

# The structure of the Namibian judicial system and its relevance for an independent judiciary<sup>1</sup>

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## **Introduction**

Prior to the attainment of nationhood in 1990 and the promulgation of the Constitution of the Republic of Namibia, which created an independent judiciary and a Supreme Court for the sovereign nation, the courts of Namibia were an extension of the judicial system of South Africa. Following the imposition of South African administration over South West Africa, after the League of Nations granted South Africa a mandate over the territory, one obvious historical fact was the assumption of legislative powers over the territory by South Africa and the resulting extension of the South African legal system. The Administration of Justice Proclamation 21 of 1919 established the High Court of South West Africa, and the Appellate Division Act, 1920 (No. 12 of 1920) granted the Appellate Division of the Supreme Court of South Africa jurisdiction over decisions of the High Court of South West Africa to hear appeals from the judgments and orders from the court. By virtue of the provisions of the Supreme Court Act, 1959 (No. 59 of 1959), the judiciary of South West Africa was amalgamated into that of South Africa, resulting in the High Court of South West Africa being constituted as the South West Africa Provincial Division of the Supreme Court of South Africa. Logically, this meant the Appellate Division of the Supreme Court of South Africa maintained jurisdiction over the decisions of the South West Africa Provincial Division of the Supreme Court of South Africa to hear and finally determine matters brought before it on appeal from the South West Africa Division or any other provincial or local division.

With the promulgation of the Constitution of the Republic of Namibia in 1990, the Supreme Court of Namibia became the highest court of appeal for the country.<sup>2</sup> It should also be added that by Proclamation 21 of 1919, which inter alia provided that Roman-Dutch law was to be applied in the territory “as existing and applied in the Province of the Cape of Good Hope“, Roman-Dutch law became the common law of the territory. The overall impact of all these

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1 This article builds on and modifies slightly a section in Amoo, SK. 2008. *Introduction to law: Materials and cases*. Windhoek. Macmillan Education Namibia.

2 See also Hosten, WJ, AB Edwards, Francis Bosman & Joan Church. 1997. *Introduction to South African law and legal theory* (Second Edition). Durban: Butterworths, p 398.

## **The Labour Court**

### ***Establishment***

The Labour Court, which belongs to the Superior Courts of Namibia, is established under section 15 of the Labour Act, 1992 (No. 6 of 1992). The Act establishes two types of labour court, namely the Labour Court<sup>48</sup> and the District Labour Court<sup>49</sup> for each district in respect of which a magistrate's court is established. In terms of Namibia's judicial hierarchy, therefore, the District Labour Court belongs to the Lower Courts.

### ***Composition***

The Labour Court consists of a judge or acting judge of the High Court of Namibia designated by the Judge-President for such purpose for the period of the hearing of, or for, such cases as may be determined by the Judge-President.<sup>50</sup> The President of the Labour Court may on his or own motion or on the request of any party to the proceedings in the Labour Court appoint two or more assessors to advise the court on any matter to be adjudicated upon by the court in the proceedings in question.<sup>51</sup> As in the case of the Labour Court, the District Labour Court may also sit with two assessors.<sup>52</sup>

The District Labour Court consists of a magistrate designated by the Minister of Justice, or any officer in the Ministry of Justice designated by the Minister.<sup>53</sup>

### ***Jurisdiction***

#### **Jurisdiction and powers of the Labour Court**

Section 18(1) of the Labour Act provides for the jurisdiction of the Labour Court as follows:

- (1) *The Labour Court shall have exclusive jurisdiction –*
  - (a) *to hear and determine –*
    - (i) *any appeal from any district labour court;*
    - (ii) *any appeal noted in terms of section 54(4), 68(7), 70(6), 95(4), 100(2) or 114(6);*

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48 Section 15(1)(a), Labour Act.

49 Section 15(1)(b), Labour Act.

50 Section 16(1), Labour Act.

51 Section 16(2)(a), Labour Act.

52 Section 17(2)(a), Labour Act.

53 Section (17)(1), Labour Act.

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proclamations on the judicial and legal systems of South West Africa was that the decisions of the Supreme Court of South Africa and the Roman-Dutch law developed by the South African courts became binding on the courts of Namibia until independence. This position was affirmed by Article 66(1) of the Namibian Constitution, which provides that both the customary law and the common law of Namibia in force on the date of independence remain valid to the extent to which such customary law or common law does not conflict with the Constitution or any other law.<sup>3</sup>

## **Establishment**

The establishment of the judiciary, as one of the main organs of state, is provided for by the Constitution, but there are also other pieces of legislation that deal with the jurisdiction of the courts and other related matters. Article 78(1)(2) and (3) of the Constitution provide for the establishment of the judiciary and its independence, as follows:

- (1) *The judicial power shall be vested in the Courts of Namibia, which shall consist of:
  - (a) a Supreme Court of Namibia;
  - (b) a High Court of Namibia;
  - (c) Lower Courts of Namibia.*
- (2) *The Courts shall be independent and subject only to this Constitution and the law.*
- (3) *No member of the Cabinet or the Legislature or any other person shall interfere with Judges or judicial officers in the exercise of their judicial functions, and all organs of the State shall accord such assistance as the Courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.*

There are existing legal and extralegal measures designed to protect and maintain the independence of the judiciary. Article 21(a) of the Constitution provides for and protects freedom of speech and expression, subject to the restrictions under paragraph (2).<sup>4</sup> Contempt of court proceedings is part of the laws of Namibia, and

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3 See also Amoo, SK & Skeffers, I. 2007. "The rule of law in Namibia". In Horn, N & Bösl, A (eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia, p 25.

4 Article 21(2) of the Constitution provides as follows:  
*The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a*

it is mentioned in particular under paragraph (2) of Article 21 of the Constitution. All persons in Namibia have the constitutional right to express their opinions on the judgments and decisions of the courts. Such opinions or criticisms, however, should not be made when the matter is sub judice, which literally means “under a judge”, i.e. in course of trial, or that the matter has not been finally disposed of by the court. Furthermore, such criticisms should not be scurrilous, male fide, or calculated to intimidate or influence the courts in the performance of their judicial functions. Any measure calculated to interfere with the independence of the judiciary is subject to contempt of court proceedings.<sup>5</sup>

The extralegal measures meant to protect and maintain the independence, impartiality and dignity of the judiciary include their conditions of service, i.e. remuneration, security of tenure, pension, and manner of appointment. The manner of appointment relates to the maintenance of the judiciary’s independence; if appointments are driven or motivated by political patronage, the independence and impartiality of the judiciary will be greatly compromised.

