charged with and prosecuted for desertion under the Military Code.

On the other hand, the Namibian Constitution protects children from economic exploitation and performing work which may be hazardous, may interfere with their education, or is likely to be harmful to their health or physical, mental, spiritual, moral or social development. For the purpose of this constitutional provision, a *child* is defined as a person under the age of 16 years. In OPAC, however, a *child* is defined as a person below 18 years of age. Since the Defence Act does not lay down the minimum age for recruitment, and since the same legislation fails to distinguish between members who are permitted to be mobilised and those who are not, it remains unclear whether the statutory law complies with the legal expectations spelt out in OPAC's Article 1. Moreover, the Act does not provide for measures that may be taken to prevent members of the forces who are below the age of 18 years from engaging in armed conflict.

The Maintenance Act¹⁰³

The Maintenance Act provides for –

- the payment of maintenance
- the holding of maintenance enquiries and the enforcement of maintenance orders
- the repeal of the former Maintenance Act,¹⁰⁴ and
- dealing with incidental matters.

One of the key provisions of this Act includes the parental duty to maintain children. Section 3 provides, inter alia, that both parents of a child are liable to maintain that child if s/he is unable to support him-/herself. This is regardless of whether the child in

101 Preamble, OPAC.

102 No. 1 of 2002.

103 No. 9 of 2003.

104 No. 23 of 1963.

question is born inside or outside the marriage of the parents; whether the child is born of a first, current or subsequent marriage; and whether the parents are subject to any system of customary law which does not recognise both parents' liability to maintain a child.

Thus, the parents of a child are primarily and jointly responsible for maintaining their child. This includes the rendering of any support which the child reasonably requires for his/her proper living and upbringing, such as the provision of food, accommodation, clothing, medical care and education. The Act also declares any law which requires a parent to give priority to the maintenance of children of a first marriage as invalid.

Practical observations have highlighted a number of difficulties being experienced as regards the implementation of the Act and the protection of children under the Act. As regards children who are in conflict with the law, there are too many delays in the administration of justice to them. Another area of concern is the reporting structure, which hampers the rendering of an efficient service to children. For example, social workers report to the Ministry of Health and Social Services; police officers report to the Ministry of Safety and Security; and magistrates and prosecutors report to the Ministry of Justice. This results in too much bureaucracy, which usually hinders the protection and services offered to children. It is recommended, therefore, that a National Coordinator be provided for in the reporting structure. All role players in children's administration would then be expected to report to the National Coordinator in order to eliminate unnecessary delays in the system.

It is furthermore pointed out that police officers, prosecutors and presiding officers are not trained to deal with children in conflict with the law. They often become impatient with the children they deal with and, under such circumstances, children find it difficult to express themselves freely. In addition, under cross-examination – especially in rape cases – some defence lawyers are ruthless, placing the child at the mercy of a relatively unaccommodating justice system.

The Community Courts Act¹⁰⁵

This Act provides for –

- the recognition and establishment of Community Courts
- the appointment of justices and for clerks and messengers of court
- the application of customary law by Community Courts
- the jurisdiction of and procedure to be adopted by Community Courts
- appeals from Community Courts to other courts, and
- connected and incidental matters.

Section 12 of the Act provides a Community Court with the jurisdiction to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognised by customary law.

¹⁰⁵ No. 10 of 2003.

The establishment of Community Courts and their jurisdiction have been received with mixed feelings within the legal fraternity. Some jurists have questioned the role of such courts and their application in the legal system, taking into account the nature of customary law. Apart from that, not many magistrates are au fait with customary law, and will therefore find it difficult to hear appeals on Community Court decisions.¹⁰⁶

However, what is noticeable is that, in its 34 sections, the Act does not make provision for dealing with children.

The Recognition of Customary Marriages Bill

Notably, one draft legal instrument that will have a substantial effect on women – and, thus, in one way or another, also on children – if it comes into force is the Recognition of Customary Marriages Bill.

