

Human Rights and the Rule of Law in Namibia

Edited by Nico Horn and Anton Bösl

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Table of contents

Contributors	5
Foreword Peter Shivute	9
Foreword to the 2 nd edition (2009) Norbert Lammert	10
List of abbreviations	11
Introduction Nico Horn and Anton Bosl	13
The rule of law in Namibia Sam K Amoo and Isabella Skeffers	17
The constitutional jurisprudential development in Namibia since 1985 Sam K Amoo	39
Traditional governance and African customary law: Comparative observations from a Namibian perspective Manfred O Hinz	59
The justiciability of social, economic and cultural rights in Namibia and the role of the non-governmental organisations John Nakuta	89
Third-generation human rights and the protection of the environment in Namibia Oliver C Ruppel	101
The protection and promotion of human rights in Namibia: The constitutional mandate of the Ombudsman John Walters	121

The Human Rights and Documentation Centre at UNAM Oliver C Ruppel	131
International human rights norms and standards: The development of Namibian case and statutory law Nico Horn	141
The implementation of international and regional human rights instruments in the Namibian legal framework Francois-Xavier Bangamwabo	165
The universality of human rights: Challenges for Namibia Salome M Chomba	187
The rule of law in sub-Saharan Africa – An overview Peter Shivute	213
Appendix Constitution of the Republic of Namibia	221

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Foreword

It is recognised that there are differences of opinion as to the definition of the concept *rule of law*. There may also be divergent views as to whether there exists a nexus between the rule of law, democracy, and sustainable economic and social development. These differences in definition and understanding of the concept have led to misunderstandings and even contradictions in the implementation of the rule of law. It is, however, uncontroversial that the rule of law plays a crucial role in the protection and promotion of human rights, democracy and transparent governance. According to the World Bank, the rule of law prevails in countries where the government itself is bound by the law, every person in society is treated equally under the law, the human dignity of each individual is recognised and protected by law, and justice is accessible to all.

In deciding whether or not to invest in a particular country, genuine investors meticulously examine, among other things, a state's commitment to the rule of law and the effectiveness of its institutions. A country that does not observe the basic tenets of the rule of law is unlikely to enjoy a high degree of foreign direct investment, and is unlikely to achieve reasonably high living standards for its people. Issues such as the state of the rule of law in Namibia; the role and mandate of the Ombudsman in the protection and enforcement of fundamental rights and freedoms; social, economic and cultural rights; traditional governance; and African customary law are weighty matters in our constitutional democracy. The challenge is to provide a platform where these topical issues can be debated, while at the same time making the outcome of such debate available to the wider public.

This publication, coming as it does on the 18th anniversary of our country's independence, is a timely and careful response to these challenges. The publication embodies a useful collection of articles on the state of the rule of law in our country and beyond, and is a sure source of material not only on this important aspect of our democracy, but also on related and equally crucial aspects of transparent governance, such as the independence of the judiciary; the constitutionally recognised principle of the maintenance of ecosystems and essential ecological processes as well as the biological diversity of Namibia; the implementation of international and regional human rights instruments; and the attendant challenges. *Human Rights and the Rule of Law in Namibia* is destined to be a useful reference book for lawyers, academics, students, policy-makers and, indeed, members of the public interested in the topics covered therein.

Peter Shivute
Chief Justice of Namibia

Foreword

to the 2nd edition (2009)

The Preamble of the Universal Declaration of Human Rights of 1948 states that freedom, justice and peace in the world are founded on the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family. Human rights serve to protect and promote the dignity of human beings worldwide; indeed, human rights could be seen as a legal codification of the concept of human dignity.

The primary objective of any State is to protect the dignity of its citizens. The state not only has to provide human rights which belong to all human beings, it also has to protect them. Key to this objective are not only a constitution that enshrines basic human and citizens' rights, but also their enforcement through the principle of the rule of law and relevant institutions. Whilst the effective protection of human rights is the benchmark of any civilised society, the rule of law is an indispensable precondition of a modern state. Both determine the citizen's quality of life and indicate the vitality of a living democracy.

A publication on human rights and the rule of law can, therefore, enhance the understanding of these crucial paradigms. The various articles presented here on their application and implementation in Namibia attempt to expose and analyse the country's numerous achievements and challenges in this regard.

The first edition of this publication, which I had the honour of launching in April 2008, was received extraordinarily positively, and was quickly sold out. And the timing of this second edition – already in high demand – for the 19th anniversary of Namibia's independence is no accident: it will not only continue to contribute to a better understanding of human rights and the rule of law, but will also celebrate Namibia's achievements in these arenas.

The Konrad Adenauer Foundation initiated and funded the first and second editions of this publication as part of the more than 200 programmes it runs in over 100 countries across the globe. Through these programmes the Foundation strives to promote, amongst other things, good governance, the rule of law, and human rights. May this publication nobly serve this purpose as well, by deepen the understanding of human dignity and human rights, and by strengthening the rule of law in Namibia.

Prof. Dr. Norbert Lammert

President of the German Federal Parliament

Deputy President of the Konrad-Adenauer-Stiftung

List of abbreviations

AIDS	acquired immune deficiency syndrome
BIG	Basic Income Grant
BIOTA	Biodiversity Transect Africa
CAT	Convention against Torture and other Acts of Cruel, Degrading and Inhumane Treatment or Punishment
CEDAW	Convention for the Elimination of Discrimination against Women.
CERD	Convention for the Elimination of all Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of Congo
EPZ	export processing zone
ESC (rights)	economic, social and cultural (rights)
HIV	human immunodeficiency virus
HRDC	Human Rights and Documentation Centre (Namibia)
ICC	(1) International Coordinating Committee of National Human Rights Institutions for the Promoting and Protection of Human Rights (2) International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
JTC	Justice Training Centre
KAF	Konrad Adenauer Foundation
LAC	Legal Assistance Centre
NDP(1/2/3)	(First/Second/Third) National Development Plan
NGO	non-governmental organisation
NHRI	national human rights institution
NSHR	National Society for Human Rights
OPAC	Optional Protocol to the Convention on the Rights of the Child: Armed Conflict
OPSC	Optional Protocol on the Sale of Children
RSICC	Rome Statute of the International Criminal Court

SADC	Southern African Development Community
SANTAC	Southern African Regional Network against Trafficking and Abuse of Children
SWAPO	South West Africa People's Organisation
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNAM	University of Namibia
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNHCHR	United Nations High Commission on Human Rights
US(A)	United States (of America)

Introduction

Nico Horn and Anton Bösl

The independence of Namibia in 1990 was an important landmark on the changing political landscape of Africa. The process towards this independence in itself was a unique and irreversible transformation, resulting in a sovereign democratic nation state. The United Nations played a significant role in the transition period, while the negotiations that led to the final settlement were a really international process, involving the colonial power South Africa, but also Cuba, the Soviet Union and the so-called Eminent Persons Group from Canada, France, Germany, Great Britain, and the United States.

The Constitution of the new nation is also unique, and is considered to be one of the most modern worldwide. It includes a Bill of Rights, which is based on the Universal Declaration of Human Rights and protects all the basic civil and political rights.

A democratic constitution was, and is not, a totally new invention in Africa. However, what makes the Namibian case exceptional is that, for the past 18 years, Namibia has maintained a working democracy, based on the rule of law and human rights principles.

This publication focuses on major aspects and the current condition of the management of the rule of law and the observance of basic human rights in Namibia, and attempts to critically analyse the successes and failures.

Sam Amoo and Isabella Skeffers set the pace with an article on the rule of law in Namibia. The article looks at the Constitution and then considers Namibia's rule of law record by referring to certain rule-of-law benchmarks: the separation of powers, constitutional privileges, executive privilege, parallel legal systems, retroactive and discriminatory legislation, government accountability in court, and access to justice and legal representation – to mention but a few.

In the second article, **Sam Amoo** looks at the Constitution through the eyes of the courts. The author makes an interesting statement by making 1985 – five years prior to independence – the birth date of Namibian constitutionalism. In

other words, constitutional jurisprudence began with Proclamation R101 in 1985. The Proclamation provided for the powers of the Transitional Government of National Unity, a body established by the South African government, tasked with transforming the apartheid system in the then South West Africa to a democratic entity. The post-independence High and Supreme Courts of Namibia received powers expected in a constitutional democracy, such as the power to review legislation and even common law. Yet, with the limited freedom the South West Africa Supreme Court had, it had laid the foundations of constitutional jurisprudence for an independent Namibia.

Manfred Hinz analyses the role of traditional governance and African customary law in an independent Namibia in comparison with other southern African states. Hinz's analysis of traditional governance and customary law in southern Africa is based on both his academic research of the subject and his intense participation in the legal processes that dealt with the issue in post-independence Namibia and neighbouring states. He sees African constitutionalism as a new phase for customary law and traditional governance, where it can develop in the spirit of the new African constitutionalism. For Hinz, African constitutionalism and traditional governance do not contradict but rather complement each other – especially in Namibia.

John Nakuta writes in a slightly alternative tone. While acknowledging the place of second generation rights in Namibian constitutionalism, he bemoans the fact that economic and social rights are still the stepchildren of human rights in Namibia. And while he acknowledges the important role that non-governmental organisations (NGO) and the general non-governmental community play in the protection of rights, he also discusses NGOs' failures to deal with the pressing needs of minorities, the poorest of the poor, and the disenfranchised.

Oliver Ruppel looks at the legal framework for the protection of third-generation rights, with special reference to the environment. While Namibia has developed a strong constitutional and legal framework for the protection of third-generation rights, the author points to the recent Ramatex debacle as a symptomatic indication that Namibia still falls far short of the expectations of international human rights standards.

John Walters, the Ombudsman of the Republic of Namibia, writes on the execution of his constitutional human rights mandate. He highlights his paper

with references to some of the prominent cases investigated by his Office, and an account of the Ombudsman's human rights awareness campaign.

Oliver Ruppel expounds on the role, functions and activities of the Human Rights and Documentation Centre (HRDC) at the Faculty of Law at the University of Namibia. The article also looks at the UNESCO chair on Human Rights and Democracy, established at the HRDC in 1994 with UNESCO support.

Nico Horn looks at the way in which the Namibian courts and municipal legislation have enforced and implemented the principles of the United Nations treaties. He concludes that, although Namibia has done more than most African countries to localise UN instruments, there are still gaps in Namibian legislation that need attention.

Francois-Xavier Bangamwabo deals extensively with the implementation of civil and political rights in Namibia by considering the extent to which international obligations are reflected within the Namibian Constitution and other relevant legislation. Bangamwabo is certainly much more optimistic than Ruppel and Nakuta. His optimism is possibly the result of the fact that first-generation rights are explicitly protected in Chapter 3 of the Constitution, while second- and third-generation rights form part of government policy in Article 95 of the Constitution. As an afterthought, Bangamwabo looks at the Optional Protocol on the Involvement of Children in Armed Conflicts. He points out that the domestic framework of this lesser-known treaty needs more attention.

Salome Chomba approaches the problem of implementation of the law in general, by looking at the expectations of the treaty bodies responsible for the monitoring of implementation of the various human rights treaties in member states. She concentrates on the Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention against Torture and other Acts of Cruel, Degrading and Inhumane Treatment or Punishment (CAT), and the lesser-known Optional Protocol on the Sale of Children (OPSC). In each case, she concentrates on Namibia's country reports and the shortcomings in Namibian legislation and conduct as pointed out by the respective treaty bodies.

Peter Shivute, Chief Justice of the Republic of Namibia, has the last word, with an overview of the rule of law in Africa. He points to the importance of the rule of law as an instrument of development. Shivute emphasises the importance of

Introduction

the different role players in creating a just society based on the rule of law. While an independent judiciary is a *conditio sine qua non*, it must be complemented by a strong civil society and a well-organised independent legal profession.

In general, this publication has brought together 11 articles advocating for, celebrating, and critically analysing the rule of law and human rights in Namibia. These articles are sure to inspire all the stakeholders from the government, the judiciary, civil society, and the ordinary concerned citizen, to strive for a free, prosperous society and a justice state based on the rule of law.

Please note that any final errors or omissions that may remain are the responsibility of the individual authors.

The rule of law in Namibia

Sam K Amoo and Isabella Skeffers

Introduction¹

The Republic of Namibia, as the country is now known, was declared a German Protectorate in 1884 and a Crown Colony in 1890, and thereafter became known as South West Africa. The territory remained a German colony from 1884 until 1915, when it was occupied by South African forces. From 1920 onwards the territory became a Protectorate, or a Mandated Territory of South Africa in terms of the Peace Treaty of Versailles. Namibia achieved its independence in 1990 after a long and protracted struggle, on both diplomatic and military fronts, for the achievement of self-determination and sovereignty. The South African Administration was characterised by patent abuse of the human rights of the indigenous people of Namibia. Apartheid, as a political system, is inconsistent with the rule of law; consequently, any political or a legal system based on apartheid will be devoid of the rule of law. This was the basic characteristic of the South African Administration in Namibia. It was devoid of the rule of law and legitimised by the decisions of a judiciary that justified the racist policies and violations of the rule of law on legislative supremacy and analytical positivism. With the achievement of sovereignty and self-determination, however, Namibia adopted a Constitution which is the supreme law of the nation, and ushered in the principle of constitutional supremacy and a system of governance based on the principles of constitutionalism, the rule of law, and respect for the human rights of the individual.

Constitution

The Namibian Constitution came into force on the eve of the country's independence as the supreme law of the land and, therefore, the ultimate source of law in Namibia.² All other laws in Namibia trace their legitimacy and source

1 This article is based on a questionnaire developed for a comparative study among 15 countries on the state of the rule of law. For the study, see Konrad Adenauer Foundation (Eds.). 2006. *Rule of law: The KAF Democracy Report 2006*. Bonn: Bouvier.

2 Article 1(6) of the *Constitution of the Republic of Namibia* provides that "This Constitution

from the Constitution. In order to prevent the creation of a legal vacuum, Article 140 of the Constitution logically provides that all laws in force immediately before the date of independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent court.

Human rights

The Namibian Constitution is a product of a struggle for sovereignty and human rights. This is reflected in the first provision, which states that Namibia is a —³

... sovereign, secular, democratic and unitary state founded upon the principles of democracy, the rule of law and justice for all.

It creates, inter alia, the three organs of state, namely the executive, the judiciary and the legislature; establishes the various service commissions; and defines state responsibility to obligations, succession to treaties, and the status of international law. The Constitution also contains a Bill of Rights that outlines fundamental human rights and freedoms, including the right to administrative justice. These rights and freedoms are protected and entrenched under relevant general provisions.⁴ The Constitution does not precisely define the difference between *rights* and *freedoms*, but it may be argued that the difference lies in the extent of permissive derogation.

Under Article 131 of the Constitution, the rights and freedoms contained in Chapter 3 are entrenched, and the provisions may not be repealed or amended insofar as such repeal or amendment detracts or diminishes from such rights and freedoms. The rights contained in Chapter 3 include protection of life; protection of liberty; respect for human dignity; abolition of slavery or forced labour; equality and freedom from discrimination, arbitrary arrest and detention; access to a fair trial; the guaranteeing of privacy and respect for family; the rights of children; the right to acquire property; the right to political activity; the right to administrative justice, culture, and education. The fundamental freedoms contained in Chapter 3 include freedom of speech and expression; freedom of thought, conscience and belief; freedom of religion; freedom to assemble peaceably and without arms;

shall be the Supreme Law of Namibia”.

3 Article 1(1), *The Constitution of the Republic of Namibia*.

4 See Articles 5 and 131, *The Constitution of the Republic of Namibia*.

freedom of association; freedom to withhold labour; freedom to move freely throughout Namibia; freedom to reside and settle in any part of Namibia; freedom to leave and return to Namibia; and freedom to practise any profession, or carry on any occupation, trade or business. The Namibian courts have handed down a number of cases upholding the rights of individuals under the Bill of Rights, including the rights of persons with HIV/AIDS⁵ and the right of accused persons to legal representation provided by the state.⁶ Under Article 25, the courts are given the power to declare invalid any law or any action of the executive and agencies of the government that is inconsistent with the provisions of Chapter 3.

However, the Constitution does draw a distinction between *rights* and *freedoms*. With regard to the latter, Article 21(2),⁷ for example, provides that they –

... 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 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.

These permissible restrictions under specific Articles of the Constitution, together with the general nature of the provisions of a constitution, *prima facie*, require the exercise of the constitutional jurisdiction of the courts in interpreting the grey areas of the Constitution, as to what constitutes decency or morality, for example. Since Namibia's independence, the courts have been called upon to interpret similar provisions of the Constitution and have adopted what may, to borrow John Dugard's expression, be termed "a natural law cum realist or a purposive approach",⁸ and have developed a particular jurisprudence based on the values of the Namibian people. These cases are concerned with the determination of

5 *Nanditume v Minister of Defence* 2000 NR 103.

6 *Government of the Republic of Namibia & Others v Geofrey Kupuzo Mwilima & Others*, Supreme Court Case No. SA 29/2001.

7 Article 21 provides for the freedom of speech and expression, thought, religion, association, etc.

8 Dugard, J. 1971. "The judicial process, positivism and civil liberty". *South African Law Journal* 88:181–200.

the constitutionality of legislative provisions or practices relating to corporal punishment,⁹ the restraining of prisoners by chaining them to each other by means of metal chains,¹⁰ and homosexual relationships.¹¹

For example, the provisions of Articles 21(2) and 22 of the Constitution allow for derogation from the stated freedoms on specific grounds. A case in point is *Kauesa v Minister of Home Affairs & Others*,¹² where the court had to rule on the constitutionality of Regulation 58(32) of the Police Regulations deemed to have been made under the Namibian Police Act, 1990 (No. 19 of 1990), which prohibited a member of the Namibian Police from commenting unfavourably in public on the administration of the Namibian Police or any other government department and rendered such conduct an offence.

The central issue to be determined was whether Regulation 58(32) constituted a permissible restriction on the right to freedom of speech of a serving member of the Namibian Police Force. Article 21(1)(a) of the Namibian Constitution provides that –

... all persons shall have the right to freedom of speech and expression.

A limitation on such right could only be permissible if it fell within the terms of Article 21(2) which provides that –

The fundamental freedoms ... shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of such rights and freedoms ..., which are necessary in a 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.

9 See Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State 1991(3) SA 76 (NmS).

10 See Namunjepo & Others v Commanding Officer, Windhoek Prison & Another 2000 (6) BCLR 671 (NmS).

11 See The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another, Supreme Court of Namibia Case No. SA 8/99.

12 *Kauesa v Minister of Home Affairs & Others* 1995 NR 175 (SC); (4) SA 965 (NmS). See also *Fantasy Enterprise CC t/a Hustler The Shop v The Minister of Home Affairs & Another* 1998 NR 96 (HC); *Nasilowski & Others v The Minister of Justice & Others* 1998 NR 97 (HC).

The court held that the limitation in this case was not rationally connected with its objective, and Regulation 58(32) was arbitrary and unfair: it failed to specify the ascertainable extent of the limitation it imposed on the right as required by Article 22 of the Constitution.

It is interesting to note that, on the flip side, the High Court (the court *a quo* in this case) actually ruled that the restriction was a fair one. It is sometimes the case that the High Court and the Supreme Court adopt different interpretations to the same constitutional issue.¹³

Apart from permissible restrictions under specific provisions of the Constitution, it may be added that the derogation from or the suspension of some of these rights and freedoms are permitted under Articles 24 and 26, where a state of emergency, a state of national defence, or martial law have been declared. But the exercise of the power granted to the executive under Chapter 4 has to comply with the provisions of Article 24(2); if these provisions are not complied with, the exercise of these powers can be challenged.

Separation of powers

The doctrine of the separation of powers recognises the existence of three organs of state: the executive, the legislature, and the judiciary, as provided for by Article 1(3) of the Namibian Constitution,¹⁴ but it also recognises the fact that, in order to guarantee and protect the civil liberties of the individual and to prevent dictatorship and absolutism, mechanisms need to be established that are capable of putting constitutional and legal restraints on the powers of government or the various organs of state. In the Namibian Constitution, various mechanisms are provided for in order to ensure that each branch of government remains independent of the other, through a system of checks and balances. The executive consists of the President (elected by public vote) and Cabinet (appointed by the President). The primary legislative power in Namibia is vested in the National Assembly, the members of which are elected by public vote, while the judicial power is vested in the courts, consisting of the Supreme Court, High Court and Lower Courts.

13 Another example of such opposite views would be *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Elizabeth Khaxas*, *supra*.

14 Article 1(3): "The main organs of State shall be the Executive, the Legislature and the Judiciary".

Although the legislative and judicial powers are constitutionally vested in Parliament and the courts, respectively, the separation of powers is threatened by two realities. Firstly, the very ominous situation that 42 of the 72 members of the National Assembly (i.e. the legislative) are simultaneously members of Cabinet (i.e. the executive) does not bode well for the necessity for a clear dividing line between the executive and the legislature. Secondly, the justices of the highest courts of the land (the Supreme and High Courts), are appointed (and dismissed) by the President, albeit on the recommendation of the Judicial Service Commission, as contemplated in Article 32(4) of the Constitution.