## **The Supreme Court**

### ***Composition***

Article 79(1) of the Constitution provides that the Supreme Court should consist of a Chief Justice and such additional judges as the President, acting on the recommendation of the Judicial Service Commission, may determine, while Article 79(2) adds that the Supreme Court is to be presided over by the Chief Justice. It should also be mentioned that no judge is permitted to sit as a judge of the court over a case to whose decision s/he was a party in a lower court. All appointments of judges to both the Supreme Court and the High Court are to be made by the President on the recommendation of the Judicial Service Commission.<sup>6</sup> In the case of *S v Zemburuka*,<sup>7</sup> the court ruled that the appointments of acting judges should be subjected to the same procedure as their tenured counterparts. All judges so appointed are to hold office until the age of 65, but the President is entitled to extend the retiring age of any judge until 70.<sup>8</sup> A judge

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*democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.*

5 See also *S v Heita* 1992 3 SA 785 (NmHC), and *Alfonso Ngoma v Minister of Home Affairs* High Court Case No. A. 206/2000.

6 Article 82(1), Namibian Constitution.

7 2003 NR 200.

8 Article 82(4), Namibian Constitution.

can be removed from office prior to the expiry of his/her tenure, but only by the President acting on the recommendation of the Judicial Service Commission, and only on the grounds of mental incapacity or gross misconduct.<sup>9</sup>

### ***Jurisdiction***<sup>10</sup>

#### **Appellate jurisdiction of the Supreme Court**

The general jurisdiction of the Supreme Court is provided for by the Constitution.<sup>11</sup> It vests in the Supreme Court the inherent jurisdiction which vested in the Supreme Court of South West Africa immediately prior to the date of independence, including the power to regulate its own procedures and to make court rules for that purpose.<sup>12</sup> The Supreme Court is primarily a court of appeal and its appellate jurisdiction covers appeals emanating from the High Court, including appeals which involve interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder.<sup>13</sup> It is the highest court of appeal in Namibia and its decisions are final.<sup>14</sup> It should also be added, however, that in the exercise of the prerogative of mercy, the President is empowered to pardon or reprove offenders, either unconditionally or subject to such conditions as he/she may deem fit.<sup>15</sup> The Supreme Court is not bound by any judgment, ruling or order of any court that exercised jurisdiction in Namibia prior to or after independence.<sup>16</sup>

The Constitution further vests in Parliament the power to make legislation providing for the appellate jurisdiction of the Supreme Court.<sup>17</sup> Under the relevant provisions of the Supreme Court Act, 1990 (No. 15 of 1990), the Supreme Court is vested with unlimited<sup>18</sup> appellate jurisdiction over appeals from any judgment

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9 Article 84(1) and (2), Namibian Constitution.

10 Article 78(4), Namibian Constitution.

11 (ibid.).

12 Article 79(2), Namibian Constitution.

13 (ibid.).

14 Section 17(1), Supreme Court Act, 1990 (No. 15 of 1990).

15 Article 33(2)(d), Namibian Constitution.

16 Section 17(2), Supreme Court Act of 1990.

17 Article 79(4), Namibian Constitution.

18 Section 14(2)(a), Supreme Court Act of 1990. Section 14(2) states that the right of appeal to the Supreme Court –

... shall –

- (a) *not be limited by reason only of the value of the matter in dispute or the amount claimed or awarded in the suit or by reason only of the fact that the matter in dispute is incapable of being valued in money; and*
- (b) *be subject to the provisions of any law which specifically limits it or specifically grants, limits or exceeds such right of appeal, or which prescribes the procedures which have to be followed in the exercise of that right.*

or order of the High Court; and any party to any such proceedings before the High Court, if dissatisfied with any such judgment or order, has a right of appeal to the Supreme Court.<sup>19</sup> In the exercise of its appellate jurisdiction, the Supreme Court has the power to receive further evidence, either orally or by deposition before a person appointed by the court, or to remit the case for further hearing to the court of first instance or to the court whose judgment is the subject of the appeal, with such instructions relating to the taking of further evidence or any other matter as the Supreme Court may deem necessary. The Supreme Court is also empowered to confirm, amend or set aside the judgment or order that is the subject of the appeal, and to give any judgment or make any other order which the circumstances may require.<sup>20</sup> Records indicate that the Supreme Court's jurisdiction to amend or set aside a judgment or order of a lower court is used sparingly and on very compelling grounds.

As a rule, in determining civil appeals from a decision of the High Court, an appeal should take the form of a re-hearing of the record, but not a retrial. However, if it appears to the court that there was insufficient evidence before the trial judge, a retrial will be ordered.

### **Jurisdiction of the Supreme Court as Court of First Instance**

The Supreme Court has original jurisdiction over matters referred to it for decision by the Attorney-General under the Constitution, and with such other matters as may be authorised by Act of Parliament.<sup>21</sup> In this sense, therefore, it can be concluded that the Supreme Court indeed has original jurisdiction over constitutional matters, but that this original jurisdiction is not exclusive to the Supreme Court because the High Court is also vested with original jurisdiction over constitutional matters.<sup>22</sup> Unlike, for example, in the case of the judicial structure in South Africa, where there is a Constitutional Court, the Namibian Constitution does not create a separate Constitutional Court per se, but the Supreme Court can constitute itself into a Constitutional Court in the cases mentioned earlier. By virtue of the provisions relating to the original jurisdiction of the Supreme Court under the Supreme Court Act of 1990,<sup>23</sup> whenever any matter is referred for a decision to the Supreme Court by the Attorney-General, the latter is entitled to approach the Supreme Court directly, without first instituting any proceedings in any other court, on application to it, to hear and determine the matter in question.<sup>24</sup>

19 Section 14(1), Supreme Court Act of 1990.

20 Section 19(a) and (b), Supreme Court Act of 1990.

21 Article 79(2), Namibian Constitution.

22 See footnote 112 below.

23 Section 15, Supreme Court Act of 1990.

24 Section 15(1), Supreme Court Act of 1990. See also *Ex Parte: Attorney-General. In re:*

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In the exercise of its original jurisdiction, as stated above, the Supreme Court has the power to receive evidence either orally or on affidavit or by deposition before a person it appoints, or to direct that the matter be heard by the High Court. The Supreme Court is also empowered to grant or refuse the application or to confirm, amend or set aside the proceedings that are the subject of the hearing, and to give any judgment or make any order which the circumstances may require.<sup>25</sup>

#### ***Review jurisdiction of the Supreme Court***

The Supreme Court also has review jurisdiction over the proceedings of the High Court or any lower court, or any administrative tribunal or authority established or instituted by or under any law.<sup>26</sup> The Supreme Court may exercise this jurisdiction *ex mero motu* (of the court's own accord) whenever it comes to the notice of the court or any judge of that court that an irregularity has occurred in any proceedings, notwithstanding that such proceedings are not subject to an appeal or other proceedings before the Supreme Court. This review jurisdiction, however, does not confer upon any person any right to institute any such review proceedings in the Supreme Court as a court of first instance.<sup>27</sup>

#### ***Sessions of the Supreme Court***

The Supreme Court is obliged to hold not less than three sessions during each calendar year. The seat of the court is in Windhoek.