Namibia has two types of marriage systems: civil and customary.¹⁰⁷ A *civil* marriage is solemnised by civil or religious rites, while a *customary* marriage is based on tradition. Before a customary marriage comes into existence, the prospective spouses and their families negotiate the union, exchange marriage considerations, establish a matrimonial residence, and perform traditional ceremonies.¹⁰⁸

There are still many people in Namibia who marry under customary law.¹⁰⁹ While 19% of Namibia's population as a whole are married under civil law, 9% are married under customary law. In the Caprivi Region, for example, 34% marry under customary law, compared with 5% under civil law. In the Kavango Region, 29% get married traditionally against 13% who opt for a civil marriage.¹¹⁰

It was stressed that, since the majority of Namibians were Christian, it should be easier to prevent polygynous marriages.¹¹¹ In 2005, the Committee on the Elimination of Discrimination Against Women took up this issue in Namibia's Second and Third Periodic Country Reports, stating that although the Committee had previously identified polygyny as an area of concern, the issue had not yet received the required domestic attention.¹¹² The Committee's criticism addressed the fact that women in polygynous partnerships are not afforded legal protection under the general law system because, currently, only civil marriages are given full recognition by the state's legislation.¹¹³ For example, the Married Persons' Equality Act,¹¹⁴ which removed the common law principle

106 Hinz (2008b).

107 Friesen (1998:1).

108 (ibid.).

109 The following data are found in NPC (2003).

110 Ambunda & De Klerk (2008:69).

111 Friesen (1998).

112 See CEDAW (2005).

113 Such as in the Marriages Act, 1961 (No. 25 of 1961).

114 No. 1 of 1996.

of a husband's marital power, is not applicable to marriages by customary law; hence, the abolition of marital power has no effect on women in polygynous marriages. Polygyny, a practice which is simply left to function in a legal vacuum, may result in the violation of women's (and perhaps children's) rights. It is difficult to understand, therefore, why the principles in the Married Persons' Equality Act do not apply to customary marriages.

The Customary Marriages Bill was proposed by the Law Reform and Development Commission,¹¹⁵ but it has not yet been submitted to Parliament. The Bill provides, *inter alia*, for the full legal recognition of marriages concluded under customary law. The Bill specifies the requirements for and the registration of customary law marriages, as well as for the consequences of customary law marriages as regards matrimonial property. According to the Bill, customary law marriages will have the same full legal recognition as civil marriages enjoy. The minimum requirements for a customary marriage under the proposed Act are as follows:

- Full age (unless consent from both parents as well as from government is obtained)
- Consent of both intending spouses
- The lack of relationship to each other by affinity or blood to such a degree that their marriage would not be valid in terms of applicable customary law, and
- Neither prospective spouse is party to an existing customary law marriage or a marriage under common law.

Thus, bigamy (and polygamy) will be outlawed once the proposed Act comes into force. The Married Persons' Equality Act will subsequently be amended to the effect that the provisions of the Act, including the abolition of marital power, apply to all marriages, whether by customary law or contracted under the Marriages Act.¹¹⁶ Even the Constitution specifically refers to customary marriages in two of its Articles.¹¹⁷ But what is the status of customary marriages in Namibia? Also, as regards the recognition of such marriages, the following questions arise:¹¹⁸

- What are the criteria according to which a customary marriage can be deemed valid?
- What are the rules governing the relationship between spouses?
- What is the matrimonial property regime?
- What are grounds for divorce?
- How is divorce effected?

Although customary law provides answers to some aspects of these questions, legal certainty for –

- the parties to such marriages

115 See Namiseb (2008:107ff).

116 No. 25 of 1961.

117 Article 4(3)(b), which addresses the acquisition of citizenship; and Article 12(1)(f), concerning the privilege of a spouse to withhold testimony against him-/herself or his/her spouse.