Primacy of law

Article 18 of the Namibian Constitution provides that –

[a]dministrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

This Article comes under the entrenched provisions of the Bill of Rights. Therefore, under the Namibian legal system, the jurisdiction of the courts to review administrative action, and the justiciability of this right by any person aggrieved by the exercise of administrative discretion falls come under the regime and protection of the Constitution. Thus, the judicial review of administrative action is one of the constitutional mechanisms meant to protect the rights of the individual, and prevent the potential abuse of discretionary power.

Judicial independence

The independence of the judiciary has been recognised in all democracies as a sine qua non for the promotion of a culture of democracy and human rights. Consequently, under Articles 78(2) and (3), the Constitution guarantees that independence, and provides that the courts –

... shall be independent and subject only to the Constitution and the law[,]

and further that –

[n]o 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.

This judicial independence, therefore, is by no means unfettered: it is fettered by the Constitution and the law. Judicial officers are accountable to the Judicial Service Commission in the performance of their judicial functions, and are subject to the rules relating to professional ethics, discipline and dismissal as stipulated in the Constitution and other law.

Protection of fundamental rights

Article 25(2) of the Constitution provides that –

... aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

Equality before the law

As part of the Bill of Rights under Chapter 3 of the Constitution, Article 10 provides that –

[a]ll persons shall be equal before the law ...

and that –

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

Although the Constitution clearly provides for freedom from discrimination on the basis of sex, for example, it is not always clear to what extent these provisions are applied. An example is the case of Muller,¹⁵ where a man sought to acquire the surname of his wife upon marriage but was refused to do so because the practice does not apply to men.

15 *Muller v President of the Republic of Namibia* 2000 (6) BCLR 655 (NmS).

Constitutional privileges

According to Article 31 of the Constitution, –

[no] person holding the office of President or performing the functions of President may be sued in any civil proceedings save where such proceedings concern an act done in his or her official capacity as president.

Furthermore, –

[n]o person holding the office of President shall be charged with any criminal offence or be amenable to the criminal jurisdiction of any Court in respect of any act allegedly performed, or any omission to perform any act, during his or her tenure of office as President.

Control over law enforcement and military

Chapter 15 of the Constitution deals with the Police and Defence Forces and the Prison Service. According to the provisions of this Chapter, the President has the power to appoint and dismiss the Inspector-General of the Police (which is the highest authority in the Police).¹⁶ In addition, the President is the Commander-in-Chief of the Defence Force and –¹⁷

... shall have all the powers and exercise all the functions necessary for that purpose.

This provision casts the net very wide for the powers granted to the President, but does not include any provision that ultimately fetters this power.

Finally, the Constitution also empowers the President to appoint and dismiss the Chief of the Defence Force (the second in command) and the Commissioner of Prisons.¹⁸ The sum total of these provisions make it clear that the President has the ultimate control over the Police and Defence Forces and the Prison Service, fettered only by the Constitution in general. In addition, there is evidence that, during the state of emergency that was declared in the Caprivi Region, the military – and not the Police – were called upon to take control of the situation. The regulations allowing for this were based on pre-independence regulations.

16 Articles 116 and 117.

17 Article 118.

18 Articles 119–123.

Executive privilege

The Constitution does not afford the president legislative power in the form of decrees that can sideline the ordinary legislative process. During the law-making process, however, the President does have the power to veto a Bill which is sent to him or her for approval by the National Assembly, if in his/her opinion the Bill would, upon adoption, conflict with the provisions of the Constitution. However, this power is fettered by the provision that the National Assembly can still resend the Bill to the President for signature, where s/he would not have the veto option for the second time. Nonetheless, in practice it is not clear how much these provisions help, as the majority of the National Assembly consist of Cabinet Ministers and the National Council plays a mere advisory role to the National Assembly.

Changes in the past five years

As was mentioned earlier, to date, the Constitution has only been amended once, namely in 1998, to allow for an additional term of office for the Founding President, Dr Sam Nujoma. No amendments to the Constitution have taken place since, including the past five years.

Non-state parallel judicial systems

Article 66(1) of the Constitution provides that –

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

Furthermore, in Article 66(2), power is granted to Parliament to repeal or modify any part of the common law or customary law, and –

... the application thereof may be confined to particular parts of Namibia or to particular periods.

Therefore, the Constitution creates more of a hierarchical system than a parallel one, with the Constitution being the highest in the hierarchy, then legislation, followed by customary and common law on the same tier. Namibia is a country rich in cultural diversity, with customary (or traditional) law being a very real

part of that diversity. In addition, the vast majority of the Namibian population lives in the rural areas, where customary law is practised on a daily basis. This reality necessitated the drafters of the Constitution to constitutionally recognise customary law. In recent years, the conflict with the ‘formal’ legal system and that of customary law has become more apparent. It has been argued that various customary law practices are in conflict with the Constitution, especially regarding the provisions in the Bill of Rights. Therefore, Parliament has passed certain laws in an attempt to harmonise customary law practices with the ideals enshrined in the Constitution. These laws include The Traditional Authorities Act, 2000 (No. 25 of 2000), the Communal Land Reform Act, 2002 (No. 5 of 2002), and the Community Courts Act, 2003 (No. 10 of 2003). The Community Courts Act provides a mechanism for parties aggrieved by proceedings of a traditional court to be able to appeal to the ‘formal’ court system.

Legislation

Access to information

The Constitution does not provide for an express right of citizens to gather information on legislation. However, it is within the interests of democracy, legal certainty and Parliamentary accountability that legislation be readily available to all citizens. In Namibia, laws are published in the *Government Gazette* upon promulgation. These Acts can then be bought from the Ministry of Justice offices. Persons with Internet connectivity can also obtain certain Acts online. In addition, debates on laws that have taken place in the National Assembly and National Council are compiled in what is known as the *Hansard*, which can be obtained from Parliament for a fee.

Although information on legislation is available in these formats, it is still very difficult for most Namibians to use effectively: the official language in Namibia is English and, therefore, all Acts of Parliament are printed in that language. The problem with this is that the majority of the Namibian population lives in rural areas, where most of them do not speak or read the English language. In addition, the Acts are not available in Braille.

Retroactive legislation

Retroactive legislation is prohibited by Article 12(3) (Fair Trial) of the Constitution, which provides that –

[n]o persons shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed.

As is apparent, this provision only applies to criminal legislation.

Discriminatory legislation

Certain conditions make it difficult for certain persons to comply with the laws. For example, as has been outlined above, information on legislation is not readily available to all citizens. Consequently, one cannot obey a law that one does not know exists. Except for this concern, there is no particular law which Namibian citizens cannot comply with for legitimate reasons.

Legal certainty

Despite a high degree of legal certainty in Namibia, there are some areas and practices which pose a challenge to that certainty. Firstly, certain practices under customary law – a system being practised by many inhabitants of the country – are still not in line with the Constitution. Deserving special consideration in this regard are the property and inheritance rights of women, and the recognition of customary marriages. It is uncertain, therefore, what legal force or validity these practices have.

Secondly, Article 16(2) of the Constitution provides that –

[t]he State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.

Since before independence, the Namibian government has been concerned with the situation of land ownership in the country, which culminated in the promulgation of the Agricultural (Commercial) Land Reform Act, 1995 (No. 6 of 1995) and the drafting of the Land Reform Policy White Paper (1998) by the Ministry of Lands, Resettlement and Rehabilitation.¹⁹ The Act was designed to bridge the gap between the landless black majority and white minority who

¹⁹ For a comprehensive review of the land reform process in Namibia, see the report by the Legal Assistance Centre, at www.lac.org.na (last accessed 15 March 2008).

own the bulk of commercial farmland in Namibia, by expropriating the land from the latter and redistributing it to the former. The Land Reform Policy is not without its problems, however. The implementation of the Act has left many questions. For instance, who exactly benefits from expropriated property? Shortly after the inception of the Land Reform Policy, newspaper reports were published suggesting that the persons who were on the list of beneficiaries for expropriated farmland were not necessarily those whom the policy initially intended to benefit.

A third issue which should be considered with regard to legal certainty is the applicability in Namibia of some apartheid legislation. Upon independence, Namibia inherited various statutes from South Africa, some of which were repealed by the Constitution because of their apartheid and, therefore discriminatory, character. However, one noticeable example of such a law which was not repealed is the Native Administration Proclamation (No. 15 of 1928). This Proclamation provides for different marital property regimes depending on the colour of a person's skin, and whether that person lives north or south of the colonial 'Red Line' or 'Police Zone'.²⁰

Courts

Government accountability in court

Article 5 in Chapter 3 of the Constitution provides that –

[t]he fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner herein prescribed.

Access to justice and legal representation

Costs of litigation, especially in civil suits, are relatively high in Namibia. In order to have a successful civil suit, one has to have a private lawyer – in itself an expensive exercise. In criminal cases, the complainant is represented by a public

20 The Police Zone consisted of southern and central Namibia to which white settlement was directed. Unlike the territories north of this so-called Red Line, which were governed through a system of indirect rule, in the Police Zone the Administration employed policies of direct control.

prosecutor who is paid by government. In the case of the accused, however, s/he has the right (according to Article 12(1)(e)) to be defended by a legal practitioner of his/her choice. However, this is not possible for accused persons who are less privileged and cannot afford a legal practitioner of their choice. Therefore, Article 95 of the Constitution generally provides for the promotion of the welfare of the people. Article 95(h) specifically provides for a –

... legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State.

The binding effect of the provisions of Article 95 was one of the issues that had to be determined by the Supreme Court of Namibia in the case of *Government of the Republic of Namibia & Others v Mwilima & all other accused in the Caprivi treason trial*.²¹ As was discussed earlier, the Supreme Court ruled that in so far as the services impinged on the fundamental rights of the individual as enshrined under Chapter 3 of the Constitution, the government was under a constitutional obligation to provide such services and the judiciary had the obligation to enforce and protect the fundamental rights of the individual as enshrined in the Constitution. In the case of *State v Kau & Others*,²² the Supreme Court ruled that the failure to inform appellants of their rights to legal representation is an irregularity. Defendants also have the right to represent themselves in court, that is, after they have been informed of their right to legal representation.

Fair trial

Article 12 of the Namibian Constitution contains the provisions for fair trial. The criminal procedure in Namibia is governed by the Criminal Procedure Act, 1977 (No. 51 of 1977). The effectiveness of the judiciary in Namibia is basically respected and all persons generally have an equal opportunity in court for a fair trial. Double jeopardy is forbidden in the Constitution in Article 12(2). According to Article 12(1)(d) of the Constitution, –

[a]ll persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.

21 2002 NR 235 (SC).

22 1995 NR 1 (SC).

Indeed, the perception by the Namibian on the street seems to be that the ‘criminals’ (as accused persons are commonly referred to) are given more rights than they deserve.

Judicial biases

There are no reports of judicial bias when it comes to the Namibian judiciary. However, a recent Article argues that foreign judges tend to decide in favour of government more than local judges.²³

Proportionality

In respect of statutory offences, the legislature normally provides minimum or maximum sentences (usually a fine and time for imprisonment, or both) to be imposed by the courts when sentencing a convicted person. Common law offences are different, however, in that the presiding officer has more discretion on the sentence to be imposed. In the latter case, the judge would be guided by previous decisions, although each case is judged on its own merits. Nonetheless, some pieces of legislation are disproportionate in the sentences they prescribe to certain offences. An example of such legislation is the contentious Stock Theft Act, 1990 (No. 12 of 1990), which prescribes a minimum sentence of 30 years’ imprisonment for a repeat offender for stealing livestock. It has been the case that some rapists and murderers have not received a sentence of 30 years’ imprisonment for their crimes. Therefore, the question remains whether the life of a human being can be regarded as less valuable than that of an animal.

Discriminatory justice

There are no specific groups of persons who, from the outset of a trial, can expect a higher or lower sentence than for the same offence committed by other people. However, this does not exclude the usual principles and mitigating factors taken into consideration during sentencing. Nonetheless, these factors do not guarantee a convicted person a lesser sentence.

Namibia’s Constitution provides for the practice of presidential pardon in Article 32(3)(d). Although such pardons are discriminatory by nature, there are no

²³ Von Doepp, P. 2006. “Politics and judicial decision making in Namibia: Separate or connected realms?”. *IPPR Briefing Paper No. 39*, October, p 5. Available at www.ippr.org. na; last accessed 14 March 2008.

reported cases of some persons being privileged or discriminated against during this process.

Judicial independence

Appointment of judges

According to Sub-article 32(4)(a) of the Constitution, the President has the power, upon recommendation of the Judicial Service Commission, to appoint the Chief Justice, the Judge-President of the High Court, and other judges of the Supreme Court and the High Court. Furthermore, Article 82(4) provides that all judges, except acting judges, are permitted to hold office until the age of 65, but the President is entitled to extend the retiring age of any judge to 70.²⁴ The Sub-article also provides that provision can be made by Act of Parliament for retirement at ages higher than those specified in the Constitution.

Article 84 of the Constitution provides for the removal of judges from office. According to Sub-article 84(1), only the President may remove a judge from office before the expiry of his or her tenure, on the recommendation of the Judicial Service Commission. Furthermore, Sub-article 84(2) stipulates that judges may only be removed from office on the ground of mental incapacity or for gross misconduct, and only after the Judicial Service Commission has investigated whether or not the judge should be removed. The Article further empowers the President, again on recommendation of the Judicial Service Commission, to suspend a judge pending the investigations.

Government interference

Article 78(3) of the Namibian Constitution expressly states that –

[n]o 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.

24 The work of the Judicial Service Commission is regulated by the Judicial Service Commission Act, 1995 (No. 18 of 1995). Statutes dealing with ancillary issues pertaining to judges are the Judges' Pension Act, 1990 (No. 28 of 1990); Medical Aid Scheme for Members of the National Assembly, Judges and Other Office Bearers Act, 1990 (No. 23 of 1990); Judges' Remuneration Act, 1990 (No. 18 of 1990).

The Institute for Public Policy Research (IPPR) undertook a statistical analysis of judicial independence in Namibia.²⁵ As part of the research, the extent to which Namibian judges were susceptible to government interference in their decision-making process on the bench was questioned. Generally, the study indicates that, as a whole, the Namibian judiciary has performed quite admirably in terms of independence from the other branches.²⁶

Changes in the past five years

In the past five years, there has been no tangible change in the frequency or nature of government interference in judges' adjudication. However, an interesting display of tension between government and the judiciary could be observed in the Caprivi treason trial, especially regarding the issue of legal representation of the accused persons.

Non-state actor interference

Non-state actor interference is virtually non-existent when it comes to exerting influence on the process of adjudication, whether in a legal or illegal manner. However, certain cases attract more public attention and consequent advocacy than others, which in some instances necessitates legislative reform – rather than the judiciary succumbing to non-state actor interference.

Changes in the past five years

In recent years, the issues surrounding women's and children's rights, especially issues concerning the safety of women and children (e.g. domestic violence), have obtained much public attention with calls for stiffer sentences to be imposed by the judiciary.

Criminal justice

The criminal justice system of Namibia is governed by the Constitution, legislation, and the common law. Criminal jurisdiction is vested generally in the judiciary and, in the exercise of this jurisdiction, the courts and the law enforcement agents are bound by the Constitution and all other relevant laws.

25 Von Doepp (2006:5).

26 (ibid.:1).

These include the Criminal Procedure Act, the Police Act, and their respective regulations. The underlying constitutional principles of the criminal justice system of Namibia are the presumption of innocence and legal subjectivity. From these basic presumptions other constitutional provisions are derived which relate to arrest and detention (Article 11); fair trial (Article 12); the right to adequate time and facilities to prepare and present a defence (Article 12(1)(e)); the right to legal representation (Article 12(1)(e)); the privilege against self-incriminating statements (Article 12(1)(f)); and the admissibility of testimony obtained in contravention of Article 8(2)(b).

Law enforcement abuses

Article 12(1)(b) of the Constitution provides that an accused person has to be tried –

... within a reasonable time, failing which the accused shall be released.

However, this excludes the requirement contained in the Constitution that an accused person has to have his/her first appearance before a magistrate within 48 hours of arrest. Although the Constitution is clear as to the requirements for the treatment of detainees, these tenets are not always followed through in practice. A major problem in the prison system in Namibia right now is the treatment of detainees in prisons and holding cells. In addition to the Constitution, the Namibian legislature has passed several statutes to regulate the prison service, including how prisoners should be treated. In terms of these laws, various requirements are laid out, including the segregation of prisoners (male and female prisoners, juvenile and adult persons, prisoners suffering from mental illnesses, and first and subsequent offenders), and sanitary and other health requirements. However, the question begs to be answered whether these requirements are complied with in practice. In 2006, the Ombudsman of Namibia embarked upon an investigation in order to answer this question.²⁷ The results of that investigation make it clear that the conditions in prisons in Namibia leave much to be desired, especially as regards overcrowding in cells and the length of time both trial-awaiting prisoners and convicted persons are kept in cells which are meant for 48-hour occupation only.

²⁷ Walters, JR. 2006. *Special report on conditions prevailing at police cells throughout Namibia*. Windhoek: Office of the Ombudsman.

Corruption in law enforcement and the judiciary

In Namibia, corruption is a problem perceived to be on the increase.²⁸ In 2003, the legislature responded with the promulgation of the Anti-corruption Act, 2003.²⁹ The Act provides for the establishment of the Anti-corruption Commission, which opened its offices on 1 February 2006. Consequently, President Pohamba has embarked on a campaign of zero tolerance for corruption, which also aims at sensitising the citizenry about the scourge of corruption.

Levels of corruption

According to an Afrobarometer³⁰ survey in Namibia in 2006, 41% of the respondents interviewed thought that police officers were involved in corruption, while 57% of the same respondents had never paid a bribe to a police officer to avoid problems with the police. Although perception indices are usually hard to rely on, it should be stated that the Namibian police system is one generally burdened by a lack of resources, particularly human resources.

Judges in Namibia are highly respected and well-paid individuals in society. This, however, should be considered in light of the fact that magistrates, who are also part of the judiciary, are not as well paid as judges. As has been stated above, judicial independence in Namibia is widely observed, and this means that corruption in the judiciary is very rare.

Main causes of corruption

As has been stated above, corruption in Namibia is perceived to be on the increase. However, it is not clear whether corruption is actually on the increase or whether there is just more awareness about the problem. Besides the Anti-corruption Commission, various non-state actors are also involved in the monitoring of

28 According to Transparency International's Corruption Perceptions Index, Namibia ranked 55 out of 163 countries in 2006 and 57 out of 179 countries in 2007 in respect of how corrupt it was perceived to be by expert assessments and opinion surveys. See www.transparency.org; last accessed 14 March 2008.

29 Anti-corruption Act, 2003 (No. 8 of 2003).

30 The Afrobarometer is a research project aimed at garnering information in order to measure the political, social and economic state of affairs in Africa. The research is done through standardised country surveys that are conducted in more than 12 countries. For further reading, see www.afrobarometer.org; last accessed 10 March 2008.

corruption.³¹ It is also a general perception that the Namibian public sector is prone to nepotism and tribalism, which is the perfect recipe for a corrupt system. Reported instances of corruption seem to be at upper-administration level, sometimes with high-ranking government officials allegedly being involved. However, it is not clear what happens to these allegations after they get reported in the media; indeed, the perception is that when high-ranking government officials are involved, nothing happens to these cases.

Public administration

Legality of public administration

The Constitution, being the supreme law of the land, expects all components of the state – including public administration – to be subject to it. Theoretically, access to an office in public administration is open to everybody. However, there are some instances where the public feels that nepotism and tribalism play a role in the appointment of public servants. Public servants are remunerated according to the Public Service Act, 1995 (No. 13 of 1995), which creates salary scales commensurate with performance and qualifications. However, instances of corruption are still reported, even involving higher-ranking officials. Notable examples are the Social Security Commission and Avid Investment case, and that of the Offshore Development Company.

Remedies

Article 18 of the Namibian Constitution requires administrative bodies and administrative officials to –

... act fairly and reasonably to comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

31 See for example www.insight.com.na, which seeks to report on actual instances of corruption. The Namibia Institute for Democracy (NID) also publishes information on actual instances of corruption. The report (*Actual instances of corruption as reported in the Namibian print media*), as well as other publications dealing with good governance topics, are available on the NID website, www.nid.org.na.

Since Namibia's judicial system ranks generally well when it comes to independence, transparency and competence, one may expect success by using this process, depending on the merits of the particular case.

Lack of compliance with the principles of natural justice will justify the intervention of the courts by nullifying and setting aside the decision. However, as stated by Chief Justice Strydom in *Chairperson of the Immigration Selection Board v Frank & Another*,³² as a general principle the courts are not permitted to substitute their decisions for the decision of the administrator because the discretion is granted to the administrator, and to do otherwise would amount to usurpation of the power of the administrator and a breach of the principles of separation of powers. However, a court would exercise the discretion itself where there are exceptional circumstances.³³ Examples of instances where the courts have exercised their jurisdiction not to refer a matter back include cases where there were long periods of delay, where the applicant would suffer prejudice, or where it would be grossly unfair.³⁴

General assessment

Rule of law: General situation

The rule of law in Namibia exists with few restrictions, with no significant changes in the past five years.