#### ***Binding nature of decisions of the Supreme Court***

A decision of the Supreme Court is binding on all other courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted<sup>28</sup> in conformity with the principles of legislative sovereignty.

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*Corporal Punishment by Organs of State* 1991 NR 178 (SC); 1991 (3) SA 76, and *Ex Parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmS).

25 Section 20(a)(b), Supreme Court Act of 1990.

26 Section 16(1), Supreme Court Act of 1990.

27 Section 16(2), Supreme Court Act of 1990.

28 Article 81, Namibian Constitution.

## **The High Court**

### *Composition*

The High Court shall consist of the Judge-President and such additional judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.<sup>29</sup> The Constitution is silent on the qualifications for appointment as High Court judges or acting judges, but section 3 of the High Court Act, 1990 (No. 16 of 1990) contains detailed provisions relating to such qualifications.

Section 8 of the High Court Act provides for the retirement of judges of the High Court as follows:

- (1) *Any judge of the High Court holding office in a permanent capacity –*
  - (a) *shall retire from office on attaining the age of 65 years;*
  - (b) *may retire from office if he has attained the age of 65 years and has completed at least eight years pensionable service as defined by any law relating to pensions of judges;*
  - (c) *may at any time with the approval of the President retire from office if he or she becomes afflicted with a permanent infirmity of mind or body disabling him or her from the proper discharge of his or her duties of office or if any other reason exists which the President deems sufficient.*

The constitution of a court of High Court is provided for by section 10 of the Act, as follows:

- (1) (a) *Subject to the provisions of this Act or any other law, the High Court shall, when sitting as a court of first instance for the hearing of any civil matter, be constituted before a single judge: Provided that the Judge President or, in his or her absence, the senior available judge may, at any time[,] direct that any matter be heard by a full court.*
- (b) *A single judge may at any time discontinue the hearing of any matter being heard before him or her and refer it for hearing to the full court.*
- (2) *Any appeal from a lower court may be heard by one or more judges of the High Court, as the Judge-President may direct.*

As a rule, the judgment of the majority of the judges of the full court constitutes the judgment of the court, but where the judgments of a majority of the judges of any such court are not in agreement, the hearing is adjourned and commenced de novo before a new court constituted in such manner as the Judge-President or, in his or her absence, the senior available judge may determine.<sup>30</sup>

29 Article 80(1), Namibian Constitution.

30 Section 14(1), High Court Act.

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If at any stage during the hearing of any matter by a full court or by a court consisting of two or more judges, any judge of such court dies or retires or becomes otherwise incapable of acting or is absent, the hearing is, if the remaining judges constitute a majority of the judges before whom it was commenced, to proceed before such remaining judges, and if such remaining judges do not constitute such a majority, or if only one judge remains, the hearing is to be commenced de novo, unless all the parties to the proceedings agree unconditionally in writing to accept the decision of the majority of such remaining judges or of such one remaining judge, as the case may be, as the decision of the court.<sup>31</sup>

### ***Jurisdiction***

The High Court is a superior court of record and its jurisdiction is provided for by both the Constitution and the High Court Act. The Constitution vests the High Court with both original and appellate jurisdiction,<sup>32</sup> and all proceedings in the High Court are to be carried on in open court,<sup>33</sup> provided that the court may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security.<sup>34</sup> It is situated permanently in Windhoek, and goes on circuit to Gobabis, Grootfontein, Oshakati, Swakopmund etc.<sup>35</sup> The jurisdiction of the High Court is provided for by section 16 of the High Court Act, as follows:<sup>36</sup>

*The High Court shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within Namibia and all other matters of which it may according to law take cognisance, and shall, in addition to any powers of jurisdiction which may be vested in it by law, have power –*

- (a) to hear and determine appeals from all lower courts in Namibia;*
- (b) to review the proceedings of all such courts;*
- (c) [The rule here under the original subsection has been abolished]*
- (d) in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.*

As stated earlier, the Supreme Court has the jurisdiction to hear appeals from a judgment or order of the High Court. However, in some cases, these appeals

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31 Section 14(2), High Court Act.

32 Article 80(2), Namibian Constitution.

33 Section 13, High Court Act.

34 Article 12(1)(a), Namibian Constitution.

35 Section 4 of the High Court Act provides that the seat of the High Court is to be in Windhoek, but if the Judge-President deems it necessary or expedient in the interests of the administration of justice, he or she may authorise the holding of its sitting elsewhere in Namibia.

36 Section 16, High Court Act.

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need not go directly to the Supreme Court. Section 18(1) of the High Court Act provides that an appeal from a judgment or order of the High Court in any civil proceedings or against any judgment or order of the High Court given on appeal is to be heard by the Supreme Court.

Section 18(2) of the High Court Act provides as follows:

*An appeal from any judgment or order of the High Court in any civil proceedings shall lie –*

- (a) in the case of a single judge sitting as a court of first instance –*
  - (i) to the full court<sup>37</sup>, as of right, and no leave to appeal shall be required; or<sup>38</sup>*
  - (ii) directly to the Supreme Court –*
    - (aa) if all parties to the proceedings concerned agree thereto in writing; or*
    - (bb) in the event of no such agreement, leave to appeal has been granted by the court which has been given the judgment or has made the order; or*
    - (cc) in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court.*
- (b) in the case of a full court or two or more judges, sitting as a court of first instance, to the Supreme Court, as of right, and no leave so to appeal shall be required.*
- (c) in the case of a full court, or one or more judges sitting as a court of appeal, to the Supreme Court if leave to appeal has been granted by the court which has given the judgment or has made the order or, in the event of such leave to appeal being refused, leave to appeal being granted by the Supreme Court.*

Under the provisions of sections 32 and 37 of the Legal Practitioners Act, 1995 (No. 15 of 1995), the Court has the power to discipline legal practitioners who have been found guilty of unprofessional, dishonourable or unworthy conduct.

### **Original jurisdiction**

Under its original jurisdiction, the court shall have the power to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of the Constitution and the fundamental rights and freedoms guaranteed thereunder,<sup>39</sup> including the power to overrule legislation where legislation is inconsistent with or ultra vires either the Constitution or enabling legislation.<sup>40</sup> The inherent jurisdiction to overrule applies

<sup>37</sup> A *full court* is defined in the High Court Act as a court consisting of more than two judges.