118 See Hinz (2008a:95ff).

- the benefit of the children
 - the public with which such spouses entertain transactions,
- requires more legislative intervention, e.g. in terms of a statute comparable to the Marriage Act¹¹⁹ or the Married Persons' Equality Act.¹²⁰

The Child Care and Protection Bill

This Bill, originally drafted in 1994 and revised several times since then, aims to give effect to certain rights of children as contained in the Constitution and under the CRC. The Bill is currently being revised again by the Ministry of Gender Equality and Child Welfare.¹²¹ This vital piece of legislation intends to replace the outdated Children's Act. Law reform in this area is essential if children in Namibia are to receive the care and protection they so desperately need.¹²²

Among other things, the Bill outlines provisions for foster care, adoption and children's homes, and is expected to include rules about when children acquire the capacity to make important decisions such as giving consent to medical treatment, acquiring contraceptives or being tested for HIV. Also addressed are issues related to child trafficking, child labour and crimes relating to child abuse and neglect.¹²³

To ensure that the Bill is in the best possible form before being tabled in Parliament, which is envisaged for the end of 2009, the Ministry of Gender Equality and Child Welfare has been running a multifaceted multimedia project to consult with stakeholders and the public on the Bill's content. The Legal Assistance Centre has provided technical assistance to the Ministry throughout the process.¹²⁴ The project is supported by UNICEF and guided by a technical Working Group which meets regularly. The Committee on the Rights of the Child urged the government to fully involve civil society, youth and school councils as well as NGOs in activities promoting and protecting the rights of the child, particularly when it comes to cultural practices that tend to discriminate against children born outside marriage and those with disabilities.

National policies, programmes and projects related to the protection of children's rights

The previous section identified the statutory protection afforded to children since Independence. However, Namibia is also governed by a number of policies that aim either

119 No. 25 of 1961, as amended.

120 No. 1 of 1996. Cf. section 16 of the Act, which takes note of customary marriages, but explicitly excludes the applicability of the most important achievements of the Act to customary marriages.

121 MGECW (2009c).

122 For a detailed discussion of the Child Care and Protection Bill, see the contribution by Lena Kangadjela and Clever Mapaure elsewhere in this volume.

123 (ibid.).

124 Hubbard & Coomer (2009).

at implementing constitutional provisions, or at carrying out specific mandates under certain laws. One such is Vision 2030,¹²⁵ which inter alia provides for the promotion of disadvantaged children, including orphans, in order to prepare them for and enable them to live meaningful and happy lives.¹²⁶

Policies outline the principles of actions adopted or proposed by government in order to supplement constitutional provisions, or ensure that they are realised. In most cases, policies are a deliberate move by government and other relevant stakeholders such as NGOs to enable children's rights, among other things, to be actualised. These documents have their foundations in Article 95 of the Constitution, which provides for the promotion of the welfare of the people. Policies are usually statements of long-term objectives which are to be achieved as resources permit.

Children around the world face various challenges on a daily basis. These challenges include rape, a lack of adequate health facilities, a lack of education, child labour, child sexual abuse, HIV/AIDS, a lack of facilities for physically challenged children, and a lack of victim-friendly courts and proper juvenile detention and rehabilitation centres – to mention but a few. To protect children, the government implements policies in an endeavour to supplement the existing legislative framework. Such implementation occurs with the assistance of interested organisations as well as the public.

The constitutional principles of state policy include a commitment to raise and maintain the nutritional status of and access to health care for all Namibians, while the General Policy Statement of 1990, expressing the priorities of the new government, highlighted health as one of the four key development sectors for immediate attention. Since the General Policy Statement, several other policies have been issued that impact directly on the survival of Namibia's children. These policies are reflected in the National Development Plans (NDPs), which demonstrates the government's strong commitment to programming and investment in sectors which directly promote the improvement of child survival.

Various policies and programmes have been issued since Independence, all of which aim at protecting one or more rights of the child. Some of Namibia's major policy achievements are reflected briefly in the following sections, indicating the broad categories on which the Namibian government has focused its attention.

Health

A Health Policy was adopted, which has its main goal the equitable provision of health services. For example, the Primary Health Care (PHC)¹²⁷ Programme aims to ensure that

125 Office of the President (2004).

126 See http://www.npc.gov.na/vision/pdfs/Chapter_3.pdf; last accessed 8 October 2009.

127 The health system in Namibia is founded on the PHC approach adopted by WHO member states in Alma Atta, Russia, in 1978. The approach was implemented in Namibia to ensure

all Namibians, especially those living in previously disadvantaged Regions and isolated communities, have equal access to basic health care; that preventative services are free, with fee structures for non-PHC services based on the ability to pay; and that community involvement underpins the sustainability of all PHC programmes. Specific programmes deal with various issues, such as the following:

- Immunisation
- Diarrhoea
- Malaria/safe motherhood
- HIV and AIDS, and
- Nutrition.