Major obstacles

Namibia's legal and political climate has remained largely unchanged throughout its 18 years of independence. However, it remains to be seen how much the current political atmosphere will have an effect on change when the next elections take place.

32 2001 NR 107 (SC).

33 See *WC Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board & Others* 1982 (4) SA 427.

34 See *Greyling (ibid.)*, *Dawlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange (Edms) Bpk & Others* 1983 (3) SA 344 (WLD) at 369 G–H, and *Local Road Transportation Board & Another v Durban City Council & Another* 1965 (1) SA 586 (AD) at 598–599.

What could also be considered as an impediment to the full realisation of the rule of law in Namibia is the virtual lack of engaging political debate amongst the citizens. This lack of debate is a symptom of the lack of knowledge amongst citizens, however, due to their limited access to information on the operations of government and what they may rightfully expect from government.

Konrad Adenauer Foundation support in Namibia

The principal obstacle to the full realisation of the rule of law in Namibia is the lack of education and information amongst a large group of the country's population. Due to limited resources and the allocation of state funds into certain sectors only, civic education does not receive the priority that it should. The rule of law can only be fully realised once the citizens know their rights and know how to enforce and protect those rights. In addition, only then can a proper culture of accountability be fostered and maintained. This is where the support of an organisation such as the Konrad Adenauer Foundation (KAF) proves invaluable through activities such as civic education, seminars, workshops and training.

Conclusion

The constitutional history of Namibia, prior to the promulgation of the 1990 independence Constitution, depicts a legal and judicial system that was constrained by the concept of legislative supremacy and analytical positivism. The promulgation of the Constitution saw the evolution of a new constitutional paradigm oriented towards the achievement of the rule of law and the promotion and maintenance of human rights.

Dicey's (1915)³⁵ definition of the rule of law lays down general principles as prerequisites for the achievement of the rule of law, namely –

- fair trial and punishment by ordinary courts of the land
- equality before the law, and
- the provision and enforcement of human rights.

The constitutional order that has existed since independence indicates that governance in Namibia has by and large been conducted within the ambit of

35 Dicey, AV. 1915. *An introduction to the study of the law of the constitution*. Oxford: Oxford University Press.

the definition of the rule of law, as expounded by Dicey.³⁶ Against the backdrop of what has been expounded in this paper, it is submitted that the current Namibian government has shown a strong commitment to the maintenance of the rule of law in the country.

36 (ibid.).

The constitutional jurisprudential development in Namibia since 1985

Sam K Amoo

Introduction

The jurisprudence evolving from the decisions of the Namibian courts and establishing a discernible epistemological paradigm can be best understood if studied within the context and perspectives of the historic evolution of the Namibian judiciary, and by an analysis of the pre- and post-independence decisions. The evolution of the Namibian judiciary is closely linked to the colonial history of the country.

Prior to the attainment of nationhood and the promulgation of the Namibian independence Constitution which creates an independent judiciary and Supreme Court of a 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 granting of the League of Nations' Mandate over the territory to South Africa, 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 maintenance of the jurisdiction of the Appellate Division of the Supreme Court of South Africa 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 Namibia.³⁷ It needs to be added that by Proclamation 21 of 1919, which provided, inter alia, 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 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 that were developed by the South African courts up until independence became binding on the courts of Namibia. This position was affirmed by Article 66(1) of the Constitution of the Republic of Namibia, which provides that –

[b]oth the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary law or common law does not conflict with this Constitution or any other law.

It has been pointed out that the South African legal system was constrained before the promulgation of that country's new Constitution by the jurisprudence and principles of legislative supremacy and analytical positivism.³⁸ John Dugard asserts that an empirical study of the legal process in South Africa leads to the conclusion that –³⁹

... judges adopt a neutral, non-activist position in their approach to human rights issues and that a form of positivism may account for this phenomenon.

This position was confirmed by MM Corbett, the then Chief Justice of South Africa, in his presentation to the Truth and Reconciliation Commission by these words:⁴⁰

37 See also Hosten, WJ, AB Edwards, F Bosman & J Church. 1997. *Introduction to South African law and legal theory* (Second Edition). Durban, p 398.

38 Dugard, J. 1971. "The judicial process, positivism and civil liberty". *South African Law Journal*, 88:181–200; Dugard, J. 1981. "Some realism about the judicial process and positivism – A reply". *South African Law Journal*, 98:372–387.

39 Dugard (1981:373).

40 Khan, E. 1998. "The Truth and Reconciliation Commission, and the Bench, legal practitioners and legal academics". *South African Law Journal*, 115:18.

[T]here are, and in the past always have been, constraints upon the exercise of judicial power. A judge is not always at liberty to do what he thinks is the best or most fair or expedient. He is required to dispense justice in accordance with the law. In the ideal situation law and justice coincide, but this need not necessarily be so, especially where the law consists of legislation. These truths are reflected in the oath which a judge is required to take upon assuming office. Prior to the coming into effect of the Interim Constitution, Act 200 of 1993, the oath prescribed was by s. 10 (2) (a) of the Supreme Court Act 59 of 1959 and it required the judge to swear to "... administer justice to all persons alike without fear, favour or prejudice, and ... in accordance with the law and customs of the Republic of South Africa".

It has been argued, therefore, that the decisions of the Superior Courts of South Africa involving legislation dealing with state security, interracial marriages and legislation, *sui generis*, created a particular type of jurisprudence, with an epistemological paradigm towards the denial of civil liberties, and a departure from liberal principles and presumptions of common law that constitute the cornerstone of Roman-Dutch law as developed by the South African courts.⁴¹ The courts of South West Africa, by the application of the doctrine of judicial precedent and *stare decisis* were, therefore, bound to be influenced by this jurisprudence and the related epistemological paradigm. As pointed out by Justice O'Linn,⁴² –

... the Courts functioned in a legal system where Parliament was supreme, not the Constitution ... [and that] notwithstanding the considerable constraints of security legislation and the effects of racist indoctrination of society, the courts generally allowed considerable freedom of expression and the opportunity to place both sides on the table in accordance with long established legal procedures.

Prior to the coming into effect of the Constitution of the Republic of Namibia, also for reasons stated above, the Namibian judiciary comprised South African-appointed judges applying South African law, with the constraints imposed by reliance on the jurisprudence of legislative supremacy and analytical positivism. However, with the enactment of Proclamation R101 of 1985 by the South African government, the Namibian legal system assumed a dimension that engendered an important differentiation and digression, both in principle and practice, from the South African legal system. The Proclamation provided for a Bill of Rights⁴³

41 Dugard (1981:376).

42 O'Linn, Bryan. [n.d.]. *Namibia: The sacred trust of civilization, ideal and reality*. Windhoek: Gamsberg Macmillan, p 179.

43 These rights included protection against execution without due process (Article 1); liberty, security of person and privacy (Article 2); equality before the law (Article 3); fair trial

against which the Namibian courts could test and review the validity of certain laws and administrative decisions and actions. In this regard, reference should be made to the observations of Eric C Bjornlund,⁴⁴ when he wrote that –

[c]ases in the South West Africa [Provincial Division of the] Supreme Court [of South Africa] between 1985 and 1990 seem especially significant because of the vigour with which the South Africa[-]appointed Namibian judges expressed civil liberties principles regardless of whether the holdings were explicitly based on the constitutional text. ... To the extent that the South African Appellate Division prevented the Namibian judges from giving effect to the Bill of Rights through judicial review, those judges often used grounds other than the Bill of Rights to emasculate repressive legislation and in the process created a bully pulpit to take the place of genuine judicial review. These cases suggest that Namibian judges believed that courts are empowered to promote the rule of law, and the Bill of Rights only strengthened their resolve.

Similar observations were made by Justice O'Linn:⁴⁵

The culture of human rights does therefore not commence with independence and the enactment of the new constitutions in Namibia and South Africa, even though the new constitutions abolished the discriminatory and security-dominated legislative dispensation and the principle of the supremacy of parliament. Consequently the courts can now also declare laws of parliament unconstitutional and null and void on the ground of being in conflict with human rights enshrined in the aforesaid constitution.

In their judicial functions, the South West African courts had to apply South African laws; in the area of civil law, where the application of the generality of Roman-Dutch common law was the issue, they were always at liberty to be guided by the liberal presumptions and principles of Roman-Dutch common law, e.g. the principles relating to practices and behaviour *contra bonos mores*. Their mettle and resolve to maintain these liberal ideals were put to the test in

(Article 4); freedom of expression (Article 5); peaceful assembly (Article 6); freedom of association (Article 7); participation in political activity (Article 8); freedom of culture, language, tradition and religion (Article 9); freedom of movement and residence (Article 10); and ownership of property (Article 11).

44 Bjornlund, Eric C. 1990. "The devil's work? Judicial review under a Bill of Rights in South Africa and Namibia". *Stanford Journal of International Law*, 391-434 at 429.

45 See O'Linn B. 1996. "The role of the court in balancing the fundamental rights of accused and convicted persons with those of the victims and potential victims of crime and in ensuring the innocent is not punished and the guilty does not escape punishment". In Cilliers, C & SK Amoo (Eds.). *The role of the courts in balancing the fundamental rights of accused and convicted persons with those of the victims and potential victims of crime*. Pretoria: University of South Africa, p 32.

cases where the application of relevant South African legislation was potentially inconsistent with the rule of law and civil liberties of the individual.⁴⁶ As mentioned earlier, these were cases involving the security laws and emergency regulations, including detention without trial, the presumptions of fair trial in criminal proceedings, the review of administrative discretion, restrictions on freedom of expression, and apartheid laws regulating residence.

It is the purpose of this paper to analyse some of the cases of the courts of South West Africa and Namibia from 1985 after the implementation of Proclamation R101 and after the promulgation of the Constitution of the Republic of Namibia: firstly, in order to determine the extent to which the South West African courts were able to apply the laws by upholding the legal presumptions that protect the rights of the individual during the colonial era; and, secondly, to establish if there has been any perceptible trend towards a particular jurisprudence, and the constitutional and epistemological paradigm emanating from and associated with such jurisprudence, since 1985.

Security laws

State v Angula⁴⁷

This case involved a capital prosecution of seven alleged South West Africa People's Organisation (SWAPO) guerrillas under section 11(a) of the Suppression of Communism Act, 1950 (No. 44 of 1950) for furthering the aims of communism, and under section 2(1) of the Terrorism Act, 1967 (No. 83 of 1967) for promoting the aims and objectives of SWAPO and participating in terrorist activities.

Under section 19 of Proclamation R101,⁴⁸ which constituted the interim government, the courts were given the power of judicial review over Acts of the South West Africa/Namibia Legislative Assembly. However, the Proclamation did not expressly grant the courts the jurisdiction to test the validity of the Acts of the South African Parliament under the South West Africa/Namibian Bill of Rights. The defence, nevertheless, challenged prosecutions under the Terrorism Act and the Suppression of Communism Act on the ground that both Acts conflicted with the provisions of the South West Africa/Namibian Bill of Rights

46 O'Linn (ibid.:179).

47 *State v Angula* 2 SA 540 (SWA 1986).

48 Proclamation R101, *Government Gazette* 9790 (South Africa 1985).

that guaranteed the presumption of innocence and prohibited any criminal sanction with retroactive effect, and argued that the court had the jurisdiction to review the validity of the Acts because, under section 34 of Proclamation R101, existing laws continued in effect only “subject to the provisions of the proclamation”.⁴⁹

The prosecution submitted that the Bill of Rights, being only the appendix to Proclamation R101, was not part of the territory’s constitution and, thus, could not be used to block the prosecutions. J Strydom, one of the five judges on the Supreme Court of South West Africa (and later Chief Justice of the Republic of Namibia), found that the Bill of Rights did form part of the new constitution, i.e. Proclamation R101. But while he conceded that the Suppression of Communism Act and the Terrorism Act did conflict with the South West Africa/Namibian Bill of Rights, he upheld the validity of the statutes on the ground that all existing laws constitutionally enacted by a competent authority continued in force until repealed.⁵⁰

State v Andreas Johnny Heita⁵¹

However, in the case of *State v Andreas Johnny Heita*, the defence succeeded in their argument that the Bill of Rights constituted higher imperatives which executive/legislative enactments should comply with for the achievement of the rule of law. In this case, the accused persons appeared before Judge Levy in the Supreme Court of South West Africa on charges of murder, abduction and contravention of the Terrorism Act. Originally, there was only one charge under the Terrorism Act; but based on 187 separate counts. Later in the trial, the indictment was changed on the application of the state by the deletion of counts 134–187, and the adding and/or restructuring of the indictment to include, inter alia, nine counts of murder and 31 of attempted murder.

The point was taken by the learned defence counsel, ab initio, that the charges contained in the indictment did not disclose offences, in that section 2 of the Terrorism Act was in conflict with Annexure 1 to Proclamation R101 and, in consequence, no prosecution for offences allegedly committed thereunder was competent. On 5 September 1986, after the objection to the indictment had

49 (ibid.).

50 Bjornlund (ibid.:416).

51 *State v Heita & Others* 1987 (1) SWA 311.

been served but before the presentation of argument thereon, Proclamation R157 of 1986 – issued by the State President of the Republic of South Africa, purporting to amend Proclamation R101 – was promulgated with the clear intention to prohibit the court from pronouncing on the legal objection taken to the charges. This was clearly evidenced by the retroactive application of Proclamation R157.

Sections 2 and 3 of the State President's Proclamation R157 provided as follows:

Sec. 19 of the Proclamation is hereby amended by addition of the following subsection:

(5) *No Court of Law shall be competent to inquire into or pronounce upon the validity of any Act of Parliament of the Republic of South Africa enacted before or after the commencement of this Proclamation. This Proclamation shall be called the second South West African Legislative and Executive Establishment Amendment Proclamation of 1986 and shall be deemed to have come into operation on 17 June 1985.*

However, in his judgment, Judge Levy alluded to the retroactivity of the Proclamation and upheld the objection of the defence on the ground that section 2(2) of the Terrorism Act, under which the accused was charged, was in conflict with the presumption of innocence contained in Annexure 1 to Proclamation R101 of 1985.

The court further held that —⁵²

... the State President's Proclamation R157 of 1986 neither dealt with a new procedure nor did it prescribe new rules of evidence; it was a substantive amendment in so far as it purported to prevent the Court from enquiring into or pronouncing upon the validity of Acts of the Republic of South Africa; that accordingly, since the present case had been pending before 5 September 1986, it was not affected by Proclamation R157; that accordingly, sec. 2 (1) (a) of the Terrorism Act had been repealed by Proclamation R101 so that the offences alleged to have been committed by the accused after June 1985 (the date on which Proclamation R101 had been promulgated) were no longer offences for which they could be prosecuted.

52 However, it needs to be added that, in the case of *Cabinet of the Interim Government v Katofa*, 1987 (1) SA 695 (A) at 727 G–729 F, the Appellate Division of the Supreme Court of South Africa held that Annexure 1 to Proclamation R101 of 1985 only applied to laws enacted by the newly installed Legislative Assembly and not to prior laws of the South Africa Parliament and, by implication, also not to administrative authority exercised in accordance with such laws.

Judge Levy's views on constitutional interpretation bore clear testimony to his resolve to use the Bill of Rights as higher imperatives to promote the rule of law.⁵³

Emergency regulations and detention without trial

***Kafota v Administrator-General of South West Africa*⁵⁴**

The applicant applied in the Supreme Court of South West Africa to order the release of his brother who had been detained in terms of section 2 of Proclamation AG 26 of 1978. The court ordered the authorities to grant the detainee access to a lawyer. The court found that the Administrator-General's *ipse dixit* – or unsubstantiated statement – that he was satisfied that the detainee was a person as intended by section 2 was not sufficient to discharge the onus resting on him to justify the detention of the detainee. Therefore, the court granted an *interdictum de libero homine exhibendo* ordering the detainee's release. The court found it unnecessary to consider whether the new Bill of Rights provided independent grounds to declare the continuing detention unlawful.

Other cases, like *Cabinet for the Interim Government of South West Africa v Bessinger*,⁵⁵ *NANSO v Speaker*,⁵⁶ and *Shifidi v Administrator-General of South West Africa & Others*,⁵⁷ involved the interpretation and application of the provisions of the Bill of Rights by the courts of Namibia before independence, indicating the resolve of these courts to use the Bill of Rights as higher principles to challenge the validity of the laws of the South African regime and promote the rule of law.

As indicated earlier, after the attainment of independence and sovereignty, Namibia adopted a Constitution with an entrenched Bill of Rights and a provision that elevated the Constitution as the supreme law of the land.⁵⁸ This effectively

53 See O'Linn (ibid.:24).

54 *Kafota v Administrator-General for South West Africa* 4 SA 211 (SWA 1985); see also 1986 (1) SA 800 (SWA).

55 1 SA 618 (SWA 1989).

56 *Namibian National Students Organisation (NANSO) v Speaker of the National Assembly for South West Africa*, 1 SA 617 (SWA 1990).

57 1989 (4) SA 631 (SWA).

58 Article 1(6) of *The Constitution of the Republic of Namibia* provides that "[t]his Constitution shall be the Supreme Law of Namibia".

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 that of constitutional supremacy, which has provided the Namibian judiciary with the 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 a jurisprudence based on value judgments and an epistemological paradigm rooted in the values and norms of the Namibian people. Chief Justice Strydom, in his address to judicial officers at the first Retreat of the Office of the Attorney-General at Swakopmund on 20–22 November 2002, stated the following:⁵⁹

[I]t 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, particularly Chapter 3, the Courts are often called upon to exercise a value judgment. It was this exercise that led the Court in the Corporal Punishment⁶⁰ decision to encompass both aspects of constitutional interpretation and judicial independence.

Chapter 3 of the Constitution provides for fundamental human rights and freedoms, which are entrenched. However, the Constitution draws a distinction between *rights* and *freedoms* and, with regard to the latter – in Article 21(2),⁶¹ for example – provides that they –

... 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 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.

These limitations, together with the general nature of the provisions of a constitution, *prima facie*, require the exercise of the constitutional jurisdiction

59 The address was entitled “Namibia’s constitutional jurisprudence – The first twelve years”.

60 1991 (3) SA 76 (NmS).

61 Article 21 provides for the freedom of speech and expression, thought, religion, association, etc.

of the courts in interpreting the grey or penumbra areas of the Constitution, for example as to what constitutes *decency* or *morality*. Since independence, the courts been called upon to interpret similar provisions of the Constitution and, as mentioned earlier, have adopted a natural law-cum-realist or purposive approach, and have developed a particular jurisprudence based on the values of the Namibian people. These cases include the interpretation of the constitutionality of legislative provisions or practices relating to corporal punishment,⁶² the restraining of prisoners by chaining them to each other by means of metal chains,⁶³ homosexual relationships,⁶⁴ etc.

In the address mentioned above, Chief Justice Strydom also stated the following:

In the two Mwangingi cases⁶⁵ the High and Supreme Courts of Namibia accepted the principle that a Constitution, and more particularly one containing a Bill of Rights, calls for an interpretation different from that which courts traditionally apply to ordinary legislation. Dealing with instances where the courts were required to make value judgments[,] the corporal punishment case authoritatively laid down that a court, in coming to its conclusion, should objectively articulate and identify the contemporary norms, aspirations and expectations of the Namibian people and should have regard to the merging consensus of values in the civilized international community. These cases set the tone for Namibian Courts and the way it was required of them to interpret the [C]onstitution.

In the case of *Minister of Defence v Mwanginghi*,⁶⁶ the Supreme Court approved the dictum in *State v Acheson*⁶⁷ that –

[T]he Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a mirror reflecting the national soul, the identification of the ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the Constitution must therefore preside over and permeate the processes of judicial interpretation and judicial discretion.

62 See *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State* 1991 NR 178(SC); 1991 (3) SA 76 (NmS).

63 See *Namunjepo & Others v Commanding Officer, Windhoek Prison & Another*, 2000 (6) BCLR 671 (NmS).

64 See *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Another*, Supreme Court of Namibia Case No. SA 8/99.

65 1992 (2) SA 355 (NmSC); 1993 NR 63 (SC).

66 1992 (2) SA 355 (NmSC).

67 1991 NR 1 (HC) at 10 AB.

In the case of *Government of the Republic of Namibia & Another v Cultura* 2000,⁶⁸ the late Chief Justice Mahomed reiterated this approach to the interpretation of the Constitution, as follows:

A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the “austerity of tabulated legalism” and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.

As mentioned above, this approach requires judicial decisions oriented to value judgments, which have been followed by the Namibian courts, but the value-judgment approach raises questions relating to the following:

- The identification of not only the values but also the authoritative source that has the mandate to do so
- The inherent elements of the subjectivity of this approach
- The nature of the mechanism to be employed to ascertain the values and norms, and
- The binding effects of the values.