<sup>38</sup> It is doubtful whether full bench appeals have been removed from practice.

<sup>39</sup> Article 80(2), Namibian Constitution.

<sup>40</sup> Article 25(1)(a), Namibian Constitution; *Fantasy Enterprise CC t/a Hustler Shop v The Minister of Home Affairs and Others* (High Court of Namibia Case No. A 159/96). See also the cases of *Kauesa v Minister of Home Affairs* 1995 (1) BCLR 1540 (NmS); *Ex Parte:*

also in the case of subsidiary legislation where it is uncertain or unreasonable, or it contains an improper delegation. As a rule, the inherent jurisdiction of the superior courts means that they may do anything that the law does not forbid, in contradistinction to the lower courts, such as magistrates' courts, which are creatures of statute in that they cannot claim any authority which cannot be found within the four corners of the Magistrates' Courts Act.<sup>41</sup> With regard to the court's original jurisdiction over cases involving the fundamental rights of the individual, special mention needs to be made of the provisions of Article 18 of the Namibian Constitution and Rule 53 of the High Court Rules that vest in the court the jurisdiction to review administrative action. The importance of this lies in the development of the law relating to administrative justice by the Namibian courts.<sup>42</sup>

When the High Court sits as a court of first instance for the hearing of any civil matter, it is to be constituted before a single judge; but the Judge-President or, in his or her absence, an available senior judge may at any time direct that any matter be heard by a full court.<sup>43</sup> However, with criminal appeals from a lower court, the High Court has to be constituted in the manner prescribed in the applicable law relating to procedure in criminal matters.<sup>44</sup>

### **Appellate jurisdiction**

The High Court derives its appellate jurisdiction to hear and adjudicate upon appeals from lower courts primarily from the Constitution,<sup>45</sup> but there are other provisions in the High Court Act that also deal with its appellate jurisdiction. One or more judges may constitute the High Court as a court of appeal,<sup>46</sup> but the Judge-President or, in his or absence, an available senior judge has the discretion to direct that a matter be heard by a larger number of judges.<sup>47</sup>

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*Attorney-General. In re: Corporal Punishment by Organs of State* 1991 (3) SA 76 (NmS); *Namunjepo and Others v Commanding Officer, Windhoek Prison and Another* 2000 (6) BCLR 671 (NmS); and *Muller v The President of the Republic of Namibia and Another* 2000 (6) BCLR 655 (NmS).

41 Hosten et al. (1997:393).

42 See *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank and Elizabeth Khaxas*, Case No. SA 8/99; *The Government of the Republic of Namibia v Ngeve Raphael Sikunda*, Case No. SA 5/2001.

43 Section 10(1)(a), High Court Act.

44 Section 10(4), High Court Act.

45 Article 80(2).

46 Section 10(2), High Court Act.

47 Section 10(3), High Court Act.

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The powers of the High Court as regards the hearing of appeals are provided by section 19 of the High Court Act, as follows:

- (1) *The High Court shall have power –*
  - (a) *on hearing of an appeal to receive further evidence, either orally or by deposition before a person appointed by the court, or to remit the case to the court of first instance or the court whose judgment is the subject of the appeal, for further hearing, with such instructions relating to the taking of further evidence or any other matter as the High Court may deem necessary;*
  - (b) *to confirm, amend or set aside the judgment or order which is the subject of the appeal and to give any judgment or make any order which the circumstances may require.*

### **Review jurisdiction**

The High Court has review or supervisory jurisdiction over all proceedings from inferior courts. Under this jurisdiction, the High Court has the power to call for and review the record of any proceedings determined by an inferior court and, if necessary, to revise any judgment or order contained in any such record. As indicated hereunder, the High Court may also either on its own motion, or on application from an interested party, transfer any proceedings pending before any inferior court to another inferior court of competent jurisdiction or to itself for trial and determination, to ensure that the proceedings are determined expeditiously, conveniently, fairly and authoritatively.

The grounds of review of the proceedings of Lower Courts are stated under section 20 of the High Court Act, as follows:

- (a) *absence of jurisdiction on the part of the court;*
- (b) *interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;*
- (c) *gross irregularity in the proceedings;*
- (d) *the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.*

After review of the proceedings, the court has the power to confirm, alter or set aside the conviction and/or sentence.

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- (b) *to consider and give a decision on –*
  - (i) *any application made to the Labour Court in accordance with the provisions of this Part in terms of any provisions of this Act;*
  - (ii) *any application to review and set aside or correct any decision taken by the Minister or the Permanent Secretary, the Commissioner, any inspector or any officer involved in the administration of the provisions of this Act;*
- (c) *to review the proceedings of any district labour court brought under review on the grounds mutatis mutandis referred to in section 20 of the High Court Act, 1990 (Act 16 of 1990);*
- (d) *to grant any application referred to in paragraph (b) or (c) any urgent interim relief until a final order has been made in terms of the said paragraph (b) or (c);*
- (e) *to issue any declaratory order in relation to the application or interpretation of any provision of this Act, or any law on the employment of any person in the service of the State or any term or condition of any collective agreement, any wage order or any contract of employment;*
- (f) *to make any order which it is authorised to make under any provision of this Act or which the circumstances may require in order to give effect to the objects of this Act;*
- (g) *generally to deal with all matters necessary or incidental to its functions under this Act, including any labour matter, whether or not governed by the provisions of this Act, any other law or the common law.*
- (2) *A party to any proceedings before the Labour Court may appear in person or be represented by a legal practitioner admitted to practise as an advocate in terms of the Admission of Advocates Act, 1964 (Act 74 of 1964), or as an attorney in terms of the Attorneys Act, 1979 (Act 53 of 1979).*
- (3) *Subject to the provisions of this section and sections 16 and 22, the Labour Court shall, in the exercise or performance of its powers and functions, have all the powers of the High Court of Namibia under the High Court Act, 1990 (Act 16 of 1990), as if its proceedings were an order of, the said High court of Namibia.*

### **Jurisdiction and powers of District Labour Courts**

Section 19 of the Labour Act provides for the powers of the District Labour Courts as follows:

- (1) *A district labour court shall have jurisdiction -*
  - (a) *to hear all complaints lodged with such district labour court by an employee or employer (hereinafter referred to as the complainant) against an employee or employer (hereinafter referred to as the respondent) for an alleged contravention of, or alleged failure to comply with, any provision of this Act or any term and condition of a contract employment or a collective agreement;*
  - (b) *to make any order against, or in respect of, the respondent or the complainant, as the case may be, which it is empowered to make under any such provision of this Act.*