According to the consortium of nongovernmental organizations NANGOF, the impact of HIV on children's health is especially strong because of high levels of poverty and lack of access to health care services. Anna Beukes, executive director of NANGOF, said Namibia has a "good health policy framework" but that the country's "failure is to translate it into practice and enforce it," causing the country to "[lose] all the good work that has been done so far." She added that socioeconomic factors like poverty and inequality "have a gender and age dimension, affecting women and children more severely."¹²⁸

Household food security

Four policy documents have either direct or indirect implications for (children's) food security in Namibia. They are as follows:

- The National Agriculture Policy¹²⁹
- The National Development Plans (NDP)¹³⁰
- The Food and Nutrition Policy,¹³¹ and
- The Food Security and Nutrition Action Plan.¹³²

Water and sanitation

A child's right to survival include the right to proper water and sanitation. This led to the establishment of the Water Supply and Sanitation Policy in 1993, which was replaced in 2008.¹³³ This policy aims to contribute toward improved health; ensure a hygienic environment; protect water from pollution; promote the conservation of water; and

that all citizens have access to the full range of health and social development services. This is being achieved through the provision of clinics, outreach programmes, and community-based health care services.

128 See *Medical News Today*, 14 April 2009, <http://www.medicalnewstoday.com/articles/145849.php>.

129 MAWF (1995a).

130 GRN (NDP1–NDP3).

131 MAWF (1995b).

132 NSFNC (1995).

133 MAWF (2008).

promote economic development. Today, more than 80% of the Namibian nation has access to clean water, even in the most marginalised communities.

Education

The Constitution entitles all children in Namibia to free primary education. Indeed, education is considered so fundamental a right – and duty – of every citizen that attendance to age 16, or the completion of primary school, is compulsory. The right to education does not end by being guaranteed a seat in a classroom. The education provided by schools needs to be relevant, and the curriculum has to have current and future value for the child. In addition, teachers are required to have the ability to impart knowledge effectively and develop their students' problem-solving and social skills.

Currently, educational matters are dealt with under the Education Act.¹³⁴ In addition, several policies and programmes aimed at promoting quality education in Namibia have been established since Independence.¹³⁵ The key government policies focused on achieving the constitutional guarantees for child education are presented in the 1992 statement *Towards education for all*, which establishes goals for access, equity, quality and democracy. Additionally, the NDPs aim at improving the standards of education in Namibia by upgrading and expanding human resources, physical facilities and instructional resources.¹³⁶

The **National Policy on HIV and AIDS for the Education Sector**¹³⁷ concentrates on OVC and emphasises the need to disseminate information to schools, parents and caregivers on exemptions from the payment of school funds and hostel fees, and stipulates that no learner is permitted to be excluded from a government school, or from examinations, because of his/her inability to pay school funds or examination fees or to afford a school uniform. Therefore, all education sector employees are sensitised about the special needs of OVC. This facilitates OVC's access to supportive and counselling services and, where necessary, school feeding schemes. The policy also stresses the need for effective inter-school referral systems to minimise disruption and to provide support to learners when they have to be transferred after a parent or other caregiver dies. Furthermore, vulnerable children are to be favoured with respect to hostel accommodation or community boarding alternatives. Schools are also encouraged to develop networks of support for OVC at each educational institution.

The **Education for All (EFA) National Plan of Action 2002–2015**¹³⁸ aims at ensuring that, by 2015, all children, but particularly girls; children in difficult circumstances; and those belonging to ethnic minorities have access to and complete free and compulsory

134 No. 16 of 2001.

135 Cf. MBESC (2004).

136 Adkisson (1995:127).

137 Cf. MBESC & MHETEC (2003).

138 MBESC (2002).

primary education of good quality. However, the success of the Plan of Action has been hindered by cultural practices in various parts of the country, which still discriminate against the girl child and deny her the right to education.