These issues will be addressed in the analysis of the cases in which this approach has been used to interpret relevant provisions of the Constitution. One could perhaps refer to the views of Chief Justice Strydom on the question of the ascertainment of the norms and aspirations of the people of Namibia as an initial point of reference. In the same address, he stated the following:⁶⁹

[T]o determine the contemporary norms, aspirations and expectations of the Namibian people is a most important requirement when it comes to the interpretation of the Constitution and how it should be applied. What those norms and aspirations are is not always easy to determine and the parameters thereof are always not limitless. When the Constitution says that there shall be no discrimination on the grounds of sex, even if there is a majority who may be in favour of such discrimination[,] it cannot change the express prohibition against discrimination set out in the Constitution. Many of the norms and aspirations of the people are contained in the Constitution itself. Discrimination on the basis of certain stereotypes is rooted out. The dignity of all persons is guaranteed

68 1993 NR 328 (SC) at 340 B–D; 1994 (1) SA 407 NmSC, at 418 F–G. See also *Minister of Defence, Namibia v Mwandinghi*, 1993 NR 63 (SC) at 68–71; (1992) (2) SA 355 (NmS) at 361–3; *State v Acheson*, 1991 NR 1 (HC) at 10 A–C at 10; or (1991) (2) SA 805 (NmH) at 813 A–C.

69 See footnote 23 supra.

by the Constitution. The theme against the violation of a person's dignity starts with the preamble of the Constitution and can be traced to many of the provisions of Chapter 3 and other provisions of the Constitution. These and other provisions should constantly be in the mind of the judge called upon to interpret the Constitution.

The matter relating to the identification and ascertainment of the norms and values of the Namibian people, unfortunately, does not rest there. It is trite that constitutional provisions and legislation, *sui generis*, are couched in a language that is often broad and vague and, therefore, will require judicial interpretation. The Constitution may be the reference point to identify these norms and values, but, as Chief Justice Strydom correctly pointed out, the parameters of determining them are limitless.

The late Chief Justice Mahomed, in deciding whether corporal punishment authorised by law can properly be said to be inhuman or degrading and, therefore, whether it was inconsistent with Article 8 of the Constitution,⁷⁰ in the case of *Ex Parte Attorney[-]General. Namibia : in re Corporal Punishment* used the national institutions as sources of identification of norms and values of the society, and thereby added another dimension to the jurisprudence. He stated the following:⁷¹

[T]he question as to whether a particular form of punishment authorized by the law can be said to be inhuman or degrading involves the exercise of value judgment by the Court. It is[,] however[,] a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in a civilized international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.

70 Article 8 of the Constitution of Namibia provides as follows:

- (1) *The dignity of all persons shall be inviolable.*
- (2) (a) *In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.*
(b) *No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.*

71 1991 (3) SA 76 (NmS) at 91 DF.

It will be observed from the *Cultura 2000* case⁷² that, even though the Court laid down the value-oriented or purposive approach to the interpretation of the Constitution as one to be used by the Namibian courts in interpreting the Constitution, in the *Corporal Punishment* case,⁷³ the late Chief Justice Mahomed went further to identify some sources, i.e. the institutions and the Constitution, where these values may be articulated.

In the case of *The Chairperson of the Immigration Selection Board v Erna Elizabeth Frank & Elizabeth Khaxas*,⁷⁴ the court identified some of these institutions and gave some guidelines as to how the norms and values are to be identified. In the words of Justice O'Linn, —⁷⁵

[t]he “institutions” referred to were also described in the decision of the High Court in State v Tcoeb.⁷⁶ The Shorter Oxford English Dictionary was referred to wherein the following definition appears:

... an established law, custom, usage, practice, organization or other element in the political and social life of the people; a well-established or familiar practice or object; an establishment, organization or association, instituted for the promotion of some object, especially one of public utility, religion, charitable, education, etc.

The Namibian Parliament, courts, tribal authorities, common law, statute law and tribal law, political parties, news media, trade unions, established Namibian Churches and other relevant community-based organisations can be regarded as *institutions* for the purposes hereof.

In this court's judgment in *State v Namunjepo*,⁷⁷ it was also accepted that —

... Parliament, being the chosen representatives of the people of Namibia, is one of the most important institutions to express the current[-]day values of the people.

72 1993 NR 328 (SC); 1994 (1) SA 407 NmSC.

73 *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State* 1991 NR 178(SC); 1991 (3) SA 76 (NmS).

74 Supreme Court of Namibia Case No. SA 8/99.

75 (ibid.).

76 1993 (1) SACR 274 (NmS) at 284 d–e.

77 *Namunjepo & Others v Commanding Officer, Windhoek Prison & Another*, 2000 (6) BCLR 671 (NmS) 678 H.

This attracts a few comments and observations. First of all, Parliament's legislative function is exercised by way of debates in order to ascertain the weight of authority to be placed on an opinion, and in most cases, a decision is taken by the requisite majority vote, followed by the enactment of the relevant legislation. In this case, the guideline being offered here is not adequate as it does not indicate whether the contemporary values or the norms of the Namibian people are those that have been articulated and enacted in the form of legislation, or whether they are those that constitute mere expressions of opinions of members of Parliament in the form of debates, etc. To do justice to the decision of Justice O'Linn, however, it must be added that, with reference to the recognition of homosexual relationships in Namibia, certain specific reasons and yardsticks were provided for the reliance on Parliament as one the sources of the identification of the values and norms of the Namibian people. Justice O'Linn stated that –

[a]lthough homosexual relationships must have been known to the representatives of the Namibian nation and their legal representatives when they agreed on the terms of the Namibian Constitution, no provision was made for the recognition of such a relationship as equivalent to marriage or at all. It follows that it was never contemplated or intended to place a homosexual relationship on an equal basis with a heterosexual relationship. ... In Namibia as well as Zimbabwe, not only is there no such provision, but no such legislative trend. In contrast, as alleged by the respondents, the President of Namibia as well as the Minister of Home Affairs have expressed themselves repeatedly in public against the recognition and encouragement of homosexual relationships. As far as they are concerned, homosexual relationships should not be encouraged because that would be against the traditions and values of the Namibian people and would undermine those traditions and values. It is a notorious fact of which this Court can take judicial notice that[,] when the issue was brought up in Parliament, nobody on the Government benches, which represent 77% of the Namibian electorate, made any comment to the contrary. It is clear from the above that far from a "legislative trend" in Namibia, Namibian trends, contemporary opinions, norms and values tend in the opposite direction.

This position, however, has received some comments and criticisms, and in this regard, reference is made to the observations of EK Cassidy,⁷⁸ when she commented as follows:

78 Cassidy, EK. [n.d.]. "Article 10 of the Namibian Constitution: A look at the first ten years of the interpretation of the rights to equality and non-discrimination and predictions of the future". In Hinz, Manfred, Sam Amoo & Dawid van Wyk (Eds.). *The Constitution at work: 10 years of Namibian nationhood*. Pretoria: University of South Africa, p 186.

The decision assumes, without including any additional support, that the comments of the other two government officials (albeit ones in very high positions) necessarily reflect the views of the majority of Namibians in this matter. Their argument would have been stronger logically with more definitive evidence of public opinion. The majority did not consider, for example, the possibility that the silence of the ruling party Parliamentarians may have reflected party loyalty and/or respect for the President and Minister rather than agreement with their views.

The other questions relating to the identification of norms and values are the methods of verification and the subjectivity or objectivity of such methods used in the process of the identification and ascertainment of the ethos of the Namibian people.

Justice O'Linn in the *Elizabeth Frank* case⁷⁹ gave these guidelines on the subject:

The value judgment, as stated in S v Vries,⁸⁰ can vary from time to time but which [sic] is one not arbitrarily arrived at but which [sic] must be judicially arrived at by way of an attempt to give content to the value judgment by referral to the prevailing norms which may or may not coincide with the norms of any particular judge. As was pointed out in Coker v Georgia 433 US 584 (1977) at 592 these "judgments should not be, or appear to be, merely the subjective views of individual justices; judgment should be informed by objective factors to the maximum possible extent".

The objective factors can be derived from sources which include, but are not limited to: the Namibian Constitution; all the institutions of Namibia as defined supra including: debates in Parliament and in the regional statutory bodies and legislation passed by Parliament; judicial or other commissions; public opinion as established in properly conducted opinion polls; evidence placed before Courts of law and judgments of Courts; referenda;[and] publications by experts.

He continues:

[T]he relevance and importance of public opinion in establishing the current or contemporary values of Namibians when the Court makes its value judgment has been discussed in various decisions, including the decision in State v Vries⁸¹. To avoid any misunderstanding, I reiterate what I said in State v Vries in this regard: "In my respectful view the value of public opinion will differ from case to case, from fundamental right to fundamental right and from issue to issue. In some cases public opinion should receive

79 See footnote 28, supra.

80 1996 (2) SACR 638 (NmS) at 641 c–d.

81 (ibid.).

very little weight, in others it should receive considerable weight. It is not a question of substituting public opinion for that of the Court. It is the Courts that will always evaluate the public opinion. The Court will decide whether the purported public opinion is an informed opinion based on reason and true facts; whether it is artificially induced or instigated by agitators seeking a political power base; whether it constitutes a mere 'amorphous ebb and flow of public opinion' or whether it points to a permanent trend, a change in the structure and culture of society. ... The Court therefore is not deprived of its role to take the final decision whether or not public opinion, as in the case of other sources, constitutes objective evidence of community values".

The methods of which a Court can avail itself to obtain the necessary facts for the purpose of the enquiry, include, but are not limited to: taking judicial notice of notorious facts; testimony in viva voce form before the Court deciding the issue; facts placed before the Court by the interested parties as common cause; the compilation of special dossiers compiled by a referee in accordance with the provisions of Article 87(c) read with Article 79(2) of the Namibian Constitution and sections 15 and 20 of the Supreme Court Act and Rule 6(5)(b) of the Rules of the Supreme Court and Rule 33 of the High Court Rules.

He concludes that the essence and advantage of the evidential enquiry are that it serves as an objective assessment mechanism. As he puts it, –

... it may be the only appropriate way to achieve the purpose of establishing the contemporary norms and values[,] etc. ... and that [i]f the Court refuses to launch an evidential enquiry, it will fall into the trap of substituting its own subjective views for an objective standard and method. The requirement to consider the Namibian norms and values will then become a mere cliché to which mere lip service is paid.

The issue of public opinion raises questions relating the doctrine of separation of powers and the very nature of public opinion as a legitimate source of law because of, inter alia, the vicissitudes inherent in the nature of public opinion. It would appear that the position taken by the court in this case with regard to the integration of public opinion as a legal norm by the courts is a balance between what Max du Plessis calls the “utopian” and “Rawlsian” approaches to the issue of public opinion.⁸²

The other element involved in the issue of public opinion is one relating to the separation of powers. It is recognised that it is within the purview of the mandate of the legislative branch of government to legislate for matters raised to the level of national awareness by public opinion. It is also an accepted principle that, in

82 Du Plessis, M. “Between apology and utopia: The Constitutional Court and public opinion”. *South African Journal on Human Rights*, 18, 1:1–41.

their interpretive jurisdiction, they have a creative role which may involve the interpretation of a constitution or an ordinary legislative enactment. Therefore, in certain circumstances, the courts will be called upon to make authoritative pronouncements on grey or penumbra areas of the law, sometimes involving areas of public policy and values of the society, without first referring the matter to the legislature to be settled in a legislative enactment. Thus, the courts will have to play a balancing act to avoid what might constitute usurpation of the functions of the legislature. The degree of reliance on public opinion has to be determined by whether the issue involves the interpretation of a constitutional provision or a mere legislative enactment. In this regard, the courts will have to be mindful of the fact that values may not be equated with public opinion, and that it is the function of the courts to protect the rights of minorities in the face of the vicissitudes of the public opinion of the majority.

With regard to the binding effect of the values, the general principles of the judicial process – including the principles of separation of powers, judicial precedent and stare decisis – are that these values become binding if they are incorporated into legislation which is not inconsistent with the higher imperatives of a constitution, or where they are given the status of legal principles through judicial interpretation. The source of the binding effect of values elevated to principles of law through judicial interpretation is located and inherent in the constitutional jurisdiction of the courts. Therefore, these values get the authoritative stamp of legal principles and the force of law through the decisions of the court and, in this regard, through decisions involving interpretation of the Constitution.

Judge O'Linn, in addressing this issue in the *Erna Elizabeth Frank* case,⁸³ draws a distinction between the provisions⁸⁴ in the South African and Namibian Constitutions relating to the role of the courts in interpreting and giving effect to the Constitution, and concludes that –

[i]n South Africa, the judicial authority is stated in Art. 165 to vest exclusively in the Courts but as I pointed out Art. 39 vests wide powers, not only in the Courts but in tribunals or forums which appear to have judicial powers when interpreting the Bill of Rights. In regard to the judicial authority, the Namibian Constitution is ambiguous. The judicial authority is vested in the Namibian Courts by Art. 78(1), but Art. 78(2) makes their independence subject to the Constitution and the law. Although Art. 78(2) provides that the Cabinet or Legislature or any other person may not interfere with the Courts in the exercise of their judicial functions, Art. 81 provides that a decision of the Supreme

83 See footnote 38, supra.

84 See Article 39(1) and (2) and Article 165 of the Constitution of the Republic of Namibia.

Court is no longer binding if reversed by its own later decision or if contradicted by an Act of Parliament. This means ... that Parliament is not only the directly elected representative of the people of Namibia, but also some sort of High Court of Parliament which[,] in an exceptional case, may contradict the Supreme Court, provided of course that it acts in terms of the letter and spirit of the Namibian Constitution, including all the provisions of Chapter 3 relating to fundamental human rights.

This view tends to suggest that the relationship between the judiciary and the legislature with regard to the binding effect of the constitutional interpretations of the courts leads to a position of a vicious circle, but the relationship as envisaged under Article 81 of the Namibian Constitution is a logical result of the principles of the separation of powers. This relationship is not meant to create a never-ending process. It is meant to create an element of finality in the process; and even though the courts have the role of interpreting the Constitution and upholding the rights of the individual as enshrined in it, the legislative function of Parliament has to be recognised and maintained – subject, of course, to the proviso that legislative enactments are not inconsistent with the Constitution.

Conclusion

The constitutional history of Namibia prior to the promulgation of Proclamation R101 of 1985 and the Constitution of the Republic of Namibia in 1990 depicts a legal and judicial system that was constrained by the concept of legislative supremacy and analytical positivism. The promulgations of the two constitutional instruments saw the evolution of a new constitutional paradigm oriented towards the achievement of the rule of law and the promotion and maintenance of human rights, by the decisions of the courts.

Article 5 of the Namibian Constitution provides as follows:

The fundamental rights and freedoms enshrined in this Chapter [3] shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

This provision imposes a collective responsibility on all the organs of state, and requires a judiciary that is both willing and able to maintain its integrity and independence against the onslaught of executive intimidation, interference, and political patronage. The record of the Namibian judiciary indicates that, from 1985 to date, it has demonstrated the will power and integrity not to compromise

its independence, and to interpret and apply the laws of Namibia to uphold and protect the rights of the individual as provided in the Bill of Rights. In the process, the courts have adopted a particular constitutional jurisprudence and a related epistemological paradigm oriented towards value judgments, and rooted in the current and contemporary values of the Namibian people. This approach, however, raises questions relating to the courts' jurisdiction as the custodian of minority rights, and the integration of public opinion in the interpretive process of the courts.

Traditional governance and African customary law: Comparative observations from a Namibian perspective

Manfred O Hinz

Introduction⁸⁵

The traditional versus the modern, the modern in the traditional, the traditional in the modern: topics high on the agenda of scholars and politicians! Emphasising one's own (past) culture is widely practiced and part of political discourses at local, national and even international levels. The focus on one's own culture may serve different purposes. It may be a pretext for covering otherwise unacceptable behaviour or it may be used to legitimise political and societal strategies of identity (re-)construction.

Scholars of anthropology and sociology have been creative in interpreting political movements of this kind and in offering conceptualisations for their understanding. There are two important scientific discoveries that are of special interest to legal and political anthropology for the analysis of the *re-appropriation of traditional governance and customary law*. The first discovery is referred to as the *invention of traditions*,⁸⁶ or more precisely: the societal enactment of practises based on and developed out of what is said to be *tradition* in that particular society. We know from working in the field of African customary law that there are rules, which traditional authorities submit as having been in place *since time immemorial*,⁸⁷ but are nevertheless results of recent legislative actions. That recent legislative acts are said to be in existence for long is only a contradiction for those who do not understand the operation of tradition as a socio-political

85 This article is the slightly extended version of a contribution made to the Conference *Estado, Direito e Pluralismo Jurídico – perspectivas a partir do Sul Global*, organized by the Centro de Estudos Sociais of the University of Coimbra, Portugal, on 10 May 2007, with which the Faculty of Law of the University of Namibia has a partnership. The Portuguese version of the article will appear as part of the conference proceedings.

86 Cf. Hobsbawm, E., Ranger, T. (1983) (Eds) *The invention of tradition*. Cambridge: Cambridge University Press.

87 *Since time immemorial* is the formula used in traditional context to ascertain legitimacy.

concept. As such, tradition can marry recent enactments with so-called tradition said to be in existence *since time immemorial*, as long as the enactments of today find their foundation in that tradition.⁸⁸

While the first discovery of repositioning tradition has its firm place in anthropology, the second is still in the phase of exploration. The fact that something appears to be traditional, but has nevertheless been recently created and integrated into the otherwise currently existing set of rules led scholars to speak of *alternative modernities*.⁸⁹ *Modernity* has more than one face. Modernity is not just the one possible face, which is the opposite of pre-modernity or tradition. This simplifying evolutionist model that knows, at the end of its evolutionist lane, only one mode of modernity and places the non-modern rest into the past of tradition does not do justice to the multiple choices cultures have in responding to realities. The concept of modernity that accepts the plurality of cultures irrespective of obviously universal trends of globalisation and cosmopolitanism as societal ways to accommodate the plurality of environments is necessarily multi-dimensional.

However, accepting the plurality of modernities, will not render the use of *modern* and *traditional* obsolete. We will, for the lack of better analytical concepts, but also in view of the fact that, for example, legislation employs the language of traditional⁹⁰ (and with this implicitly of *modern*), still speak of something being *modern* and something else being *traditional*. The fact that a given complex situation can be interpreted as part of an alternative modernity will still leave us with the need to analyse the given complexity and to identify within it elements that find their foundation in African tradition or in imported western modernity. This analytical dissection will, however, not necessarily find an equivalent in the perception of people who live in their environments. In other words, the dissection will primarily be a tool for the interpretation of a given societal situation, but will not

88 Hinz, M.O. (1997a): *Neither natural death nor suicide – Traditional government in Namibia – Remarks from experience*. In *Traditional leadership in Southern Africa*. Johannesburg: Konrad-Adenauer-Stiftung, pp. 163-176.

89 De Sousa Santos, B. (2003), *O estado heterogéneo e o pluralism jurídico*. In De Sousa Santos, B., Trindade, J.C. (Eds.) *Conflito e transformação social: Uma paisagem das justiças em Moçambique*. Vol 1. Porto: Edições Afrontamento, pp. 73ff; *Ibid.*, (2006) *The heterogeneous state and legal plurality*. In De Sousa Santos, B., Trindade, J.C., Meneses, M.P. (Eds): *Law and justice in a multicultural society. The case of Mozambique*. Coimbra: Centro de Estudos Sociais, pp. 17ff. (18).

90 Sec. 1 of the Traditional Authorities Act, 25 of 2000, of Namibia, which contains definitions important for the understanding of the act, uses the word *tradition* 35 times, the references to acts that have traditional in its title not counted.

automatically be a proper reflection of the consciousness in a society for which all dissected elements may form a well-structured whole.

The following observations about the re-appropriation of traditional governance and customary law are based on the two mentioned anthropological discoveries. They will take note of some developments in Southern Africa with the main focus on Namibia⁹¹ and some references to South Africa and a few to Angola. South Africa has been chosen (due to the common history which the two countries share), which nevertheless led into different political avenues after Namibia's independence and the change to democracy in South Africa. Angola has been chosen because this country is at an interesting beginning in its efforts to determine an approach to its traditional governance.⁹²

I divide my observations into five parts. After this introduction (1), I will, in the second part of this paper (2), describe five possible models, which I have developed to analyse the policies of governments to relate the inherited traditional structures of governance to the structures of modernity as expressed in their constitutions. The case of Namibia will be looked at in the third part (3). Three special topics of this case study will be highlighted in the fourth part of the paper (4): namely, the interest of state governments to *structure* traditional authorities; the governmental expectation to have mechanisms for the linking of those authorities to the authorities of the state; and the Namibian nation-wide traditional project to *self-state*⁹³ customary law. Concluding remarks (5) will relate parts 2 to 4 back to the framework set out in the introduction.