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- (2) (a) *A district labour court may on the request of the respondent and with the consent of the complainant, or on its own motion, if it is of the opinion that the subject matter of the complaint relates to a dispute of interests, refer the complaint to the Commissioner.*
- (b) *A complaint referred to the Commissioner in terms of paragraph (a) shall be deemed to be a dispute reported to the Commissioner in terms of section 74.*
- (c) *If a complaint is referred to the Commissioner in terms of paragraph (a) the complainant shall, within a period of 14 days as from the date on which the complaint has been so referred or such longer period as the Commissioner may on good cause shown allow, comply with the provisions of subsection (2) of section 74.*
- (3) *Any complainant, if he or she desire, may be represented in a district labour court by a person who shall be designated by the Permanent Secretary generally or in every particular case for such purpose, and any such complainant and any respondent may appear in person in such district labour court or be represented by his or her own legal practitioner admitted to practise as an advocate in terms of the Legal Practitioners Act.*
- (4) *Subject to the provisions of this section and sections 17 and 22, a district labour court shall, in the exercise or performance of its powers and functions, have all powers of a magistrate's court under the Magistrates' Courts Act, No. 32 of 1944, as if its proceedings were proceedings conducted in, and any order made by it were a judgment of, a magistrate's court.*

*Appeals against judgment or orders of the Labour Court or the District Labour Court*

Any party to any proceedings before the Labour Court may appeal, with the leave of the Labour Court, or, if such leave is refused, with the leave of the Supreme Court of Namibia granted on application by way of petition to the Chief Justice, to a full court of the High Court of Namibia, on any question of law against any decision or order of the Labour Court or any judgment or order of the Labour Court given on appeal from a judgment or order from a District Labour Court, as if such judgment or order were a judgment or order of the High Court of Namibia.<sup>54</sup>

Similarly, any person to any proceedings before any District Labour Court may appeal to the Labour Court against any judgment or order given by such District Labour Court, as if such judgment or order were a judgment or order of a magistrate's court.<sup>55</sup>

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54 Section 21(1)(a), Labour Act.

55 Section 21(1)(b), Labour Act.

## **The Lower Courts**

### ***Establishment***

The Lower Courts are established under Article 78(1) of the Namibian Constitution. Currently, the Lower Courts in Namibia comprise the magistrates' courts and the community courts which are specifically established by the Magistrates' Courts Act, 1944 (No. 32 of 1944) and the Community Courts Act, 2003 (No. 10 of 2003), respectively. The District Labour Court discussed above is also classified as a *lower court*.

### ***The magistrates' courts***

#### **Composition**

Magistrates' courts in Namibia may be classified into *regional, district, sub-district divisions*,<sup>56</sup> and *periodical courts*.<sup>57</sup> Magistrates' courts are courts of record,<sup>58</sup> and their proceedings in both criminal cases and the trial of all defended civil actions are carried in open court.<sup>59</sup> The courts are presided over by judicial officers,<sup>60</sup> and advocates or attorneys of any division of the Supreme Court may appear in any proceeding in any court.<sup>61</sup> The Act also permits articulated clerks to appear instead and on behalf of the attorney to whom s/he has been articulated.<sup>62</sup>

Under the provisions of section 19 of the Legal Practitioners Act, 1995 (No. 15 of 1995), a candidate legal practitioner to whom a certificate has been issued by the Justice Training Centre, certifying that such candidate legal practitioner has completed a period of six months' training under a course of postgraduate training, has the right of audience –

- in any Lower Court in any matter, and
  - in Chambers in any High Court proceedings,
- but not after the expiration of a period of two years after his or her Board registration as a candidate legal practitioner.

56 Section 2(f)(2)(a)–(iv), Magistrates' Courts Act.

57 Section 26, Magistrates' Courts Act. The periodical courts are meant to serve the more remote areas of the country and as the name suggests they are only held at intervals when the volume of work in the area requires a court sitting.

58 A court of record is a court whose acts and judicial proceedings are written on parchment or in books for a perpetual memorial which serves as the authentic and official evidence of the proceedings of the court.

59 Section 5, Magistrates' Courts Act.

60 Section 8, Magistrates' Courts Act.

61 Section 20, Magistrates' Courts Act.

62 Section 21, Magistrates' Courts Act.

## ***Jurisdiction***

### **Civil jurisdiction**

All magistrates' courts have equal civil jurisdiction, except the regional magistrates' courts, which have only criminal jurisdiction.

#### *Territorial jurisdiction*

The territorial jurisdiction of a magistrate's court is the district, sub-district or area for which such court is established, and a court established for a district has no jurisdiction in a sub-district.<sup>63</sup> Similar provisions apply to the jurisdiction of the periodical courts, except that their territorial jurisdiction is subject to the provision that the court of a district within which the said area or any part thereof is situate retains concurrent jurisdiction with the periodical court within such portions of such area as are situate within such district.<sup>64</sup>

#### *Jurisdiction in respect of persons*

*A magistrate's court shall have jurisdiction over the following persons:*

- (a) *any person who resides, carries on business or is employed within the district;*
- (b) *any partnership which has business premises situated or any member whereof resides within the district;*
- (c) *any person whatever, in respect of any proceedings incidental to any action or proceeding instituted in the court by such person or himself;*
- (d) *any person, whether or not he resides, carries on business or is employed within the district, if the cause of action arose wholly within the district;*
- (e) *any party to interpleader proceedings, if –*
  - (i) *the execution creditor and every claimant to the subject matter of the proceedings reside, carry on business, or are employed within the district; or*
  - (ii) *the subject-matter of the proceedings has been attached by process of the court; or*
  - (iii) *such proceedings are taken under sub-section (2) of section sixty-nine and the person therein referred to as the "third party" resides, carries on business, or is employed within the district; or*
  - (iv) *all the parties consent to the jurisdiction of the court;*
- (f) *any defendant (whether in convention or reconvention) who appears and takes no objection to the jurisdiction of the court;*
- (g) *any person who owns immovable property within the district in actions in respect of such property or in respect of mortgage bonds thereon.<sup>65</sup>*

63 Section 26(1) and (2), Magistrates' Courts Act.

64 Section 27(a), Magistrates' Courts Act.

65 Section 28, Magistrates' Courts Act.

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The magistrates' courts have civil jurisdiction over matters in which the state is a party.<sup>66</sup>

*Jurisdiction in respect of causes of action*

In respect of causes of action, the magistrates' courts have jurisdiction in –<sup>67</sup>

- [(1)] (a) actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding N\$25 000 in value;
- (b) actions of ejectment against the occupier of any premises or land within the district: Provided that, where the right of occupation of any such premises or land is in dispute between the parties, such right does not exceed N\$25 000 in clear value to the occupier;
- (c) actions for the determination of a right of way, notwithstanding the provision of section 46;
- (d) actions on or arising out of a liquid document or a mortgage bond, where the claim does not exceed N\$100 000;
- (e) actions on or arising out of any credit agreement as defined in section 1 of the Credit Agreement Act, 1980 (Act 75 of 1980), where the claim or the value of the matter in dispute does not exceed N\$100 000;
- (f) actions other than those already mentioned in this subsection, where the claim or the value of the matter in dispute does not exceed N\$25 000.
- (2) In subsection 1 'action' includes a claim in reconvention.