The **National Policy Options for Educationally Marginalised Children**¹³⁹ identify various groups as educationally marginalised, who are therefore in need of special interventions to ensure that they have access to education. These groups include children of farmworkers, children in remote rural areas, street children, children in squatter areas and resettlement camps, children with physical or mental impairments, over-aged children according to existing policies, and children of families in extreme poverty.

The **National Policy on Orphans and Vulnerable Children** deals with vulnerable children that need care and protection due to that fact that they had lost their parents because of death.¹⁴⁰ The National Policy on OVC was endorsed by Cabinet in 2004 and launched in February 2005.¹⁴¹

The **Education Sector Policy for Orphans and Vulnerable Children**¹⁴² extends the meaning of *vulnerable children* to include children with disabilities or learning difficulties, the neglected and abused, HIV-positive children, children of indigenous minorities, and other vulnerable children.

The **Education and Training Sector Improvement Programme (ETSIP)**¹⁴³ is a 15-year strategic plan (2006–2020) developed by the education sector in response to the demands of Vision 2030, which foresees Namibia achieving higher levels of industrialisation and earnings, together with greater social equity. Consistent with the Millennium Development Goals and NDPs, ETSIP recognises that education is of cross-cutting importance for almost all sectors, for HIV control, poverty reduction, democracy, multi-culturalism and good governance.¹⁴⁴

ETSIP pays specific attention to the educational needs of OVC and it proposes to provide the following in the first phase of improvements scheduled for 2006–2011:¹⁴⁵

- A specialised training package on OVC is to be devised and translated into local languages, aiming at caregivers in the field of early childhood development (ECD). The package also aims at providing OVC with more equitable access to pre-primary education. It ensures increased educational and psychosocial

139 MBESC (1998).

140 With regard to OVC see also the contribution by Chiku Mchombu elsewhere in this volume.

141 Third National Conference on Orphans and Vulnerable Children held in Windhoek Namibia from 9–11 February 2005 by the then Ministry of Women and Child Welfare Division of Child Care (now the Ministry of Gender Equality and Child Welfare).

142 MBESC (1998).

143 Ministry of Education (2007). For more information see <http://www.mec.gov.na/ministryOfEducation/etsip.htm>, last accessed 20 October 2009.

144 See http://www.etsip.na/about_us.php; last accessed 20 October 2009.

145 Ministry of Education (2007).

support for OVC through schools by way of using specialised staff such as educational psychologists as necessary. Counselling services are provided at schools and other educational institutions by Regional School Counsellors, who train teachers in counselling skills. These measures encourage the establishment of circles of support and other steps to protect OVC from stigmatisation. For example, a new national code of conduct can be drafted for learners and students, and hostel guidelines can be revisited.

- Additionally, the policy recommends mechanisms to ensure that all OVC of school-going age actually attend school and are not deterred from participation in formal education. Provision for a feeding programme for OVC has also been made.

The Namibian government has realised the critical importance of Early Childhood Development (ECD) and its impact on children's performance in basic education.¹⁴⁶ In their long- and medium-term goals, Vision 2030 and ETSIP have identified ECD as a fundamental area to be addressed and developed. ECD has been placed under the auspices of the Directorate of Community and Early Childhood Development within the Ministry of Gender Equality and Child Welfare.¹⁴⁷

To assist Central Government in its efforts to address the needs in ECD, Parliament approved the Decentralisation Policy in 2000.¹⁴⁸ In accordance with this policy, the City of Windhoek has become actively involved in ECD in the city's communities. In this regard, the vision of the City of Windhoek is as follows:

Strengthening the capacity of families and communities in providing Early Childhood Development services and programmes to improve the livelihoods of its youngest residents.

The Decentralisation Policy¹⁴⁹ aims at addressing the following strategic objectives, namely to –¹⁵⁰

- promote and facilitate the provision of innovative ECD education and care services, programmes and facilities in an environment that is stimulating and conducive to ensuring that a child's need for love, care and individuality is met
- ensure that basic services are available and affordable to centres that comply with set standards and regulation
- promote the implementation of programmes aimed at child care and school-readiness
- facilitate and coordinate caregiver training
- promote family involvement and caregiver support in child development
- promote basic health, nutrition, security and safety programmes

146 See Eimann et al. (2005).

147 MRLGH & MBESC (1995).

148 MRLGH (1997).

149 (ibid.).