Five models

There is no African country that is free of African traditions or free of at least some elements that belong to western modernity. It is therefore that African

91 Where the author of this article worked as legal adviser to the Ministry of Justice from 1990 to 1993 before joining the Faculty of Law of the University of Namibia in 1993 / 94 as professor of law. In both positions, traditional governance and African customary law have been the main focus of work.

92 Based on his experience with Namibia and South Africa, the author of this paper was asked to assist the Angolan parliament and non-governmental organisations in drafting proposals for the re-appropriation of traditional governance and customary law in Angola. See Hinz, M.O. (2006e): *Direito costumeiro pilot project proposal*. Windhoek, Luanda (unpublished paper) and *Ibid.*, (2006f): *Proposal for the preparation of the white-paper process on traditional authorities in Angola*. Windhoek, Luanda (unpublished paper).

93 The meaning of *self-stating customary law* will be explained in part 4 of the paper.

governments have, in one way or the other, to make decisions about the legal and political position of both tradition and modernity in their social and legal systems.⁹⁴ Five models, or better: ideal types (Max Weber) are theoretically possible for the characterisation of the position of African tradition in a given society.⁹⁵

- **The model of strong modern monism**

In this model, African traditions are, by way of legislative act, abolished. Where the model of strong modern monism is adopted, the society could still know traditional leaders. They would, from the political viewpoint however, be at no other level than other stakeholders and opinion leaders in the society. Traditional leaders would not form part of the overall governmental structure of the society. African customary law would not be accepted as law in the sense of law defined by the *grundnorm* of the given society.

- **The model of unregulated dualism**

In this model, the state ignores (explicitly or implicitly) the existence of traditional governance and African customary law, but tolerates both without formally confirming or recognising⁹⁶ their existence, performance and acceptance.

94 There is a growing amount of literature that reflects the position of African governance in the modern African state. Cf. *inter alia*: Hofmeister, W., Scholz, I. (1997) (Eds.) *Traditional and contemporary forms of local participation and self-government in Africa*. Johannesburg: Konrad-Adenauer-Stiftung; Keulder, C. (2000) (Ed) *State, society and democracy. A reader in Namibian politics*. Windhoek: Gamsberg Macmillan; Oomen, B. (2005) *Chiefs in South Africa. Law, power and culture in the post-apartheid era*. Oxford Pietermaritzburg: James Curry, University of KwaZulu-Natal Press.

95 The following five models have been the topic of the author's research on traditional authorities for some time. See the first published reflection in Hinz, M.O. (1999) *Dezentralisierung im Schnittfeld traditioneller und demokratischer Strukturen: Das Beispiel Namibia*. In Rösler, J., von Trotha, T. (Eds.), *Dezentralisierung, Demokratisierung und die lokale Repräsentation des Staates*. Köln: Rüdiger Köppe Verlag, pp.221-232.

96 Jurisprudential considerations tell us that there is a difference between *confirmation* and *recognition*. The use of the latter adheres to an understanding according to which the state is the only source of legitimacy of government and law (legal and political centralism in the sense of Hans Kelsen). The use of *confirmation* is bound to legal and political pluralism, which accepts the state-independent existence of societally legitimate governance and law within a state-run overarching system. I, therefore, prefer the use of *confirmation*.

- **The model of regulated (weak or strong) dualism**

In this model, the state confirms traditional governance and African customary law. Both enjoy their own places apart from the authority structures of state government and the law of the state. In other words, the overall political and legal system would be a dual, or better, plural system with the state-run system on the one side and a plurality of traditional systems on the other. Dual or plural systems are systems in which traditional governance and African customary law represent officially recognised *semi-autonomous social fields* as defined in the theory of legal pluralism.⁹⁷ Whether a given dualistic situation will be called *weak* or *strong*, will depend on the degree of autonomy the state accepts to grant to those semi-autonomous social fields.

- **The model of weak modern monism**

In this model, the state takes note of the existence of traditional governance and African customary law, but does not acknowledge their existence by giving them a semi-autonomous status as in model 3. Instead, the state provides for a set of rules that integrate traditional authority and African customary law into the overall state system. Traditional leaders could become civil servants and thus be fully responsible to the state as any other civil servant. They would be entitled to perform official functions not because of their traditional legitimacy, but because of the legitimacy of the state. Customary law would be law of the state as any other law.

- **The model of (strong) traditional monism**

In this model, African traditional characteristics will prevail at the level of the state. The government of such a state would have the form of traditional authority and the law in the state would be African customary law.

The five models are in reality of different importance. Swaziland is the only African example that comes close to model 5. Model 1 is often found in French-speaking African countries, but also in some English-speaking countries. However, traditional authorities may officially not play any governmental role

⁹⁷ Cf. Moore, SF (2000) *Law as process. An anthropological approach*. Hamburg, Oxford: Lit Verlag, p. 55.

while customary law, administered by institutions of the state, can still be part of the law of the land. The abolition of traditional authorities in such cases would, therefore, go hand in hand with the integration of the administration of justice into one state-centred justice system. Could this be called a dual justice system? Most probably not, as, in such a constellation, customary law would just be the same as any other part of the law, interpreted by the same law interpreters and in the same manner as any other part of the law. Such a situation will, therefore, be more adequately be seen as a combination of models 1 and 4.

Unregulated dualism as decided political option will mainly occur in situations of transition. Angola is an example of this. The pre-colonial traditional reality of Angola has gone through many changes.⁹⁸ It is only now, after the end of the civil war, that the Angolan government has started looking into the various forms of non-statal governance and the rules and customs applied in the various communities.⁹⁹

Many African countries maintain situations which fall under model 3. What characterises political and legal dualism? What makes dualism to be strong or weak?

Looking at traditional authority, the official confirmation of traditional authority as part of the overarching governmental structure is certainly an important criterion for the degree of regulated dualism. The Constitution of South Africa recognises traditional authority as an *institution*.¹⁰⁰ This is an indication of strong dualism – at least in view of an interpretation of this provision as constitutionally guaranteed institution.¹⁰¹ However, the picture becomes more complicated when one goes into details.

98 UAN (2003) Universidade Agostinho Neto. Faculdade de Direito. *Mesa redonda sobre direito costumeiro*. Luanda (ms); Pacheco, F (2005) *Um breve olhar sobre o papel das instituições do poder tradicional na resolução de conflitos em algumas comunidades rurais de Angola*. Luanda (ms).

99 MAD (2003) Ministério da Administração do Território. *Primeiro encontro sobre a autoridade tradicional em Angola*. Luanda: Editorial Nzila.

100 Sec. 211(1) of the 1996 Constitution of South Africa.

101 The concept of institutional guarantee has, eg., a long history in the constitutional law of Germany going back to the time of Weimar. See for the approach on *Einrichtungsgarantie* taken by the German Federal Constitutional Court BVerfGE (*Entscheidungen des Bundesverfassungsgerichts*) 58, 300.

The judicial functions of traditional authorities in South Africa are still basically the same as they were in existence before the change to democracy. The re-regulating of the traditional courts is still a matter of discussion and has not been translated into an act of parliament.¹⁰² What about the administrative and legislative powers of traditional authorities?

The amount of administrative power of traditional authorities does not necessarily correspond with what one would expect after having noted the institutional guarantee of traditional authority in the Constitution. The *wall-to-wall* system of local government according to which there is no area in South Africa, which is not under local government, limits the executive scope of traditional authorities substantially.¹⁰³ Despite the resistance of traditional authorities against the wall-to-wall system of local government and promises made by the South African government to address the concerns of the traditional authorities, the so far weakened dualism remained in force as the wall-to-wall system is also constitutionally required.¹⁰⁴ The wall-to-wall system restricts traditional authority in favour of the authority of elected representatives of the communities as it forces the operation of traditional authorities into the framework of local government structures.

Whether or not traditional authorities have the power to make law used to be a debated issue.¹⁰⁵ At least with respect to customary land law, the South African Communal Land Rights Act¹⁰⁶ responded to the debate by empowering communities with communal land to make and adopt community rules on the administration of communal land.¹⁰⁷

Apart from this, the Constitution of South Africa provides for political platforms on which traditional leaders are able to raise their voices with respect to all

102 South African Law Commission (2003) *Report on traditional courts and the judicial function of traditional leaders*. Pretoria: South African Law Commission.

103 Cf here and for the following Hinz, M.O. (2000) *Traditional authorities: Sub-central government agents*. In: Hinz, M.O., Amoo, S.K., van Wyk, D. (Eds.), *The constitution at work. 10 years of Namibian nationhood*. Pretoria: UNISA, pp.81-93.

104 Sec 151(1) of the Constitution of South Africa of 1996.

105 D'Engelbronner-Kolff, M. (1998) *The people as law-makers: The judicial foundation of the legislative power of Namibian traditional communities*. In D'Engelbronner, M., Hinz, M.O., Sindano, J.L. (Eds.), *Traditional authority and democracy in Southern Africa*. Windhoek: New Namibia Books.

106 Act 11 of 2004.

107 Secs. 19 and 20 of the Communal Land Rights Act, 11 of 2004.

governmental matters that are related to them. The Constitution knows the institutions of a national and provincial houses of traditional leaders.¹⁰⁸

In contrast with the situation in South Africa, the Namibian Constitution refers to the traditional structures of the country only indirectly. Art 102(5) of the Namibian Constitution calls for the establishment of a Council of Traditional Leaders the function of which is limited to advising on communal land matters and any other matter referred to it by the president of the country. This indirect reference receives additional constitutional support by art 66 of the Constitution of Namibia, which states that the customary law of Namibia is part of the law of the land and at the same legal level as the common (ie. Roman-Dutch law) of the country.¹⁰⁹ Traditional authorities are part of customary law and, thus are implicitly confirmed by the Constitution although the Constitution of Namibia does not express this as it is the case in the Constitution of South Africa.

Namibian traditional authorities have maintained administrative functions, as Namibia has large areas, which are not under local government although there is a growing tendency to give villages and settlements of some size local government status.¹¹⁰ Traditional courts are lower courts in terms of art 83 of the Namibian Constitution. The Community Courts Act, 10 of 2003, repealed legislation that was inherited from South Africa during colonial times.¹¹¹ The new Namibian act envisages a new uniform structure of traditional courts that also takes note of constitutional requirements, but has not been fully implemented yet.¹¹² Traditional courts nevertheless continue operating as they used to do before the enactment of the Community Courts Act. As to the legislative function of

108 Sec. 211(2) of the Constitution of 1996. The task of these houses is to deal matters relating to traditional leadership, the role of traditional leaders, customary law and the customs of communities observing a system of customary law. See also secs. 16 – 18 of the Traditional Leadership and Governance Framework Amendment Act, 41 of 2003.

109 Art 66(1) of the Constitution of Namibia reads:

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

110 See Local Authorities Act, 23 of 1992, and Regional Councils Act, 17 of 1995, both as amended. The latter act provides for the proclamation of settlement areas, a status of expected transformation into local authority under the Local Authorities Act. Cf. here Hinz, M.O. (2000).

111 See Schedule to the Act.

112 I will revert to this below in part 3 of the paper.

traditional authorities, the Traditional Authorities Act, 25 of 2000, recognises explicitly the power of traditional authorities to make law.¹¹³

The quoted confirmation of customary law in art 66 of the Constitution of Namibia is found in similar words in the Constitution of South Africa.¹¹⁴ However, the clear subjection of customary to the Constitution in both legal systems weakens the dualism. This means that all African legal systems that subscribe to what we call the *new African Constitutionalism*¹¹⁵ and have not abolished or integrated legally relevant elements of their traditions cannot but implement models of dualism that have tendencies towards a strong regulation of weak dualism. This is also the case for Namibia and South Africa although it can be held from what has been said above about the Namibian situation that the Namibian dualism is less regulated than the dualism in South Africa.

Nevertheless, the orientation towards strongly regulated weak dualism and in particular the subjection of customary law to the principles of a given constitution (including in particular to the human rights and freedoms as enshrined in the constitution) is easier decreed than implemented.¹¹⁶ In particular South African case law shows that a lot can be argued when interpretations are open to jurisprudential approaches that recognise African values as we find them increasingly debated by scholars of African philosophy.¹¹⁷

Is opting for one of the described models a political decision in the sense that decision-makers are free to choose whatever model they like more? There are legal and practical reasons that inform decision-making processes that it will not be enough to prefer one of the models over the others. Why?

Cultural diversity within states is increasingly considered as something that ought to be legally reflected. There is more and more talk about the right to culture¹¹⁸

113 Sec 3(3)(c) of the Act.

114 See sec 211(3) of the Constitution of 1996.

115 See Hinz, M.O. (2006a) The project of "tradition": Constitutionalism in Africa. In Hinz, M.O., Gatter, F.T., (Eds.), *Global responsibility – Local agenda. The legitimacy of modern self-determination and African traditional authority*. Münster: Lit Verlag, pp. 17-28.

116 One of my students just completed his LL.B dissertation about the interpretation of art. 66 of the Constitution of Namibia; see Munsu, D.C. (2007) *Problems in the interpretation of article 66 with respect to the validity of customary law: A comparative analysis*. Windhoek: University of Namibia (unpublished LL.B dissertation).

117 See here, eg., *Bhe and others v the Magistrate of Khayelitsha and others* in 2005 (1) BCLR (Butterworths Constitutional Law Reports) 1 (CC) and my article, Hinz, M.O. (2006c) *Bhe v the Magistrate of Khayelitsha, or: African customary law before the Constitution*.

118 As a constitutional right, cf. art. 19 of the Constitution of Namibia and sec. 31 of the

and even the right to one's own law.¹¹⁹ Cultural diversity is increasingly being accepted as a societal asset that is worthwhile to recognise in legal terms.¹²⁰ Legal pluralism has developed from a mere empirical tool of anthropologists and sociologists into a normative concept according to which legal plurality ought to be interpreted in legal terms.¹²¹

One reason for this is supported by experience about the power of resistance, which traditions (including customary rules) have demonstrated. There are enough examples from the history of Africa which illustrate the power of this resistance. Colonial impacts produced in many instances alternative (and very often hidden) structures.¹²² The decision of the government of Zimbabwe to exclude traditional authorities from adjudicating cases had to be revised because of the *pressure of the ancestors*, as Ladley showed.¹²³ Whatever collaboration with the colonial (respectively the pre-democratic) administration traditional structures accepted in Namibia and South Africa, traditional authority preserved its African legitimacy and raised its voice after the political change.¹²⁴ The years of colonialism and civil war in Angola, did not bring traditional authority to an end in this country.¹²⁵

The re-appropriation of tradition in the case of Namibia

The long way to the independence of Namibia coincided with almost equally long efforts to prepare for the independence of the country. The United Nations Institute for Namibia (UNIN) that operated from one of the frontline states, Zambia, was not only an institution to train young Namibians who were forced to leave the colony of apartheid South Africa, but also to develop blueprints for the future independent

Constitution of South Africa of 1996. For a broader discussion see UNDP (2004) *Human development report 2004. Cultural diversity in today's diverse world*. New York: UNDP.

119 See here: Hinz, M.O. (2006d) Legal pluralism in jurisprudential perspective. In Hinz, M.O. (2006b) (Ed – in collaboration with HK Patemann) *The shade of new leaves. Governance in traditional authority: A Southern African perspective*. Münster: Lit Verlag, pp. 29-45, 35ff.

120 Cf. the quoted UNDP Human development report of 2004.

121 As elaborated on in Hinz (2006d) 31ff.

122 Cf. here Bohannan, P. (1968) *Justice and judgment among the Tiv*. London: Oxford University Press, pp. 7ff.

123 See Ladley, A. (1991) *Just spirits? In search of tradition in the customary law courts in Zimbabwe*. In *Commission of Folk Law and Legal Pluralism*. (Proceedings of the VIth International Symposium Ottawa Canada. Vol 2.) Ottawa: Commission of Folk Law and Legal Pluralism, pp. 584-605.

124 As will be explained in the following part of the paper.

125 The findings in MAD (2003) are proof of this.

Namibia. The efforts to draft policies for the various societal sectors culminated in the publication of a major book with the title *Perspectives for National Reconstruction and Development*.¹²⁶ It is interesting to note that this important policy document did not have one word to say about traditional authorities, it only has a short note on customary law. In this, the emphasis is on the fact that customary law was neglected during colonial times and needed to be developed.¹²⁷

Customary law is an important source of law which could be used to dispose of disputes easily and with expediency as it does not have difficult procedural technicalities. However, in Namibia customary law has been suppressed and sometimes used for the divisive purposes by the South African regime. The courts which administer customary law in Namibia have also been given inferior status

In order to uplift the status of customary law, a proper structure of the court hierarchy should be considered and appropriate legislation allowing its application should be provided.

It was already mentioned above that the Constitution of Namibia basically followed the *Perspectives* by more or less ignoring traditional authority¹²⁸ and in similar terms only allowing space for customary law in the overall legal structure of the country, but under the roof of the Constitution.¹²⁹ In other words, the political minds behind the Constitution did not envisage much of a role for traditional authorities. They were rather sceptical about this sector of governance, mainly because of the sometimes ambivalent position of some traditional leaders during the times of colonialism. However, the more the political leaders who returned from exile re-integrated themselves into the mainstream society, the more they were made to understand that there was a traditional reality which could not be ignored.

Traditional authorities as such were seen to be under the Ministry of Local and Regional Government. A presidential commission of enquiry was established in 1991, the task of which was to inform the political leadership of the country about the de facto roles and functions of traditional authority and in particular

126 UNIN (1986) *Namibia: Perspectives for national reconstruction and development*. Lusaka: UNIN.

127 UNIN (1986), p. 963.

128 The only instance the Constitution refers to traditional leaders is art. 102(5), which provides for the establishment of the Council of Traditional Leaders. Interestingly, art. 102(5) is placed in an article with the title *Structures of Regional and Local Government*.

129 See se above-quoted art. 66 of the Constitution of Namibia.

also the degree of acceptance of traditional authority by the people. The members of the commission travelled the whole of Namibia and held discussions in many areas of the country. The picture, which the commission recorded, reflects the traditional landscape of Namibia as it basically stands up to today. The northern territories, ie. Kaoko and Owambo (as these areas were formerly referred to),¹³⁰ Kavango and Caprivi, the latter three the areas where the majority of the Namibian population is living represent the areas where traditional authority have a broadly accepted and firm stand in the society. The Otjiherero-speaking communities (including the Ovambanderu),¹³¹ the Damara and quite a number of Nama groups who occupy areas in the central and southern part of the country do not show the same degree of organisation. The same applies to the various San groups. While all other communities enjoyed some type of recognition in the apartheid-bound constitution of so-called separate development,¹³² a representative authority was never established in Bushmanland,¹³³ the home of some San groups and earmarked for the whole Namibian San population by the apartheid administration.

Despite differences of this nature and individual dissatisfaction with the status quo, the overall result of the commission was that traditional authority was a reality which policy making had to take note of. Or in the words of the report:¹³⁴

The Commission, having found that the traditional system is not only necessary but also viable, recommends that it be retained within the context of the provisions of the Constitution of the Republic of Namibia and having regards to the integrity and oneness of the Namibian nation as a priority.

In line with above-quoted pre-independence observations on customary law, the Minister of Justice at that time took the lead in investigating the role and function of customary law. A national meeting to discuss the traditional administration of

130 The former Kaokoland is now part of the Kunene Region; Owamboland was divided into four regions: the Oshikoto Region, the Omusati Region, the Oshana Region, and the Ohangwena Region.

131 A group of people in the eastern part of central Namibia who speak Otjiherero, but see themselves distinct from the Ovaherero.

132 According to which the country was divided along ethnic lines into 11 homelands with separate governmental structures.

133 Now called Tsumkwe East and West in the Otjozondjupa Region.

134 Generally referred to as *Kozonguizi Report* after the name of the chairperson of the Commission: Adv FJ Kozonguizi; see Commission of Inquiry (1991) *Report by the Commission of Inquiry into Matters relating to Chiefs, Hadmen and other Traditional or Tribal Leaders*. Windhoek: Republic of Namibia, p. 73.

justice was held in 1992. Representatives from all branches of the legal system were invited together with traditional leaders from all corners of the country. This historic meeting was a challenge for all who thought that traditional administration of justice was something of the past. It became the starting point of a long process to investigate the administration of justice under customary law, the inherited legal framework of this and to set out principles for the drafting of a new uniform piece of legislation that would provide for the operation of traditional courts in line with constitutional requirements.¹³⁵

The author of this paper was made part of the ministerial team that was given the task to prepare the foundation for the expected new law. While first drafts were produced and discussed, fieldwork was done in all parts of the country with the aim to get a concise picture about the operation of customary law. The fieldwork was completed by 1994 and accompanied by several draft bills.¹³⁶ The most controversial point in the debate was the scope of jurisdiction of traditional courts. Some government officials held that traditional courts should not have jurisdiction in criminal matters. Procedural guarantees as enshrined in the Constitution were referred to with the opinion that traditional courts would not be able or willing to observe these guarantees. Others, like the author of this paper, argued that the conventional distinction between civil and criminal matters did not necessarily apply to perceptions under customary law. Differently from the perception under common law, customary law compensation was seen to be the principle remedy for most cases, cases that common law would not treat as cases that could finally be settled between private parties, but had to be attended to by the state under its monopoly to prosecute and punish on behalf of the society as a whole.¹³⁷ The findings from the fieldwork assisted this position. With respect to the most controversial crime for which compensation was considered to be the last word: murder, evidence could be produced that compensation paid by the murderer or his family to the aggrieved family was a powerful tool to resolve the issue and to restore peace in the community. Paying compensation was defined as *wiping the tears*.