*Administration orders*

Under section 74 of the Magistrates' Courts Act, where a judgment has been obtained for the payment of money and the judgment debtor is unable to pay the amount forthwith, or where a debtor is unable to liquidate his liabilities and has not sufficient assets capable of attachment to satisfy such liabilities or a judgment which has been obtained against him, the court may upon the application of the judgment debtor or the debtor make an order on such terms with regard to security, preservation or disposal of assets, realisation of movables subject to hypothec or otherwise as it thinks fit, providing for the administration of his estate, and for the payment of his debts by instalments or otherwise.

*Granting of protection orders under the Combating of Domestic Violence Act*<sup>68</sup>

Under section 4(1) of the Combating of Domestic Violence Act, 2003 (No. 4 of 2003), any person in a domestic relationship may apply to a magistrate's court, excluding a regional court, for a protection order.

<sup>66</sup> Section 28(2), Magistrates' Courts Act.

<sup>67</sup> Section 29, Magistrates' Courts Act, as amended by the Magistrates' Courts Amendment Act, 1997 (No. 9 of 1997).

<sup>68</sup> Act No. 4 of 2003.

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Section 5(1) of the Act provides as follows:

*A court of a district where the –*

- (a) complainant permanently or temporary resides, is employed or carries on business;*
- (b) respondent resides, is employed or carries on business; or*
- (c) cause of action arose,*  
*has jurisdiction to grant a protection order under this Act.*

*The granting of maintenance orders under the Maintenance Act<sup>69</sup>*

Every magistrate's court, other than a regional magistrate's court, is within its area of jurisdiction a magistrate's court<sup>70</sup> and as such has the jurisdiction for the following:<sup>71</sup>

- (a) in the case where no maintenance order is in force, to make a maintenance order against the person who has been proved to be legally liable to maintain a beneficiary;*
- (b) in the case where a maintenance order is in force –*
  - (i) substitute that maintenance order by another maintenance order; or*
  - (ii) discharge such maintenance order; or*
  - (iii) suspend such maintenance order on such conditions which the maintenance court determines;*
- (c) make no maintenance order.*

*Matters beyond the jurisdiction of Magistrates' Courts*

The magistrates' courts have no jurisdiction in the following:<sup>72</sup>

- (1) in matters in which the dissolution of a marriage or separation from bed and board or of goods of married persons is sought;<sup>73</sup>*
- (2) in matters in which the validity or interpretation of a will or other testamentary document is in question;*

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69 Act No. 9 of 2003.

70 Section 6, Maintenance Act.

71 Section 17(1), Maintenance Act.

72 Section 46(c), Magistrates' Courts Act, as amended by section 2 of the Magistrates' Courts Amendment Act, 1997 (No. 9 of 1997). Section 45(1) provides as follows:

*Subject to the provisions of section 46, the court shall have jurisdiction to determine any action or proceeding otherwise beyond the jurisdiction, if the parties consent in writing thereto: Provided that no court other than a court having jurisdiction under section 28 shall, except where such consent is given specifically with reference to particular proceedings already instituted or about to be instituted in such court, have jurisdiction in any such matter.*

73 Section 46(1), Magistrates' Courts Act.

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- (3) *in a matter in which is sought specific performance without an alternative of payment of damages, except in –*
- (i) *the rendering of an account in respect of which the claim does not exceed N\$25,000;*
  - (ii) *the delivery or transfer of property, movable or immovable, not exceeding N\$25,000 in value; and*
  - (iii) *the delivery or transfer of property, movable or immovable, exceeding N\$25,000 in value where the consent of the parties has been obtained in terms of section 45.*

*Removal of actions from the magistrates' courts to the High Court*

Under section 50 of the Magistrates' Courts Act, as amended by section 3 of the Magistrates' Courts Amendment Act, 1997 (No. 9 of 1997), any action in which the amount of the claim exceeds N\$5 000, exclusive of interest and costs, may, upon application to the court by the defendant, or if there is more than one defendant, by any defendant, be removed to the High Court.

**Criminal jurisdiction**

All magistrates have criminal jurisdiction, but this is subject to certain limitations in respect of the seriousness of the offence, the nature of punishment, and territorial jurisdiction. As stated earlier, magistrates' courts are the creation of a statute and, therefore, can only exercise powers and impose punishments provided for by the Act. Any exercise of jurisdiction outside the Act will be null and void. (Contrast this with the inherent jurisdiction of the superior courts.)

*Jurisdiction in respect of offences*

All magistrates' courts, other than the court of a regional division, have jurisdiction over all offences except treason, murder, and rape. The court of a regional division has jurisdiction over all offences except treason and murder.<sup>74</sup>

*Jurisdiction in respect of punishment*

The jurisdiction of the court is limited with respect to the punishment it may impose. Under section 92 of the principal Act, as amended by section 6 of the Magistrates' Courts Amendment Act, 1997 (No. 9 of 1997), the court may impose a sentence of imprisonment for a period not exceeding five years where the court is not the court of a regional division, or not exceeding 20 years, where the court

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<sup>74</sup> Section 89, Magistrates' Courts Act.

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is a court of a regional division. In the case of fines, the court may impose a fine not exceeding N\$20 000, where the court is not a court of a regional division, or not exceeding N\$100 000, where the court is the court of the regional division.

Apart from these general provisions relating to the jurisdiction of the court in respect of punishment, a magistrate's jurisdiction is sometimes increased or reduced by particular legislation. A particular statute that creates and prohibits a certain offence may also impose the sentence or the statutory offence. In this case, a magistrate may impose any fine or any sentence as it is prescribed so long as it is not beyond the prescribed penalty in the Act. As a rule, certain enactments provide for a mandatory minimum sentence, in which case any convicted person is obliged receive that minimum sentence irrespective of the peculiar circumstances of the case, including any mitigating circumstances.

*Confirmation of punishment in excess of jurisdiction*

The High Court has both express and inherent review jurisdiction over the proceedings of the magistrates' courts. Consequently, if a magistrate in a certain matter is of the opinion that the peculiar circumstances of the case are such that a punishment beyond jurisdiction is warranted, the court may either impose such punishment and transfer to the High Court (as indicated above) or a regional court, as the case may be, for confirmation or to the superior court for sentencing.