150 MRLGH (1995).

- ensure affordability and cost-effectiveness of ECD programmes
- initiate and encourage partnership to support ECD
- establish facility standards for child care centres, infant care, children with special needs, and after school care and extended programmes
- monitor, evaluate and maintain quality ECD and care services and programmes within the city of Windhoek
- improve ECD programmes and services in informal settlement areas, thus strengthening the ability of families to alleviate the impact of poverty to ensure viable livelihoods
- demonstrate the willingness and ability to operate and manage the day care facility with mature judgment, compassionate regard for the best interests of children, and consistency in complying with regulations and relevant laws
- develop knowledge and experience in the field of child care, child development, and areas related to the provision of child care services, and
- conduct and demonstrate an understanding of, and compliance with, rights for children in a day care facility.

Children's development should be safeguarded by a healthy environment that supports development and learning. Urbanisation has led to changing circumstances and challenges for children's day care. Efforts to reconcile family life and work should be enhanced, with the focus on the needs of children whilst providing positive opportunities to working parents. Continuous training opportunities for day care staff to upgrade competence and service delivery will remain a challenge to be addressed. Advocacy on the importance of ECD should be done in an effort to bring about positive change in the operating environment and in service delivery. For example, the draft policy on ECD aims at providing a guideline for a start-up programme which could be revised after successful implementation.¹⁵¹

According to the School Policy on the Prevention and Management of Learner Pregnancy,¹⁵² a girl who falls pregnant may continue with her education until the time of her confinement (until her pregnancy is visibly clear), but after giving birth, will only be re-admitted to school a year after having left to give birth to her baby. However, the Legal Assistance Centre held that the period given was too long,¹⁵³ and that the policy discriminated against girls since the same steps were not given to boys. Policy reform should, therefore, put greater emphasis on positive steps to prevent learner pregnancy, and to ensure that young parents are encouraged to continue their education for the benefit of themselves, their infants and the developing Namibian nation.¹⁵⁴

As was stated in *The Namibian* on 3 November 2009, Cabinet has approved an Education Sector Policy for the Prevention and Management of Learner Pregnancy. The article notes that –

151 (ibid.).

152 The School Policy on Learner Pregnancy in Namibia 2001.

153 See Shejvali (2009).

154 See the contribution by Rachel Coomer and Dianne Hubbard elsewhere in this volume.

[o]fficial statistics on pregnancy-related dropouts in Namibia for 2007 show that 1 465 teenagers dropped out for this reason – 96 per cent of them girls. “Comparisons with other data from a variety of sources indicate that these numbers substantially underestimate the true extent of the problem,” a statement issued by the Ministry of Information and Communication Technology said this week. “Education is both a human right in itself and an indispensable means of realising other human rights. To meet Vision 2030, Namibia needs a new policy on learner pregnancy that will make a real and sustainable difference in the lives of children and their children. The policy does not substitute its judgement for that of the family, as family and cultural values are a core component of the guiding principles set out within this policy,” the statement said. The policy places a strong emphasis on prevention, which includes the encouragement of abstinence and the communication of values, such as gender equity and respect for individual autonomy. Where a pregnancy does occur, the focus is on supporting the school-going mother to complete her education while ensuring that the infant’s health and safety are protected, and on encouraging the school-going father to have direct and regular involvement with the infant and to provide a fair share of financial support. The policy emphasises flexibility, to take into account the health of the pupil and the infant, different cultural values, different levels of family support and the point in the academic calendar when the baby is born. Statistics show that pupils who continue their education are more likely to delay subsequent pregnancies, supporting the need to return a learner-mother to the education system as soon as the situation permits. Several young mothers interviewed vowed that they would make every effort upon their return to school to discourage other girls from following their example. Each situation will be assessed and evaluated individually, with sensitivity to the pupil’s health, financial situation, options for child care, family support or lack of support, the timing of the delivery in relation to the school calendar and the needs of the newborn child. Key interventions include: information, counselling, and support to both male and female teenagers who are about to become parents, [and] focus on the health of the pregnant schoolgirl, the young mother and the infant after birth. The new policy is applicable to all primary and secondary schools in Namibia, including Government-subsidised private schools. All schools, whether subsidised by Government or not, are morally and ethically obliged to consider the best interest of pregnant schoolchildren and their infants after birth.