135 See Hinz, M.O., Sichilongo, M.F. (1992) Report of the seminar on the administration of justice for judicial officers, police officers, regional commissioners and traditional leaders, 4-5 April 1992. Windhoek: Ministry of Justice (unpublished paper).

136 The fieldwork led to a publication which I have used for years as a text book for Customary Law in the law curriculum of the Namibian Faculty of Law. See Hinz, M.O. (2003a) *Customary law in Namibia: Development and perspective*. 8th edition. Windhoek: Centre for Applied Social Sciences.

137 See Hinz (2003a), p. 175ff.

Customary law compensation is different from compensation under common law. While the claim for compensation under common law has to substantiate the loss in economic terms, compensation under customary law consists of a standardised amount of cattle (or the equivalent in money as determined by customary law) irrespective of the economic weight of the loss, thus weighing out the loss in a broader sense. In other words, customary law compensation balances the economic side of the loss, but also has, in terms of the conventional civil / criminal matter dichotomy, a punitive element. It was based on this argument that a new formula for the jurisdiction of traditional courts was developed. This new formula leaves the common law distinction between criminal and civil matters aside and gives respect to the perception of compensation under customary law. The formula was eventually accepted by the law-maker in the Community Courts Act, 10 of 2003. Sec 12 of the Act reads in its main part:¹³⁸

A community court shall have jurisdiction to hear and determine any matter relating to a claim for compensation, restitution or any other claim by the customary law...

Two research groups of the University of Namibia undertook more systematic empirical research on the acceptance of traditional authority by the people in selected areas of Namibia in the mid-nineties.¹³⁹ One of the two research groups targeted a number of Nama groups in southern Namibia; the other group concentrated on the North (Owambo, Kavango, Caprivi). The interest was to find out whether there was a significant difference between the southern groups that have a long history of exposure to colonialism and severe colonial interventions and the northern groups which were, apart from the interventions during the war for liberation, more subject to colonialism through indirect rule. The interest was also to establish whether age, gender, and the degree of state-run education were significant factors for acceptance of or resistance to traditional authority.

The results of the research were a surprise to all involved in it. Despite differences in the perception of traditional authority – unavoidable in view of the already mentioned different exposures to colonialism – the general picture about the

138 It will be important to observe how the courts will deal with this provision of the Community Courts Act, in particular in view of customary law that, eg., allows the courts to order payments to the court as a measure of punishment.

139 Keulder, C. (1997) Traditional authorities and regional councils in Southern Namibia. Windhoek: Friedrich-Ebert-Stiftung; Hinz, M.O., Katjaerua, B. (assisted by M Kalondo) (1998) 'To promote peace and welfare': The political and economic sustainability of traditional authority. Windhoek: Centre for Applied Social Sciences.

acceptance of traditional authority was very close. And more surprisingly: age, gender, and the scope of education did not play a significant factor with respect to acceptance.¹⁴⁰

The research also revealed very interesting perceptions in the acceptance of traditional authority vis-à-vis the acceptance of stakeholders in local or better: regional government. Although the research was done in the first years after independence and a lot was still on the agenda of the implementation of the new regional government scheme in Namibia, people knew very well to distinguish between the responsibilities of stakeholders of the regions and traditional authorities. Traditional authorities were the authorities “at home” and responsible for what they were responsible for *since time immemorial*. The stakeholders of the region or in a wider sense: stakeholders of the state had to provide *modern goods*, such as electricity, sewage etc.

Several acts of parliament and some more draft bills have resulted from the growing awareness that the re-appropriation of tradition was a fact that also needed legislative attention. The Traditional Authorities Act, 17 of 1995, was the first act that saw the light of the day. It was, indeed, logical to look first at the custodians and principal administrators of customary law: the traditional authorities and only thereafter at the traditional administration of justice.

The Traditional Authorities Act represents the constitutional framework for the traditional authorities operating in the country. The establishment of traditional authority; the recognition of traditional leaders; their powers, duties and functions and the limits thereof; the incompatibility with respect to the holding of traditional and state offices; the relationship of traditional authorities with government organs; the payment of traditional leaders; and other financial matters relating to traditional authorities are the most important areas regulated by the act. The act was later amended and, with additional changes, re-promulgated in 2000.¹⁴¹ The changes reflect deficits that became apparent in the implementation of the original act. However, the main concepts and principles remained as they were enacted in 1995.

Some 42 traditional authorities have been so far officially recognised on the basis of the Traditional Authorities Act. The bigger part of the recognised authorities

¹⁴⁰ It is regrettable that no follow-up research to the two research initiatives was done. Such follow-up research could have pursued opinions over time and along regional and local developments.

¹⁴¹ Act 25 of 2000.

held already recognised positions before independence. In some cases, the government accepted movements of groups out of bigger groups and accepted their standing on their own as a traditional community. Three San groups were added to the recognised communities. The biggest still unsolved problems are the problems of the Ovaherero and the Damara, to which I will revert in the next part of this paper.

The Council of Traditional Leaders Act, 13 of 1997, followed the Traditional Authorities and allowed for the operation of the constitutionally required Council of Traditional Leaders. The Council consists of two representatives from each recognised community. Although the main function of the Council is to advising the president of Namibia on the control and utilisation of communal land,¹⁴² the work of the Council is concerned with all sorts of matters of interest to traditional authorities. To a large extent, the Council has spent energy in assisting the government in the handling of applications for recognition under the Traditional Authorities Act.¹⁴³ The power to advise about applications for the recognition as traditional authority was added to the functions of the Council in an amendment to the original Traditional Authorities Act, 17 of 1995. This amendment proved to be extremely helpful as it created a very suitable platform for the discussion of applications, namely at the level of tradition and by members of the traditional set-up before, in particular, controversial applications go or decision to the administration of the relevant ministry and the political office of the head of state.¹⁴⁴

A further important legislative progress was made with the Communal Land Reform Act, 5 of 2002. *A chief without land is not a chief*, is a saying that clearly shows the importance of land in traditional governance. Land under customary law is not individually owned, it is communal in the sense that individuals have

142 See art. 102(5) of the Constitution.

143 As one can see in the agenda of the annually sitting Council of Traditional Leaders.

144 Patemann, H. (2002) Traditional authorities in process. Traditional authorities in process. Tradition, colonial distortion and re-appropriation within the secular, democratic and unitary state of Namibia. Windhoek: Centre for Applied Social Sciences, offers a good summary of the involvement of the Council in assisting in controversial cases of application. – Sec 5(5) of the Traditional Authorities Act, 25 of 2000, gives the president of Namibia the last word in deciding whether a traditional applicant will succeed with an application for recognition. The jurisprudential justification of this rule is certainly debatable: its origin lies most probably in the colonial construction according to which the highest representation of sovereignty can be more sovereign than the original traditional sovereigns. Or in other words: the president of the state is the chief of the chiefs.

various rights to use the land. These land use rights are usually allocated by traditional leaders. As a member of the community, one has a right to communal land rights. Colonial inroads have made many changes to these principles. The most severe changes occurred in situations where colonialism had a direct interest in land, ie. an interest in land for settler colonialists. Settler colonialism was interested in individual ownership. This is why one finds in Namibia, South Africa, and also Angola large areas of land, which was expropriated under the rule of colonialism and turned into free-hold land, ie. land that could be individually bought, sold and also mortgaged when need arose.

In Namibia, this type of colonial expropriation took place in the central and the southern part of the country after the defeat of the Ovaherero, Nama and Damara in the genocidal war of 1904. The territories in the North remained communal despite certain legislative interventions during the years of colonialism.¹⁴⁵

With independence, questions about the future position of communal land arose. Should land reform investigate the loss of land under colonialism? Would claims for ancestral rights force to changes in the land tenure system in so far as common law land right holders would be taken off the land and the land returned to the communities who lost that land? Should the state be the owner of communal land? If so, who would be the authority to allocate rights on communal land? What role would be left to traditional authority? What scheme would be appropriate to respond to needed changes in the inherited land tenure system?

The first set of questions was addressed in the National Land Conference in 1991 which clearly voted for land reform that would respect the status quo. Land acquisition for land reform purposes would primarily be achieved in the application of the first option of land reform: the principle of willing seller, willing buyer. Who ever was decided to sell his / her land, would be forced to offer the land to government which would be able to buy under market conditions. Only in exceptional circumstances would land be acquired by way of expropriation.¹⁴⁶

Some answers to the second set of questions were of the opinion that the state should be the owner of communal land with the consequence that communal

145 Cf here Hinz, M.O. (1998) *Communal land, natural resources and traditional authority*. In D'Engelbronner, M., Hinz, M.O., Sindano, J.L. (1998), pp. 183-203.

146 The proceedings of the conference have been published in Republic of Namibia (1991) *National conference on land reform and land question*. Vols 1 and 2. Windhoek: Office of the Prime Minister.

land should be to the disposal of the state. Land boards were to replace traditional leaders and their power to allocate customary land rights. Others, and in particular traditional leaders, were in clear support of the inherited system according to which the administration of communal land would remain the prerogative of traditional authority.

In 1996 a second nation-wide land conference took place in Windhoek: this time a conference that concentrated on the role of traditional leaders in the administration of communal land and in the allocation of rights on communal land.¹⁴⁷ The two described positions were put on the table. The traditional leaders maintained their position and won the case as the envisaged communal land act confirmed the rights of traditional leaders to allocate land rights under customary law. This is now clearly stated in sec 20 of the Communal Land Reform Act, 5 of 2002. However, allocations of customary land rights need the ratification by Land Boards as established by the Act. The ratification can only be refused under circumstances described in the Act, which are basically of a technical nature.¹⁴⁸

As to the ownership of communal land, sec 17 of the Act avoids the use of the term ownership, but stipulates that communal land vests in the state, however in trust for the benefit of the communities that occupy it. In other words, the authority of the state over communal land is not to be confused with the ownership of state land. The ownership of the latter is full ownership, while the ownership of communal land is limited. This ownership is subject to the trusteeship the state holds for the various communities.

In order to be able to meet the need for changes in the customary land tenure system, the Act provides for a procedure to alter the status of the land from land under customary law to lease-hold land.¹⁴⁹ Authority for this lies with the Minister responsible for land and the Land Boards. However, the relevant traditional authorities have to be consulted and must consent to the envisaged change, the latter when granting of the right to leasehold is effected by the Land Board.¹⁵⁰

147 Cf the conference report, Malan, J., Hinz, M.O. (1997) (Eds) *Communal land administration. Second national traditional authority conference. 26-28 September 1996*. Windhoek: Centre for Applied Social Sciences.

148 Sec. 24 of the Act.

149 Secs. 30ff of the Act.

150 Sec. 30 of the Act.

An interesting addition to the land tenure system under customary law as modified by the Communal Land Reform Act was effected by two other acts which took note of special needs in the area of the management of natural resources: The Nature Conservation Amendment Act, 5 of 1996, and the Forest Act, 12 of 2001.

The Nature Conservation Amendment Act introduced the concept of *conservancies* into the management of natural resources. According to this, *any group of persons residing on communal land*¹⁵¹ was given the right to apply for a conservancy in which the applying *group of persons* would receive rights over game in that conservancy. Although the act did not make any reference to traditional authority or customary law, the overwhelming majority of conservancies in communal areas are in one way or the other bound to a traditional authority and do apply rules and norms based in the traditions of the various communities.¹⁵²

The Forest Act provides for the establishment of *community forests*.¹⁵³ Like in the case of the conservancies, the philosophy behind this is to give the inhabitants of a given area authority over natural resources in the area. Differently from the Nature Conservation Amendment Act, the establishment of community forests is bound to the jurisdiction of traditional authorities.¹⁵⁴

It was already referred to above that the Namibian parliament adopted an act to regulate traditional courts, the Community Courts Act, 10 of 2003. Apart from the also mentioned novelty in the provision on the jurisdiction of traditional courts, the Act deals basically with all procedural matters relevant to the running of a court. While a lot is left to customary law by way *summary references*¹⁵⁵ in the act, state influence becomes prominent in the rules of appointment and

151 Sec. 24A of the Act.

152 See here my research in Hinz, M.O. (2003b) *Without chiefs, there would be no game. Customary law and nature conservation*. Windhoek: Out of Africa, pp. 33ff.

153 See secs. 15 and 31 of the Act.

154 Sec. 15(1) of the Act.

155 Sec 19 of the Community Courts Act illustrates what is meant by *summary reference*. Sec 19(1) reads:

Subject to this Act, the practice and procedure in accordance with which the proceedings of a community court shall be conducted, including procedures and rules relating to evidence, the manner of execution of any order or decision and the appropriation of fines shall be *in accordance with the applicable customary law*, but all proceedings shall be in accordance with the principles of fairness and natural justice. (Italics by the author of this paper).

dismissal of traditional justices.¹⁵⁶ Legal representation is also guaranteed in the Act,¹⁵⁷ an issue very much questioned by many traditional leaders. Decisions of traditional courts will enjoy the same enforcement mechanisms as state courts.¹⁵⁸ Appeals will be possible to the magistrates' courts and on to the High and Supreme Court.¹⁵⁹

Although the Community Courts Act is an act in force, it has not been fully implemented yet. Presumably all traditional communities have handed in the required forms, but have not been approved and gazetted yet. One reason given for this was that the Ministry was not really happy with the appeal system applied in the Act. Instead of leaving for appeal to the magistrates' courts, a change of the Act was considered that would opt for the Botswana system according to which appeals against traditional courts' decisions lay with a special customary court of appeal.¹⁶⁰

Two areas normally associated with tradition have not been translated into law yet: customary marriages and inheritance under customary law. As to the first, the Namibian Law Reform and Development Commission completed its draft of a Customary Marriage Bill; this draft bill has not been tabled to parliament.¹⁶¹ The draft confirms the existence of customary marriages in legal terms leaving it basically to customary law to determine the validity of such marriages. Only with respect to constitutional (or international human rights) requirements, the draft decrees changes in customary law. Traditional authorities will play a role in the registration of customary marriages, but also in the dissolution of these marriages. An unexpected inroad into customary law, however, can be found where the draft bill considers polygynous marriages. These marriages will not be allowed any more. Violations will even qualify as a crime of bigamy.

The Law Reform and Development Commission project on customary inheritance is more in an infant stage. This project has become rather silent after the last

156 Sec. 8 of the Act.

157 Sec. 16 of the Act.

158 Sec. 23 of the Act.

159 Secs. 26-29 of the Act.

160 This situation has created difficulties for the traditional administration of justice. After the repeal of the inherited legislation, the basis of the administration of traditional justice is customary law, which differs from community to community. The traditional justice system is also in urgent need of the enforcement mechanisms provided for in the act.

161 Law Reform and Development Commission (2004) *Report on customary law marriages*. Windhoek: Republic of Namibia.

suggestions for a draft bill did not abolish customary inheritance although there were strong voices to do so. What the said suggestion contains are rules of conflict that will allow to make an informed decision on the application of either customary or common law.¹⁶²

Three special topics: The Namibian attempt to structure traditional authorities, the rule on the relationship of traditional authority with government organs and the nation-wide traditional project to self-state customary law

The first topic

The first of the three special topics that will be commented on in this part of the paper is a problem that flows from sec 2 of the Traditional Authorities Act, 25 of 2000. Sec 2(1) reads:

Subject to this Act, every traditional community may establish for such community a traditional authority consisting of –

- (a) the chief or head of that traditional community, designated and recognised in accordance with this Act; and*
- (b) senior traditional councillors and traditional councillors appointed or elected in accordance with this Act.*

The legislative intention behind this rule was to standardise traditional authority throughout the country and by doing so also to facilitate the work of the administration. Did this intention materialise?¹⁶³

Read together with sec 17 of the Act, which limits payments of allowances to traditional councillors to 6 senior councillors and to 6 councillors, some communities requested only for the gazetting of the chief and the number of paid 12 councillors of even less. Other communities, eg. communities in Owambo submitted several hundred names as councillors for gazetting. It is understood that at least many of these councillors were *mwene gwomikunda* (Oshiwambo: leaders of wards) and, thus, in the strict sense of the word not councillors, but executive leaders in their respective areas. Given the fact that some communities have a four-

162 According to internal documents distributed to members of the then *Women and Law Committee* of the Law Reform and Development Commission.

163 The following is based on the chapter 'The traditional landscape of Namibia' in my forthcoming book *Since time immemorial. African ways of governance and law*.

layer governmental structure, meaning that below the chief and his/her council, one finds district leaders, leaders of wards or village and sub-village-leaders, the gazetted councillors may also include leaders of this lowest level of traditional governance. At the higher level of community governance, many communities have a complex leadership structure with office bearers of different responsibility and rank. An extraordinary example of this are the Caprivian communities, which all have next to the chief as the highest authority of traditional governance one person, who is called *nghambela* and one person who is the *natamoyo*. *Nghambela* is usually translated as prime minister to mean that the *nghambela* is the chief-executive officer, who runs the day-to-day business of the community with the various traditional stakeholders. The *natamoyo* represents the royal family and is the first advisor to the chief. In the language of the act and the government gazette, the *nghambela* and the *natamoyo* are senior councillors like all the other senior leaders under the chief and this in disrespect of the traditional functions they hold.

With this in mind, I hold the opinion that the attempt of the Act to standardise the composition of traditional authority has not born the expected fruits, but confusion. This has recently been supported by a decision of the High Court of Namibia.¹⁶⁴ The Ovambanderu community knows, apart from its highest authority (the chief in terms of the Traditional Authorities Act; *ombara* or king in Otjiherero) the position of *senior chief*, being some kind of sub-chief under the main chief. When the Ovambanderu drafted the constitution of their community, they did not provide for the position of *senior chief*, as, indeed, the Traditional Authorities Act does not have this position. The matter was taken to court and the court decided that it was to the community to decide on their traditional structure and this irrespective of the standardised approach implemented for the process of gazetting.¹⁶⁵ What is then the purpose of standardisation if it faces such limitation?

The attempt to standardising the composition of traditional authorities has created even more difficulties when one looks at the still unsolved problem of the Ovaherero and Damara communities. Both communities are scattered over wide areas of Namibia, a situation that was caused by colonialism. Both communities occupied vast areas in central and southern Namibia when colonialism started expanding into the then Southwest Africa. As a result both communities were marginalised and eventually confined to reserves of varying sizes.

164 Unreported Namibian High Court case of Mbanderu traditional leaders versus the Mbanderu Traditional Authority.

165 I again refer to the just mentioned forthcoming publication.

Neither the Ovaherero nor the Damara had structures of centralised authority as we find them, eg., in the Oshiwambo-speaking communities. The royal houses that rule most of these communities can be traced back to the early available ethnographical account. Centralised authority emerged only very late in the Ovaherero and Damara communities and, even then, did not overtake the ruling positions of rulers of sub-groups. The supreme leaders of the Ovaherero and the Damara held the position of *primus inter pares* with respect to the leaders of the various sub-groups of the two communities at large. Indeed, members of both communities question the legitimacy of the two positions. The structures submitted for recognition to government by the Ovaherero Paramount Chief and the Damara King provided for the position of chief and under the paramount chief or King for additional chiefs have not been considered by the government of Namibia because the Traditional Authorities Act has no space for such a constellation.¹⁶⁶

What happened instead is that Ovaherero sub-groups were recognised as communities in their own rights under the Traditional Authorities Act. Several attempts by the Ovaherero Paramount Chief to seek for remedy of the situation and receive recognition were not successful.¹⁶⁷ A very unhealthy situation, as the Communal Land Reform Act and the Community Courts Act only apply to recognised communities. This means in particular that a very substantial part of the Ovaherero are not part of the procedures before Land Boards that finalise the allocation of land under customary law.

The Damara community opted for a more pragmatic approach by seeking recognition for the sub-groups and by doing so tolerating the non-recognition of the King.

What is the lesson to learn from this? We know since Fortes' and Evans-Pritchard's *African political systems*¹⁶⁸ that traditional governance has not

166 The case of the non-recognised groups within the Ovaherero community appears almost regularly on the agenda of the Council of Traditional Leaders. Paramount Chief K Riruako and other pursued the issue of non-recognition in a court case against the Government of Namibia, which was only on procedural ground successful for the complainants, but did not solve the substantial issue of recognition. Cf *Kuaima Riruako v Minister of Regional and Local Government and Housing*. Case No 336/2001 (unreported, High Court of Namibia).

167 According to a report in the New Era of 13 March 2008, the group of unrecognised Ovaherero leaders has now decided to involve the United Nations in their case.