*Territorial jurisdiction/local limits of jurisdiction*

The local limits of jurisdiction or the territorial jurisdiction of the magistrates' courts are provided for under section 90 of the principal Act, as amended by the Magistrates' Courts Amendment Act, 1985 (No. 11 of 1985), as follows:

- (1) *Subject to the provision of section 89, any person charged with any offence committed within any district, district division or regional division may be tried by the court of that district, district division or regional division, as the case may be.*
- (2) *When any person is charged with any offence –*
  - (a) *committed within the distance of four kilometres beyond the boundary of the district, district division or regional division; or*
  - (b) *committed in or upon any vehicle on a journey which or part whereof was performed in, or within the distance of four kilometres of, the district, district division or regional division; or*
  - (c) *committed on board any vessel on [a] journey upon any river within the Republic or forming the boundary of any portion thereof, and such journey or part thereof was performed in, or within the distance or four kilometres of, the district, the district division or regional division; or*

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- (d) committed on board any vessel of on a voyage within the territorial waters of the Republic (including the territory of South West Africa), and the said territorial waters adjoin the district, district division or regional division;  
or
- (e) begun or completed within the district, district division or regional division,  
such person may be tried by the court of the district, district division or regional division, as the case may be, as if he had been charged with an offence committed within the district, district division, or regional division, respectively.
- (3) Where it is uncertain in which of several jurisdiction[s] an offence has been committed, it may be tried in any of such jurisdictions.
- (4) A person charged with an offence may be tried by the court of any district, district division or regional division, as the case may be[,] where in [sic] any act or omission or event which is an element of the offence took place.
- (5) A person charged with theft of property or with obtaining property by an offence or with an offence [involving] the receiving of any property by him, may also be tried by the court of any district, district division or regional division, as the case may be, wherein he has or had part of the property in his possession.
- (6) A person charged with kidnapping, child stealing or abduction may also be tried by the court of any district, district division or regional division, as the case may be, through or in which he conveyed or concealed or detained the person kidnapped, stolen or abducted.
- (7) Where by any special provision of law a magistrate's court has jurisdiction in respect of an offence committed beyond the local limits of the district, district division or regional division, as the case may be, such court shall not be deprived of such jurisdiction by any of the provisions of this section.
- (8) Where an accused is alleged to have committed various offences within different districts in the territory, the attorney-general may in writing direct that criminal proceedings in respect of such various offences be commenced in the court of any particular district in the territory whereupon such court shall have jurisdiction to act with regard to any such offences as if such offence has been committed within the area of jurisdiction of that court, and the court of the district division or regional division within whose area of jurisdiction the court of such district is situated, shall likewise have jurisdiction in respect of any such offence if such offence is an offence which may be tried by the court of a district division or regional division.

## **Appellate jurisdiction**

Magistrates' courts have the jurisdiction to hear and determine any appeal against any order or decision of a community court.<sup>75</sup>

## **Community Courts**

### **Establishment**

Community courts are the creation of a statute, the Community Courts Act, 2003 (No. 10 of 2003), which also provides detailed procedure and requirements for the establishment and recognition of community courts in a particular traditional community.<sup>76</sup> The Community Courts Act was promulgated, inter alia, to give legislative recognition to and formalise the jurisdiction of the traditional courts that render essential judicial services to members of traditional communities who subject themselves to their jurisdiction and the application of customary law. Formal recognition also brings the proceedings of the erstwhile traditional courts within the mainstream of the judiciary in Namibia, and subjects their proceedings to formal evaluation and review by the superior courts.

Every community court is to be a court of record, and the proceedings are to be recorded in writing by the clerk of the court.<sup>77</sup> This is an important provision not only in terms of review and appeals, but also for purposes of precedents and the authoritative ascertainment of customary law.

### **Composition**

A community court is to be presided over by one or more justices appointed by the Minister of Justice. A justice of the community court is required to be conversant with the customary law of the area of his/her jurisdiction, and is not permitted to be a member of Parliament, a regional council, or a local authority council. A person will also not be eligible for appointment as a justice of a community court if he or she is a leader of a political party, regardless of

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<sup>75</sup> See section 27, Community Courts Act, 2003 (No. 10 of 2003).

<sup>76</sup> *Traditional community* is defined in the Community Courts Act as –  
*an indigenous, homogenous, endogamous social grouping of persons comprising families deriving from exogamous clans which share a common ancestry, language, culture heritage, customs and traditions, recognises a common traditional authority and inhabits a common communal area: and includes the members of that community residing outside the common communal area.*

<sup>77</sup> Section 18(1) and (2), Community Courts Act.

whether or not that political party is registered under section 39 of the Electoral Act, 1992 (No. 24 of 1992).<sup>78</sup> The Minister of Justice has the power to remove from office any justice of a community court if such justice becomes subject to any disqualification mentioned above, but only after consultation with the traditional authority concerned and after the Minister has afforded the justice concerned the opportunity to be heard. This removal is required to be published in the *Gazette*.<sup>79</sup>

A justice of a community court may appoint one or more assessors to advise the court on any matter to be adjudicated upon by the court in the proceedings in question,<sup>80</sup> but the opinion of the assessor(s) is not binding on the court: it is only advisory.<sup>81</sup>

### **Jurisdiction in respect of cases and persons**

The jurisdiction of community courts is provided for under section 12 of the Community Courts Act, as follows:

*A community court shall have jurisdiction to hear and determine any matter relating to a claim for compensation, restitution or any other claim recognised by the customary law, but only if –*

- (a) the cause of action of such matter or any element thereof arose within the area of jurisdiction of that community court; or*
- (b) the person or persons to whom the matter relates in the opinion of that community court are closely connected with the customary law.*

The importance of this provision is that the community courts' jurisdiction is not limited to civil matters. These courts have both civil and criminal jurisdiction, provided that they do not impose custodial sentences. Their jurisdiction is limited to that extent, therefore.

### **Application and ascertainment of customary law**

Since the community courts have traditionally administered justice over persons and in jurisdictions where the operating and functional law was/is customary law, this practice was taken cognisance of when the Act was being promulgated, and provisions were accordingly incorporated therein for community courts to

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78 Section 8(1) and (2)(a)(b)(c), Community Courts Act.