Often, the entire area of child rights is thought of in terms of protection, and Namibia has already achieved much by using this concept of rights as a basis for legislation and programmes. Protection begins with the obligation of parents to their children, and the commitment of the state to support parents and caregivers. But when parents and caregivers fail, the state has an obligation to create a supportive environment. It is in light of this obligation that several policies and institutions were implemented to protect children in difficult circumstances.

Children subjected to neglect and abuse are normally admitted to a foster home, a school of industries, or to children's homes. With regard to sexual abuse and exploitation, no policy to date protects rape victims, especially children. However, sexual abuse and exploitation can be reported to the Women and Child Abuse Centres. Several programmes combat drug and alcohol abuse among children. However, it would go beyond the scope of this publication to discuss these programmes in detail.

Lastly, the Ministry of Gender Equality and Child Welfare has also introduced some preventive measures relating to children. These include the following:¹⁵⁵

- *Namibian Children's Home*: This home, situated in Eros Park, Windhoek, aims at improving the quality of life of children in need of care, as declared by a Children's Court.
- *Interim Night Shelter*: The Shelter aims at providing temporary protection and care to children in difficult circumstances, e.g. street children. The Shelter also investigates cases of street children, and chooses the applicable alternative care within their communities.
- *After-school Centre*: The Centre, situated in Khomasdal, Windhoek, aims to prevent social problems in children by involving them in after-school activities. The Centre also engages children in after-school activities to enable them to develop as responsible individuals.

With the launch of the National Plan of Action 2006–2010 for OVC in Namibia to supplement the National Policy on OVC of 2004, an important element is the effective participation of children in designing and implementing interventions. This is done under the line Ministry's Directorate of Child Welfare, with a view to strengthening capacity among children to meet their own needs.¹⁵⁶ What transpired from the Annual Progress and Monitoring Report for 1 April 2007 to 31 March 2008 regarding the National Plan of Action 2006–2010 for Orphans and Vulnerable Children in Namibia are the following, among other things:¹⁵⁷

- The implementation of OVC-related policies still needs improvement
- In order to reduce HIV and AIDS stigma as well as violence against and abuse of women and children, awareness campaigns aiming at changing behaviour and attitude should be strengthened
- The administrative burden of education and health care and grant provision should be reduced in order to improve access, and
- The completion of the Child Care and Protection Bill should be hastened in order to update the laws written during apartheid and ensure that such updated laws relate to the current scale and environment in terms of the protection and services needed.

155 Cf. http://www.mgecw.gov.na/After_School_Center; last accessed 13 October 2009.

156 MGE CW (2009d).

157 (ibid:viii).

Notwithstanding the fact that the aforementioned section on policies and programmes does not claim to be fully comprehensive, it impressively reflects the commitment of the Namibian Government to gradually and more effectively promote and protect children's rights.

Conclusion

Since Independence in 1990, the Namibian government has committed itself to addressing and improving the situation of children. This is a compelling prerequisite for the creation of an environment which allows the development of the body and mind of the child to its fullest potential, and better prepares it to serve Namibian society. Children in Namibia are a priority on the government agenda – notwithstanding which, a considerable amount of work still needs to be done. Despite the significant efforts by government to guarantee the rights of children, most children in Namibia still have a difficult start in life. This is due to poverty, debt, inadequate policy support and services, HIV/AIDS, discrimination and, in some cases, harmful cultural practices, among other reasons.

So far, only a few academic texts exist in the Namibian literature on children's rights. However, the laws and policies either in place or in the making that deal with children's rights are more than promising.

Namibia is a signatory to the CRC and the African Charter on the Rights and Welfare of the Child. Through a process of the legal reform of national laws in line with the CRC, Namibia is about to enact the Child Care and Protection Act. The Bill that represents this long-awaited piece of legislation has received tremendous support from the various stakeholders. It is hoped that enough consultation on the Bill's adequacy has been done – especially in the rural areas.