168 Fortes, M., Evans-Pritchard, E.E. (1940) *African political systems*. London: Oxford University Press.

only one face that can be summarised as pre-statal, but holds a broad variety of forms. The confrontation with colonialism, Western law and jurisprudence (including the post-independence jurisprudence associated with the new African constitutionalism) have not simplified what earlier anthropologists recorded. To the contrary: the various inroads into the already complex traditional systems have led to more complexity. The introduction of the self-clearing mechanisms in Namibia by mandating the Council of Traditional Leaders to achieve the basis for informed recommendations to government is certainly an option worthwhile to consider in comparable situations where there is a need for a legal response to a diverse traditional landscape. The attempt to standardise the establishment of traditional authorities as done in sec 2 of the Traditional Authorities Act requests reconsideration.¹⁶⁹

The second topic

The second of the three special topics that will be commented on here is the problem of regulating the relationship of traditional authorities with state organs.¹⁷⁰

Sec 12 of the original Traditional Authorities Act, 17 of 1995, had this to say:¹⁷¹

- (1) *In the performance of its duties and functions and exercise of its powers under this Act, a traditional authority shall give support to the policies of the Government, regional councils or local authority councils and refrain from any act which undermines the authority of those institutions.*
- (2) *Where the powers of a traditional authority or traditional leader conflict with the powers of the Government, regional councils or local authority councils, the powers of the Government, regional council or local authority council, as the case may be, shall prevail.*

When the Traditional Act was re-promulgated in 2000, the equivalent section to sec 12: sec 16 in the 2000 Act, was shortened to one section and read basically as it was stipulated in sec 12(1) of the original Act. It was obviously found that

169 Drafting policy in this respect will be of utmost importance for a country, such as Angola where many historically centralised communities lost their highest levels of authorities during the time of the Portuguese colonialism. Traditions that refer to the old kingdoms are still alive, however new structures have evolved or were created and claim now for recognition. Cf here Hinz, M.O. (2006f).

170 To the following, see Hinz, M.O. (2000).

171 Italics in the following are by the author.

the straightforward and unconditioned *prevailing* of state organs over traditional authorities would not stand a test in court where traditional authority could claim not to be part of an all-encompassing state hierarchy and, thus, not to be part of the civil servant structures in accordance with which civil servants had, in principle, to execute orders from their superiors. Traditional authorities would, indeed, be entitled to revert to their guaranteed rights, which would allow them to have their own opinions, to formulate their own community policies and to get these policies implemented – all this as long as they act within their functions and duties and not violate constitutional requirements.

But what about the remaining part of the old sec 12(1) of the Traditional Authorities Act? Would the obligation to *refraining from any act undermining state organs* hold constitutional water? In answering these questions, more questions have to be raised. What is *undermining*? Who is to determine what undermining is? Is undermining a term certain enough? Certain for government officials, but also for traditional authorities? Is openly criticising already undermining? Would it be undermining when a traditional authority would say *no* to a hydro-electrical power plant in the implementation of which vast grazing areas and also places of religious importance would be flooded by water?¹⁷²

It is, indeed, difficult to interpret sec 16 of the Traditional Authorities Act in such a way that the interpretation would recognise, on the one hand, the interest of government in the loyalty of traditional authorities to the state structures in which and with which they are expected to operate as sub-central public agents.¹⁷³ In other words, sec 16 of the Act would most probably not stand a test in court!

What could be a language that would suit the interest of both sides and avoid problems as we see them in sec 16? An alternative wording could be:

Subject to powers and functions vested in a traditional authority under customary law, a traditional authority shall, in the exercise of its powers and the performance of its duties and functions under customary law or as specified in this Act, give support to the policies of the Government, regional councils or local authority councils.

In order to make sure that obligations of this nature are not a one-way obligation of traditional authorities, the law on regional and local councils should contain a similar rule, reading:

172 Problems that arose in the debate about the plans of the Namibian and Angolan governments to erect a hydroelectric power plant in the area of the Kunene Epupa falls.

173 But public agents *sui generis*; cf Hinz (2000).

Subject to powers and functions stipulated in the Regional Councils Act and the Local Authorities Act, regional councils, local authority councils and members of such councils shall support traditional authorities in the exercise of their powers and the performance of their duties and functions under customary law or as specified in any other statute.

In other words, while the law in place is an unsuccessful attempt against regulated dualism and in favour of integration, the proposed alternative would meet the expectation that flows from the constitutional principle according to which Namibia is a unitary state, but at the same time be a feasible implementation of regulated dualism. In regulating the dual system, the alternative would place the burden to respect the other side on both sides.

The third topic: The nation-wide traditional project to self-state customary law

This article cannot be the place to discuss why the proposal to codify customary law is unworkable and, in actual fact, nothing but an unrealistic dream of lawyers that are bound to the philosophy of legal centralism and, at the same time, ignore the dynamics of law, here: customary law in legally pluralistic systems.¹⁷⁴ This article is also not the place to discuss the pros and cons of the customary law restatement project, as it was developed and implemented in a number of African countries by the team of Antony Allott of the School of Oriental and African Studies of the University of London.

We are talking here of *self-stating* customary law¹⁷⁵ and refer with this term to law-making or *law-ascertaining* processes which are documented, eg. in the history the Ovakwanyama in Namibia, where the new king used to announce his new laws after ascending to the throne. Reports about the famous Oukwanyama King Mandume ya Ndemufayo have it that when King Mandume declared his

174 Although the Namibia Law Reform and Development Commission ct, 29 of 1991, refers also to codification as one of the objects of the Commission, codification was not pursued in Namibia with the exception of an obviously short-lived attempt to codify criminal law.

175 Cf Hinz, M.O., Kauluma, P. (1994) *The laws of Ondonga – Introductory remarks*. In *Traditional Authority of Ondonga, The laws of Ondonga*. Oniipa: Evangelical Lutheran Church in Namibia, pp. 9-43; Hinz, M.O. (assisted by Santos Joas) (1995) *Developing customary law: Self-stated laws of Namibian communities and customary law consultative meetings with traditional leaders*. Windhoek: Centre for Applied Social Sciences; Hinz, M.O. (1997b) 'Law reform from within. Improving the legal status of women in Northern Namibia.' *Journal of Legal Pluralism and Unofficial Law* No. 39, pp. 69-79.

laws after becoming king quite a number of new rules were pronounced by him. One of the rules reported was of special inter-community (so to say international) importance as this rule declared cattle raiding with respect to the communities in the neighbourhood of Oukwanyama illegal.¹⁷⁶ Apart from this traditional proclamations of customary law by the communities themselves, we find many recent attempts to write up parts of customary law in the history of customary law of Namibia. One example of self-stated laws that belong to this group of more recent attempts to note customary law on paper that can be mentioned here is the example of Ongandjera.¹⁷⁷

What is self-stated customary law in this sense? We refer with this term to legal documents that contain aspects of the customary law of communities produced by the communities themselves in their own words. The self-statements of customary law as we know them are not exercises of codification in the sense of a code that replaces the unwritten customary law. It can be assumed that the communities self-state what it appears to them important to have in writing. Addressees of the written message are all who have to deal with the customary law outside the community. Addressees are also the own people who have to be reminded that a given part of customary law had to be changed to meet constitutional requirements or standardised in view of needs that flow from the growing interaction of members of different communities.

The trend to self-stating customary law has meanwhile been endorsed by the Council of Traditional Leaders which resolved that all traditional communities embark on a process of self-stating. Most of the communities have honoured the resolution of the Council. Many have completed their self-statements; others are debating drafts.¹⁷⁸

What the communities have produced so far varies from community to community and is still awaiting detailed analysis. However, what has been achieved up to

176 Cf Loeb, E.M. (1962) *In feudal Africa*. Bloomington: Indiana University, pp. 33f, but also Williams, F.-N. (1991) *Precolonial communities of Southwestern Africa*. Windhoek: National Archives of Namibia, pp. 187f.

177 Cf Louw, W. (1967) *Die socio-politieke stelsel van die Ngandjera van Ovamboland*. Port Elisabeth: University of Port Elisabeth (MA dissertation), pp. 131ff – The Aangandjera are another Oshiwambo-speaking group in northern Namibia.

178 Personal knowledge as member of the team that assist traditional authorities in their attempts to self-state customary law.

now reflects an extraordinary process in the re-appropriation of tradition.¹⁷⁹ The communities in Owambo, Kavango, Caprivi are very much straightforward with rules on wrongs. Some are innovative in the sense that they have added to earlier versions of their self-stated customary law rules, eg., on matters of environmental concern.¹⁸⁰ The communities in central and southern Namibia are more concerned with defining their place in the traditional landscape of the country. Some have chapters on history and language, many have long parts on the constitution of their traditional governance.

The Namibian Faculty of Law, through its associated Centre for Applied Social Sciences and the Human Rights and Documentation Centre, has been privileged to assist the process of self-stating customary law. We were able to conduct workshops with individual communities, groups of communities, and the communities at the national level. The expectation is that a first set of self-stated laws will be published in 2008.¹⁸¹

Concluding remarks

The comparative study could demonstrate that the process of the re-appropriation of traditional governance and African customary law has entered a new phase with the adoption of the constitution that implemented the spirit of the new African constitutionalism as the order of independence for the country. The new African constitutionalism is, on the one side, characterised by the notion of constitutional supremacy and the binding force of human rights and freedoms and, on the other side, by the confirmation of traditional governance and African customary law. This new phase is still in progress, even in countries, such as Namibia, in which the constitutional expectation to give customary law and, through it, traditional governance a firm stand has, by now, a history of almost 20 years.

However, societal movements indicate that a next phase in re-appropriating tradition is already on the agenda of some communities. The old generation of traditional leaders is questioned by its children who return home with university degrees. Some traditional authorities of the old generation have recruited retired

179 See here at least Hinz, M.O., Kwenani, J.W. (2006) *The ascertainment of customary law*. In Hinz, M.O. (2006b), pp. 203-214.

180 See eg., *Ooveta dhOshlilongo shUukwambi, the Laws of Uukwambi in Owambo*. The laws of Uukwambi are part of the files in the office of the author of this paper.

181 For practical reasons, it was decided that the laws of the communities in the far North of the country will be put together in a first volume, while the other laws of the other communities will follow in second volume.

government officials to be councillors to their authorities. A new generation of traditional leaders is to come; a generation of leaders that has gone through formal education and that is thus conversant with the language of modern political bargaining. All this will change the face of traditional governance and African customary law.

It is hard to anticipate what type of changes will occur under the leadership of the new generation of traditional leaders. It is also hard to anticipate how traditional governance and customary law will be accommodated in urban areas where more and more people settle. There are already communities that have special traditional officials in their leadership whose task is to observe urban developments. Whether this will be a trend that will reduce the long distance to the traditional structures *at home* or whether urban settlements will create quasi-independent structures has to be seen. It has to be seen whether the stronger authorities, such as the ones in the far North of Namibia, will remain the model authorities for the other authorities or whether these authorities will develop new models that are more appropriate.

Despite colonialism and its policy of restricting and limiting the power of traditional authority and despite the attempts made by some post-colonial modernists to declare traditional governance and customary law as something of the past that has to go, both, traditional governance and customary law have resisted and surprisingly survived. This is at least an indication that traditional governance and customary law will also resist some of the new challenges and create another form of alternative modernity.

The justiciability of social, economic and cultural rights in Namibia and the role of the non-governmental organisations

John Nakuta

Introduction

Namibia has celebrated its 18th year of independence. On this auspicious occasion, it is proper to reflect on the status and enjoyment of all human rights in the country. Human rights are traditionally divided into two main groups, namely –

- civil and political rights, and
- economic, social and cultural (ESC) rights.

Without going into detail about the reasons for such a demarcation, suffice it to say that civil and political rights have for years received, both at the international and national levels, much more prominence than ESC rights. Namibia is no exception in this regard. It is safe to state that, in the realm of civil and political rights, much has been achieved in Namibia. Many people freely exercise and enjoy the fundamental rights and freedoms recognised and protected in the Bill of Rights entrenched in the Constitution of the Republic of Namibia (Chapter 3), most of which are civil and political rights. The same cannot be said for ESC rights, though. This is so because of a number of factors, i.e. the non-entrenchment of ESC rights in the Constitution, the way these rights have been formulated in the Constitution, and the dominant perception that these rights are not enforceable under the current constitutional dispensation. ESC rights are *sine qua non* for improving people's lives and standard of living. Human rights jurisprudence from other jurisdictions shows that ESC rights can and should play a greater role in improving people's opportunities in life. Thus, this paper is premised on the conviction that ESC rights can and should play a greater role in the work and mandates of Namibian human rights organisations, with the ultimate view of using the court system to enforce ESC entitlements. The main thrust of this article, therefore, is directed towards the justiciability and or enforcement of ESC rights in Namibia.

The work herein is divided into seven sections. The discussion commences by giving a concise profile of the prevailing socio-economic conditions in the country, and how these impact on ESC rights entitlements. The next section lists the legal instruments regarded as the sources of ESC rights at the universal, regional and national level, respectively. This is followed by a commentary on the focus of certain prominent human rights organisations in the country. This part shows that the work of many of these non-governmental organisations (NGOs) have had a bias towards civil and political rights. Section five emphasises that ESC rights are legal rights unto themselves, and not mere political goals. It further seeks to highlight the danger of subjecting these rights to such a view. Section six contains the main thrust of this work. In this section I contend that ESC rights may indeed be invoked in Namibian courts. Such an invocation can either be done directly by way of a reliance on Article 144 of the Constitution, or indirectly through an expansive reading and/or interpretation of civil and political rights, as has been done in other jurisdictions, such as India. The work concludes with recommendations directed to all relevant role players involved in the human rights arena so as to ensure that all human rights are fully enjoyed.

Namibia: A socio-economic snapshot

An assessment of the human rights situation in Namibia would be incomplete without reflecting on the prevailing socio-economic conditions in the country. Research has shown that poverty is still widespread in rural communities, where nearly half the households spend more than 60% of their income on food.¹⁸² Is it reasonable and justifiable that, in an open and democratic society based on human dignity and freedom, a large majority of the population still lives in abject poverty alongside extremes of wealth? Indeed, Namibia's Gini coefficient is still one of the highest in the world. Moreover, despite the fact that government spends a considerable part of its budget on basic services like education and health, the majority of the population still has insufficient access to such services. With reference to education, there is a general consensus that Namibia has made significant progress in terms of access to education. However, there are still high disparities in the rate of enrolment amongst the various language groups. Whereas only 18% of San children are enrolled in formal education, the corresponding figures for German- and Owambo-speaking children are 92% and 89%,

182 Harris, A. 2007. *Spotlight on Development – Towards the Millennium Development Goal*. Windhoek: The NANGOF Trust, p 4.

and 89%, respectively.¹⁸³ Also, the quality and standard of education at state schools still remains a big challenge. Similarly, Namibia spends a considerable part of its annual budget on health, but health expenditure is highly unequal across the country. For instance, the per capita expenditure on health is lowest in the north-west, although that part of the country has the highest mortality rate amongst children under 5 years of age.¹⁸⁴ The provision of low-cost housing poses another challenge to the government. For example, it is said that with the current rate at which low-cost houses are being delivered, an applicant for such a house will have to wait for around 70 years to have his/her application for a house considered.

As these examples show, government's current social safety measures are not succeeding in reversing the ever-widening gap between rich and poor in Namibia. Therefore, additional strategies need to be devised to complement their efforts. Human rights, specifically ESC rights, can be one of the strategies to employ in order to achieve social justice in Namibia.

The right to work; the right to fair conditions of employment; the right to form and join trade unions; the right to social security; the right to protection of the family; the right to an adequate standard of living, including the right to food, clothing, and housing; the right to health; the right to education; and the right to culture are internationally recognised rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR). In 1993, the Vienna World Conference on Human Rights reiterated that —¹⁸⁵

... all human rights are universal, indivisible, interdependent and interrelated.

This means that civil and political rights as well as ESC rights have to be treated in an equal manner, on the same footing, and with the same emphasis.¹⁸⁶ After Namibia had ratified the ICESCR, it entered into force for the country on 28 February 1995. In addition, Chapter 3 of the Namibian Constitution also seeks to protect certain ESC rights, albeit in a somewhat limited and modest fashion.

183 (ibid.:3).

184 Government of the Republic of Namibia. 2003. *Namibia National Health Accounts*. Windhoek: Ministry of Health and Social Services, p 56.

185 *World Conference on Human Rights: Vienna Declaration and Programme of Action*, Part I, para. 5. UN Doc. A/CONF. 157/23.

186 Cooman, F (Ed). 2006. *Justiciability of economic and social rights*. Antwerp: Intersentia, p 2.

In order to contribute to the debate of the de jure and de facto status and justiciability of ESC rights in Namibia, it has become imperative to critically engage the questions posed by Cooman¹⁸⁷ as to whether ESC rights only exist on paper as part of treaties and constitutions to which governments often pay lip service at international fora, or whether they really mean something in practice for those who want to invoke these rights before the courts?¹⁸⁸

The next section will, therefore, evaluate how these rights can be enforced in the Namibian legal system.

Sources of ESC rights

ESC rights, as noted by Scheinin,¹⁸⁹ are an essential part of the normative international code of human rights. As he points out,¹⁹⁰ they have their place in the Universal Declaration of Human Rights (UDHR), in universal and regional conventions on human rights, and in a plethora of human rights treaties aimed at the eradication of discrimination and the protection of certain vulnerable groups. At the universal level, the UDHR and the ICESCR are singled out as the most important sources of ESC rights. In this regard, the UDHR provides for the right to social security, the right to work, the right to rest and leisure, the right to an adequate standard of living, the right to education, and the right to the benefits of science and culture.¹⁹¹ The ICESCR is regarded as the principal legal source of ESC rights. The rights recognised in and protected by this instrument include the right to work and to favourable working conditions (Articles 6 and 7); the right to organise and take collective action (Article 8); the right to social security (Article 9); the right to protection of the family, including protection of mothers and children (Article 10); the right to an adequate standard of living, including the right to food, clothing and housing (Article 11); the right to health (Article 12); the right to education (Article 13); and the right to culture (Article 15). Furthermore, the Convention on the Rights of the Child upholds and affirms the applicability of many of the rights contained in the ICESCR to children.¹⁹² Various other international human rights instruments contain provisions which

187 (ibid.:2).

188 Footnote 5, supra.

189 Scheinin, M. 2001. *Economic and social rights as human rights*. Dordrecht: Martinus Nijhoff, p 29.

190 (ibid.).

191 See Articles 22–27 of the UDHR in this regard.

192 See in particular Articles 25, 27, 28 and 32.

are directly related to ESC rights. The Convention on the Elimination of all Forms of Racial Discrimination, for example, prohibits discrimination on the basis of racial or ethnic origin with respect to ESC rights. The Convention on the Elimination of Discrimination Against Women affirms the applicability of the full range of ESC rights for women. Similarly, a broad range of worker-related rights has been developed under the auspices of the International Labour Organisation (ILO) and enshrined in the ILO Conventions and other legal instruments.¹⁹³

At the regional level – and of relevance to Africa and Namibia – is the African Charter on Human and Peoples' Rights, which protects the right to work, the right to health, and the right to education.¹⁹⁴

The Namibian Constitution, for its part, contains an extensive catalogue of fundamental rights and freedoms. However, as noted in the preceding section, the ESC rights provisions therein are protected in a rather limited and modest fashion. Most of the provisions relating to ESC rights are couched as guiding principles of state policies that are fundamental to the governance of the country, and the state is obliged to have regard to these principles in making laws.¹⁹⁵

Thus, the following sections will endeavour to elaborate on the status of ESC rights in the Namibian legal system, investigate to what extent they are enjoyed in Namibia, and suggest ways in which these rights may be invoked in Namibia.

Namibian NGOs and ESC rights

Namibian NGOs have employed very creative strategies to claim and realise people's basic rights. Civil society organisations have worked in diverse fields such as promoting access to affordable housing (Shack Dwellers' Association), rural development (Namibia Development Trust), minority rights (Working Group of Indigenous Minorities in Southern Africa, the Omaheke San Trust), HIV/AIDS (Namibia Network of AIDS Service Organisations), and gender issues (Sister, Women's Action for Development). NGOs that have explicitly taken up human rights issues are the Legal Assistance Centre (LAC), the National Society for Human Rights (NSHR), and the Basic Income Grant Coalition (BIG). The approaches the latter three NGOs have taken are discussed in more detail

193 Leckie, S & A Gallagher (Eds.). 2006. Economic, social and cultural rights: A legal resource guide. Philadelphia: University of Pennsylvania Press, p xv.

194 See in particular Articles 15–17 of the African Charter on Human and Peoples' Rights.

195 See Article 95 of the Constitution of the Republic of Namibia.

below, along with those of the Office of the Ombudsman. Although not an NGO, the Office of the Ombudsman is included here because it has a constitutional mandate to monitor the protection and enjoyment of all human rights. This certainly includes ESC rights.