79 Section 8(3), Community Courts Act.

80 Section 7(2), Community Courts Act.

81 Section 7(7), Community Courts Act.

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apply customary law. Sections 13 and 14 of the Community Courts Act provides as follows:

13. *In any proceedings before it[,] a community court shall apply the customary law of the traditional community residing in its area of jurisdiction: Provided that if the parties are connected with different systems of customary law, the community court shall apply the system of customary law which the court considers just and fair to apply in the determination of the matter.*
14. *The community court may rely on any submissions on customary law made to it and if it entertains any doubt thereafter, it is permissible and lawful for the court to consult decided cases, text books and other sources, and may receive opinions, either orally or in writing[,] to enable it to arrive at a decision in the matter: Provided that such sources are made available to the other parties.*

### **Representation**

Under section 16 of the Community Courts Act, a party to any proceedings before a community court is obliged to appear in person and may represent himself or herself or be represented by any person of his or her choice. It will appear from this provision that legal practitioners may be able to represent their clients in community courts. If this is the correct interpretation of the Act, then the Namibian situation is a departure from the positions obtaining in some jurisdictions, where legal practitioners cannot represent clients in similar courts.

### **Appeals against orders or decisions of community courts**

A party to any proceedings in a community court, who is aggrieved by any order or decision of that community court, may appeal to the magistrate.<sup>82</sup> Furthermore, an appeal against an order or decision made or given by a magistrate's court is to lie to the High Court.<sup>83</sup>

### **Conclusion**

The foregoing represents the judicial structure of Namibia as an independent organ of state. The independence of the judiciary as embodied in the letter and spirit of the Namibian Constitution and the new dispensation is a sine qua non for the dispensation and administration of justice. Sandra Day O'Connor, Associate Justice of the Supreme Court of the United States of America, in her address to the Arab Judicial Forum in Manama, Bahrain, on 15 September 2003, on the role of the judiciary in an independent sovereign state, had the following to say:

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82 Section 28, Community Courts Act.

83 Section 29(1), Community Courts Act.

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*Alexander Hamilton, one of the Framers of the United States Constitution, wrote in The Federalist No. 78 to defend the role of the judiciary in the constitutional structure. He emphasised that “there is no liberty, if the power of judging be not separated from the legislative and executive powers. ... [L]iberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.” Hamilton’s insight transcends the differences between nations’ judicial systems. For only with independence can the reality and the appearance of zealous adherence to the Rule of Law be guaranteed to the people. As former U. S. President Woodrow Wilson wrote, government “keeps its promises, or does not keep them, in its courts. For the individual, therefore, ... the struggle for constitutional government is a struggle for good laws, indeed, but also for intelligent, independent, and impartial courts.” Let us keep in mind the importance of independence to the effective functioning of the judicial branch.*

An independent judiciary requires both that individual judges are independent in the exercise of their powers, and that the judiciary as a whole is independent: its sphere of authority protected from the influence, overt or insidious, of other government actors.

The principle that an independent judiciary is essential to the proper administration of justice and the promotion of liberty and the rights of the individual is recognised in the jurisprudence on democratic government. But the task of an independent judiciary is not only to dispense justice according to the law and promote and maintain the rights of the individual against the onslaught of state power: it includes the development of the law. It involves the maintenance of the integrity of the institution. This is essential for the predisposition of the members of the judiciary towards the performance of the well-known traditional tasks and, more importantly, the development of the law. In a jurisdiction such as Namibia’s, which operates under a written Constitution as the supreme law of the land, the achievement of this role involves the performance of judicial functions with regard to the anticipated objectives of the Constitution. This means that the interpretative function needs to aim at ensuring both the legislation and the common law comply with the precepts of the Constitution. The necessary prerequisites for the achievement of this goal are the personal integrity of the judge (probity and impartiality of judges) and the independence of the judiciary. By *independence of the judiciary* one is not referring to structural independence alone, but also that cultural and institutional independence which grants the judiciary in the common law jurisdiction that peculiar characteristic of judicial activism necessary for the development of the law. The Namibian Constitution and the legal system grant the judiciary this jurisdiction, and this point is better illustrated with the institutional constraints imposed on the country’s pre-independence judiciary.

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The judiciary of South West Africa was constrained by its integration into the South African legal system, operating as it did under the political and constitutional framework of legislative supremacy and analytical positivism. It is in the light of these obvious constraints that one cannot but acknowledge the fortitude of the judiciary in its attempt to integrate human rights values in their judgments, especially after the enactment of Proclamation R101 of 1985.

As indicated earlier, after it had attained independence and sovereignty, Namibia adopted a Constitution with an entrenched Bill of Rights and a provision that elevated the Constitution to be the supreme law of the land. This effectively replaced the doctrine of legislative sovereignty – which, from the history of the legal systems of both South Africa and Namibia, was equated with legislative supremacy – with the doctrine of constitutional supremacy, which has provided the Namibian judiciary with the necessary constitutional leverage to promote the principles of the rule of law and constitutionalism, and protect and advance the fundamental rights of the individual. This exercise has involved the interpretation of the Constitution and, since independence, the Namibian courts have adopted a values-oriented approach to such interpretation and have thereby developed home-grown jurisprudence based on value judgments and an epistemological paradigm rooted in the values and norms of the Namibian people. GJC Strydom, the then Chief Justice, in his address to judicial officers at the first retreat of the Office of the Attorney-General at Swakopmund from 20 to 22 November 2002, stated the following:

*It is trite that ordinary presumptions of interpretation will not independently suffice in interpreting such a document [the Constitution] and that our Courts must develop guidelines to give full effect to the purport and aim of our Constitution. The Constitution remains the Supreme Law of Namibia from which all laws flow and against which all laws can be tested ... [I]n interpreting the Constitution, especially Chapter 3, the Courts are often called upon to exercise a value judgment. It was this exercise that led the Court in the Corporal Punishment decision to encompass both aspects of constitutional interpretation and judicial independence[.]*

This approach of exercising constitutional interpretation and judicial independence guarantees the development of the home-grown jurisprudence that is required for development of the law. But the growth of home-grown jurisprudence should not be seen as the sole responsibility of the judiciary: academia and legal practitioners also play a role. This calls for research, the constructive review of judgments in local law journals, assistance in editing judgments for law reports, the appointment of members of academia to the bench as auxiliary judges, and the provision of a forum for regular interactions of all role players in the legal system.

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Finally, it must be reiterated that the maintenance of the independence of the judiciary depends on prerequisites other than those mentioned earlier in this article. For the judges and magistrates to carry out their roles effectively, both the Judicial Service Commission and the Magistrates' Commission are obliged to ensure that the courts have sufficient and well-trained staff, as well as the necessary infrastructural resources and facilities sufficient and necessary for the effective and efficient operation of the courts. Other branches of government are entreated to work in partnership with the judiciary to support judicial decisions in order to instil in the public that confidence in the legal system and the judiciary of Namibia necessary to ensure the individual's fidelity to law.