The current research findings from this desk study and the findings reflected in the other articles in this publication show that there is a complex patchwork of existing policies, international instruments and local legislation relating to child rights. Provisions relating to children's rights are found in a broad range of laws, from the Constitution and specific legislation on domestic violence, combating of rape, combating of immoral practices, child maintenance, education and social welfare, to laws on divorce and separation proceedings.

One barrier to the effective protection of children's rights is the shortage of Children's Courts. A second is the fact that police officers, prosecutors, magistrates and judges appear not to be specially trained in handling children's cases. This puts the children in a compromised position, taking into account their vulnerability.

While there has been progress in developing appropriate measures for children, there are still significant gaps in dealing with children in the criminal justice system. The Child

Justice Bill has not been tabled in Parliament for more than seven years. There is also an over-reliance on the 1977 Criminal Procedure Act, which still falls short of addressing the challenges of children in conflict with the law.

Moreover, low ages of criminal responsibility under the existing legislation mean that children as young as 7 can be held criminally responsible, while children as young as 12 can be imprisoned. In an attempt to remedy this anomaly, the Child Care and Protection Bill provides for Prevention and Early Intervention Services. These are meant to reduce the risk of violence or other harm within the family environment. Prevention services can be targeted at the entire community, where, for example, a programme for parents on effective methods of child discipline could help prevent family conflicts.

Lastly, it is important for children's legislation to have a monitoring mechanism. Namibia may choose a monitoring mechanism which it is comfortable with, but an institutionalised form of monitoring is necessary. It is recommended that such monitoring bodies institutionalise children's participation in monitoring and treaty reporting processes. Namibia also needs to allocate more of its budgetary resources to education, policy development and implementation, and to strengthening programmes that are already in place. However, what the government and other stakeholders have done so far is more than one step in the right direction.

In conclusion, as Coomer states, the following can be held:¹⁵⁸

Namibia is addressing some of these challenges children and young people face. Over two thirds of children aged between 12 and 23 months receive all recommended childhood vaccinations. It is reported that 88 per cent of households have access to an improved water source and the educational prospects for children are hopeful, with a national literacy rate of approximately 90 per cent. In terms of legislation, laws such as the Combating of Rape Act and the Combating of Domestic Violence Act help to protect children from violence. But if we are to truly help the next generation, if we are to reach the Millennium Development Goals, Vision 2030 and Namibia's full potential, more can and must be done. The main piece of legislation in Namibia governing the care and protection of children is the Children's Act of 1960. It is an outdated law that does not serve the needs of children in Namibia today. To address this problem, the Ministry of Gender Equality and Child Welfare is in the process of preparing new legislation – the Child Care and Protection Bill. This law can help service providers and community members to care for and protect children. The revision process to prepare the bill for tabling is of utmost importance. The challenges and issues that children face have changed in the years since the Children's Act was written, and even since Independence. In the nineties, no one could have predicted the scale or impact of the HIV-AIDS [pandemic]. [No one] could have predicted the sharp rise in international child trafficking, the levels of sexual abuse which Namibian children endure or the numbers of child-headed households – to name but a few of the issues which endanger Namibian children today. The Child Care and Protection Bill aims to provide mechanisms that can be used to assist children who are at risk. The ... Bill makes provision for prevention and intervention services, which could include assistance during pregnancy, training in parenting skills or help

158 Coomer (2009).

to families with drug or alcohol problems. It also provides for measures to assist children who are being neglected or abused, including procedures to remove the children from the usual home environment if there is no other way to protect them. The Bill also outlines provisions for foster care, adoption and children's homes, and is expected to include rules about when children acquire the capacity to make important decisions such as giving consent to medical treatment, acquiring contraceptives or being tested for HIV. Also addressed are issues related to child trafficking, child labour and crimes relating to child abuse and neglect. A safe childhood should not be a dream but a right. Strong laws and policies can help to achieve this right. The ... Child Care and Protection Bill is currently being revised on the basis of feedback from the public and from service providers who will implement the new law.

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