The Legal Assistance Centre

The LAC is the only public-interest law centre in Namibia. Its mission is to make the law accessible through education, law reform, research, litigation and legal advice. Since its inception the LAC has worked mainly on civil and political rights, and has had great success in the promotion and protection of these rights. However, they have not shown the same vigour in claims pertaining to ESC rights. In 2004, the LAC was approached by residents of the Goreangab Dam settlement to institute action against the City of Windhoek for cutting off the water supply to their community. Instead of taking the matter to court, the LAC reached an agreement with the Municipality without the prior consent of the residents.¹⁹⁶ With this, the LAC missed an opportunity to institute the first class action for socio-economic rights in Namibian courts.

The National Society for Human Rights

The NSHR is one of the main human rights monitoring and advocacy organisations in the country. Like the LAC, it has mainly focused on the monitoring and advocacy of civil and political rights. However, recent reports indicate that the NSHR has expanded its monitoring mandate to include the observance of ESC rights. For example, the latest NSHR report focuses on, amongst other things, the status of the right to an adequate standard of living, the right to a safe environment, the right to education, the right to health, and the right to culture.

The BIG Coalition

The BIG Coalition is a practical response to poverty in Namibia. It is a coalition of NGOs that advocate for the state to pay a monthly cash grant of N\$100 to every Namibian citizen, regardless of age or income. The money paid to people not in need is recuperated through the tax system. Despite the fact that the BIG initiative has been applauded nationally and internationally as a unique way

196 Sashman, C. 2004. "LAC gets cold feet". *New Era*; available at <http://allafrica.com/stories/200410210255.html>.

to address the income disparities in the country, the government rejected the Coalition's proposal, saying that Namibia was not a welfare state. This led the Coalition to launch its own pilot project in the Omitara village, which is said to be one of the most impoverished settlements in the country.

The Ombudsman

The office of the Ombudsman is an institution established under Article 89 of the Constitution. The duty of the Ombudsman is to investigate, amongst other things, apparent or alleged violations of fundamental rights and freedoms.¹⁹⁷ The human rights and fundamental freedoms that can be investigated by the Ombudsman are not only those contained in Chapter 3, but include a variety of civil, political, economic, social and cultural rights.¹⁹⁸ In 1998, for example, the Ombudsman received 1,111 complaints. The largest percentage of these related to unfair dismissal (21%), followed by complaints about remuneration/salaries (13%) and pension funds (12%). These are all issues of a socio-economic nature, indicating the important role the Ombudsman plays in protecting and enforcing socio-economic rights in Namibia.¹⁹⁹

Economic, social and cultural rights as legal rights in Namibia

Apparently, the drafters of the Constitution bought into the idea that ESC rights were not true rights and that they related instead to goals, policies and programmes. This might indeed be the case if one compares such rights to civil and political rights. However, as pointed out by Eide and Rosas,²⁰⁰ fundamental needs should not be at the mercy of governmental policies and programmes, but should be defined as entitlements.²⁰¹ Treating ESC entitlements as mere political programmes undermines the fundamental principle that human rights

197 See Article 91(a) of the Constitution of the Republic of Namibia.

198 See Reif, LC. 2000. "Building democratic institutions: The role of national human rights institutions in good governance and human rights protection". *Harvard Human Rights Journal*, 13; <http://www.law.harvard.edu/students/orgs/hrj/iss13/reif.shtml>; last accessed 12 January 2006; quoted in Mubangizi, JC. 2006. "The constitutional protection of socio-economic rights in selected African countries: A comparative evaluation". *Afr. J. Legal Stud.*, 1:1–19.

199 (ibid.).

200 Asbjørn, E & R Allan. 2001. *Economic, social and cultural rights: A universal challenge*. Dordrecht: Martinus Nijhoff, p 3.

201 (ibid.).

are inalienable. Several authors have shown the unsoundness of viewing ESC rights as ‘spurious rights’. For example, in 1986, a group of distinguished experts in international law meeting in Maastricht observed that, as human rights and fundamental freedoms were indivisible and interdependent, equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political rights and ESC rights.²⁰² Similarly, at a meeting held in Abuja, Nigeria, in 1999 between local and international human rights actors, the Secretariat of the African Commission, academics, journalists, legal experts, the Nigerian Human Rights Commission, and traditional community leaders, participants decried the failure of the African Commission on Human and People’s Rights to concretely engage the continent’s human rights problems and address Africa’s pervasive ESC rights denials.²⁰³

Current practices in Namibia show that ESC entitlements are still not regarded as legal rights unto themselves. It comes as no surprise, therefore, that documents such as the NSHR’s 2007 Annual Report²⁰⁴ would reveal that a disproportionate number of people in the country still live in abject poverty, do not enjoy an adequate standard of living, are unemployed, are extremely poor, and live in squalid living conditions in informal settlements. Needless to say, the situation as sketched above is incompatible with the government’s obligations to protect, respect and fulfil the ESC rights/entitlements of the people. The perception of ESC rights as unenforceable principles of state policy cannot be left unchallenged, therefore. Such an attitude is defeatist and contrary to the principle that all human rights and fundamental freedoms are indivisible and interdependent. An expansive and purposive reading of the Namibian Constitution may indeed lend itself to the successful invocation of ESC rights under the current constitutional dispensation. The following section will seek to clarify my statement.

202 *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*. UN Doc. E/CN.4/1987/17.

203 International Human Rights Internship Program & Asian Forum for Human Rights and Development. 2000. Circle of rights – Economic, social and cultural rights activism: A training resource. Washington, DC: IHRIP, p. 541.

204 National Society for Human Rights. 2007. *Namibia: Human Rights Report 2007*. Windhoek: NSHR, pp 12–19.

The enforcement of ESC rights in Namibia: A constitutional dilemma?

According to Liebenberg,²⁰⁵ there is either a direct or an indirect way to protect ESC rights as justiciable rights within the domestic legal system. The South African Constitution provides a clear example of the direct protection of ESC rights, by containing a detailed catalogue of these entitlements in its Bill of Rights. Such an entrenchment of ESC rights allows individuals and groups whose rights have been violated to seek redress from the courts. ESC rights are protected indirectly through an expansive interpretation of certain civil and political rights.

I argue that ESC rights can be enforced both directly and indirectly under the Namibian Constitution. The direct way would be grounded on the creative device of Article 144 of the Constitution, which reads as follows:

Unless otherwise provided for by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Applying Article 144 to the ICESCR, therefore, means that the Covenant – as ratified by Parliament – became part of the corpus of law of Namibia on the date it entered into force for Namibia on 28 February 1995. The construction of Article 144 presupposes that the provisos and entitlements of the ICESCR have direct and immediate application within the Namibian legal system, thereby enabling individuals to seek enforcement of their internationally recognised ESC rights in Namibian courts. Article 144 thus potentially opens the door for Namibian citizens to appreciate the importance of the world beyond their own country in the definition and enforcement of human rights.²⁰⁶ Indeed, the Article in question has in the past been relied upon to invoke certain provisions of international instruments binding on Namibia. For example, in *Kuaesa v Minister of Home Affairs & Others*, the court held that the African Charter on Human and Peoples' Rights had become binding on Namibia and formed part of the law of Namibia and, therefore, had to be given effect in Namibia.²⁰⁷ The case of *Michael Andreas*

205 Liebenberg, S. 2001. *The protection of economic, social and cultural rights in domestic legal systems*. The Hague: Global Law International, pp 57–78.

206 Mutasah, T. 2004. "The justifiability of socio-economic rights in southern Africa". The OSISA Journal, 4, 3, November:1.

207 Case No. A 125/94, unreported, pp 78–9.

Müller & Imke Engelhard v Namibia was another instance in which the utility of Article 144 was at issue. *In casu*, the United Nations Human Rights Committee, relying on Article 144, held that Article 26 of the International Covenant on Civil and Political Rights had direct application in Namibia, and that certain provisions of the Aliens Act, 1937 (No. 1 of 1937) (as amended in South Africa to February 1978) were inconsistent with the equality and non-discrimination guarantees contained under Article 26 of the Covenant. As such, the Committee directed the Namibian government to allow the husband in question to adopt his wife's surname, despite the government's objections.²⁰⁸ This decision confirms the international-law-friendly nature of the Namibian Constitution. However, sceptics claim that such friendliness only extends to the enforcement of civil and political rights, and not to ESC rights. Needless to say, such a construction bespeaks a thin and impoverished version of Article 144.

It further downplays the now undisputed fact that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Such sceptics are further reminded that, as per the principles of public international covenants, states are precluded from invoking provisions in their domestic laws to escape their international obligations. Therefore, the Namibian government, like any other state party to the Covenant, is obliged to take steps – including the adoption of legislation – to the maximum of its resources so as to progressively achieve the full realisation of all the ESC rights recognised and protected in the Covenant.²⁰⁹ It is submitted that, through the creative device of Article 144, the ICESCR may be directly invoked in the Namibian legal system.

ESC rights may also receive constitutional protection through an expansive interpretation of certain civil and political rights, such as the right to life, human dignity, equality or security of person.²¹⁰ This entails the indirect protection of ESC rights as justiciable rights within the domestic legal system. The best example of this type of protection is found in Indian constitutional jurisprudence, where the Directive Principles of State have been interpreted to give content to the civil and political rights as contained in the Bill of Rights of the Indian

208 United Nations Human Rights Committee. *Communication No. 919/2000: Namibia. Mr Michael Andreas Müller and Imke Engelhard v Namibia*. CCPR/C/74/D/919/2000, 28 June 2000.

209 See Article 2 of the ICESCR.

210 Footnote 25, *supra*.

Constitution. For instance, in the *Francis Coralie Mullin* case, the Indian Supreme Court declared that –²¹¹

[t]he right to life includes the right to live with human dignity and with all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing, shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter, include the bare necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.

The Indian experience with regard to overcoming the so-called constitutional dilemma, namely ESC entitlements, is of particular relevance to Namibia. Both constitutions contain elaborate catalogues of civil and political rights compared to scant ESC provisions/entitlements. In both constitutions, ESC entitlements are formulated as directive principles of state policies as opposed to enforceable rights. Also, both constitutions contain draw-back clauses precluding their respective courts to enforce the ESC entitlements.

Both constitutions also create a *prima facie* constitutional dilemma/impasse, namely the enforcement of ESC rights in their respective jurisdictions. This ‘dilemma’ has been treated differently in the two countries. The Indian judiciary has, through creative interpretation, pioneered a process of interpreting civil and political rights in a manner that would help give a dynamic legal character to ESC rights.²¹² In Namibia, lawyers, academics, the courts and ESC rights advocates have come to accept the situation as unbridgeable and beyond their powers. However, in India, ESC rights advocates – supported by the judiciary – refused to adopt such a defeatist attitude.

The difference in the two countries’ approaches and/or attitudes is telling. In India, the debate regarding the legal standing of ESC rights there has been settled, whereas, in Namibia, we are still grappling with the artificial divide between civil and political rights and ESC rights.

211 *Francis Coralie Mullin v The Administrator*, Union Territory of Delhi, (1981) 2 SCR 516 at 529.

212 Mutasah (2004:8).

The Indian judiciary succeeded in dispelling the perceived constitutional dilemma brought about by the Directive Principles of State policy. Through their expansive interpretation of these principles, the courts in that country have shown that the law can be used to fight poverty.

Conclusion

In this paper I argued that ESC rights need to be given greater prominence in order to address the high levels of inequality, poverty and social exclusion in Namibia. I further argued that it is indeed possible to invoke ESC rights within the Namibian legal system. I have shown that this can be done by either directly invoking these rights based on Article 144 of the Constitution, or indirectly through the expansive interpretation of certain civil and political rights as was done in Indian jurisprudence. With regard to human rights NGOs and state institutions, I have shown that there is a bias towards civil and political rights in their monitoring mandates.

In view of the above, I submit the following recommendations:

- The government should submit its periodic reports on the status of ESC rights in the country to the Committee on Economic, Social and Cultural Rights (CESCR), as per the provisions of the ICESCR. The government should further take concrete steps to ensure the protection, respect and fulfilment of all ESC rights.
- Human rights NGOs should expand the scope of their work to include ESC rights. They should also educate the general public about the scope and content of the various ESC rights. Furthermore, NGOs should remind government of its obligation to file its periodic reports to the CESCR, and should complement such reports with their own shadow reports. The LAC, as the only public-interest law centre, should consider the institution of public interest litigation as a way to seek enforcement of ESC entitlements.
- The Office of the Ombudsman should use its constitutional mandate more proactively to investigate all human rights violations, with a particular focus on ESC rights.
- The judiciary should learn from the best practices of the Indian jurisprudence when confronted with a claim involving ESC rights.

Third-generation human rights and the protection of the environment in Namibia

Oliver C Ruppel

Introduction

This paper examines the role of third-generation human rights and their implication in respect of the protection of the environment. In the first part, the emergence of third-generation human rights and the interrelationship between the rule of law and the protection of the environment in Namibia will be examined. For comparative purposes, reference will also be made to the situation in South Africa. The second part of this article reflects on environmental law and policy in Namibia, again with special attention to human rights. The third part focuses on current human rights and environment-related challenges for Namibia. Burning issues like climate change and poverty, the exploitation of natural resources and atomic energy, as well as international trade, globalisation and foreign investment are reflected with regard to the interrelationship between human rights and the environment. The Ramatex case exemplifies how liberal trade and globalisation driven by investment and profit motives can equally violate human rights and threaten the ecosystem.

Third-generation human rights

Third-generation human rights and the environment

Taking into account the strong factual relationship between environmental degradation and the impairment of human rights, it is important to consider how these two fields interrelate within the law. Various constitutions²¹³ of the world regard the right to a safe, healthy and ecologically balanced environment as an independent human right.

The Czech jurist and first Secretary General of the International Institute for Human Rights in Strasbourg divided human rights into three generations as

213 See *infra* section 24 of the 1996 South African Constitution.

early as 1977. The so-called first-generation (human) rights²¹⁴ refer to traditional civil and political liberties prominent in Western liberal democracies, such as freedom of speech, religion, and the press, as well as freedom from torture, which presuppose a duty of non-interference on the part of government towards individuals. These rights are the ‘classical’ human rights contained in notable instruments such as in Chapter 3 of the Constitution of the Republic of Namibia. For many years, the dominant position was that only these rights were genuine human rights.²¹⁵

Second-generation rights have generally been considered as rights which require affirmative government action for their realisation. Second-generation rights are often styled as *group rights* or *collective rights*, in that they pertain to the well-being of whole societies. In contrast with first-generation rights, which have been perceived as individual entitlements, particularly the prerogatives of individuals, second-generation rights are held and exercised by all the people collectively or by specific subsets of people. Examples of second-generation rights include the right to education, work, social security, food, self-determination, and an adequate standard of living. These rights are codified in the International Covenant on Economic, Social and Cultural Rights (1966),²¹⁶ and also in Articles 23–29 of the Universal Declaration of Human Rights (1948).²¹⁷ Writers reluctant to recognise second-generation rights as human rights have often based their arguments on the assumption that courts are unable to enforce affirmative duties on states and that such rights are, therefore, mere aspirational statements. Similarly, critics have opined that, regardless of the political system or level of economic development, all states are able to comply with civil and political rights, but not all states have the ability to provide the financial and technical resources for the realisation of affirmative obligations such as education and an adequate standard of living.²¹⁸

214 The terminology was introduced by Karel Vasak; see Vasak, Karel. “Human rights: A thirty year struggle. The sustained efforts to give force of law to the Universal Declaration of Human Rights”. *UNESCO Courier*, 30:11.

215 Steiner, HJ, P Alston & R Goodman (Eds.). 2008. *International human rights in context: Law, politics, morals* (Third Edition). Oxford: Oxford University Press.

216 1966 United Nations International Covenant on Economic, Social and Cultural Rights; see www.unhchr.ch/html/menu3/b/a_ceschr.htm; last accessed 29 March 2008.

217 1948 United Nations Universal Declaration of Human Rights; see <http://www.unhchr.ch/udhr/lang/eng.htm>; last accessed 29 March 2008.

218 On the classification of human rights, see Parker, C. 2002. *Human rights law*. Leicestershire: Upfront Publishing, p 39f.

Third-generation or ‘solidarity’ rights are the most recently recognised category of human rights.²¹⁹ This grouping has been distinguished from the other two categories of human rights in that its realisation is predicated not only upon both the affirmative and negative duties of the state, but also upon the behaviour of each individual. Rights in this category include self-determination as well as a host of normative expressions whose status as human rights is controversial at present. These include the right to development, the right to peace, the right to a healthy environment, and the right to intergenerational equity.²²⁰

The right to a healthy environment requires a healthy human habitat, including clean water, air, and soil that are free from toxins or hazards that threaten human health. The right to a healthy environment entails the obligation of governments to –

- refrain from interfering directly or indirectly with the enjoyment of the right to a healthy environment
- prevent third parties such as corporations from interfering in any way with the enjoyment of the right to a healthy environment, and
- adopt the necessary measures to achieve the full realisation of the right to a healthy environment.

However, do individuals really have the ‘challengeability’ when it comes to human rights and environmental law and policy, or are these still considered to be merely aspirational ‘soft law’?

The rule of law and the environment in Namibia

Environmental degradation and climate change increasingly receive international coverage within the context of human rights issues. Recognition of the link between the abuse of the human rights of various vulnerable communities and related damage to their environment is expressed under the term *environmental justice*. In both the industrialised and developing parts of the world, a growing body of evidence demonstrates that poor and other disenfranchised groups have been the greatest victims of environmental degradation.

219 Recent reference has been made to so-called fourth-generation human rights or ‘communication rights’, which are concerned with human rights in the information society.

220 Kiss, A & D Shelton. 2004. *International environmental law*. Ardsley, NY: Transnational Publishers, p 12ff.

The concept of *environmental justice* embraces two objectives. The first is to ensure that rights and responsibilities regarding the utilisation of environmental resources are distributed with greater fairness among communities, both globally and domestically. This entails ensuring that poor and marginalised communities do not suffer a disproportionate burden of the costs associated with the development of resources, while not enjoying equivalent benefits from their utilisation. The second is to reduce the overall amount of environmental damage domestically and globally.

In Namibia, the Constitution is the fundamental and supreme law of the country. It excels in being a Constitution guaranteeing human rights by comprehensive coverage and provisions set out in clear language.²²¹ Human rights are justifiable as their protection can be secured through the courts. As part of the Bill of Rights under Chapter 3 of the Namibian Constitution, Article 10 provides as follows:

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

Article 12 of the Namibian Constitution contains the provisions for fair trial. The principle of the rule of law runs throughout the constitutional regime.²²² The doctrine of the separation of legislative and executive powers from those of the independent judiciary is guaranteed. The doctrine of the separation of powers recognises the existence of three organs of state: the executive, the legislature, and the judiciary, as provided for by Article 1(3) of the Constitution, but it also recognises that, in order to guarantee and protect the civil liberties of the individual and to prevent dictatorship and absolutism, there need to be established mechanisms that are capable of putting constitutional and legal restraints on the powers of government or the various organs of state. Various mechanisms are put in place to ensure that each branch of government remains independent of the other, through a system of checks and balances.²²³

221 Ruppel, OC. (Forthcoming). "Nature conservation in Namibia: Customary law to complement statutory environmental law?". *UNEP Journal of African Environmental Law and Policy*, Volume 2008:1ff.

222 Hinz, MO. 2003. "The rule of law and the new African constitutionalism". In Hinz, MO (Ed.). 2003. *Without chiefs there would be no game: Customary law and nature conservation*. Windhoek: Out of Africa Publishers, p 273.

223 Diescho, J. 1994. *The Namibian Constitution in perspective*. Windhoek: Gamsberg Macmillan Publishers, p 70ff.

Article 78(2) and (3) guarantee the independence of the judiciary, and provide that courts shall be independent and subject only to the Constitution and the law. Article 25(2) of the Constitution provides that –²²⁴

[a]ggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

The relevant clause for the environment is Article 95(l), which stipulates that –

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

...

- (l) *maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future;*

Furthermore, when it comes to the protection of the environment, Article 91(c) includes in the functions of the Ombudsman –

... the duty to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia;

... .

The Constitution and the Ombudsman Act, 1990 (No. 7 of 1990) spell out the key mandate areas and powers of the Ombudsman, which include the protection, promotion and enhancement of respect for human rights and the environment in Namibia. In dealing with this mandate, the Ombudsman has a two-pronged approach: first, a complaint will be received from an aggrieved person and investigated. If satisfied that a violation in the light of the above has occurred, the Ombudsman may provide suitable remedies, including those provided for in the Ombudsman Act and in Article 25(2) of the Constitution. Article 100 of the Constitution provides that, all natural resources, including water, vest in the state, unless otherwise legally owned.

224 (ibid.).

It can be concluded that the Constitution merely sets the environmental framework. The wide range of national environmental policies and laws will now be discussed, after a brief comparative look over the border to Namibia's neighbour, South Africa.

Human rights and the environment in South Africa

In South Africa, the 1996 Constitution takes into considerable account the strong factual relationship between environmental degradation and the impairment of human rights. Under section 24 of the South African Constitution, everyone has the right to an environment that is not harmful to their health or well-being. It adds that the government is obliged to act reasonably to protect the environment by preventing pollution, promoting conservation, and securing sustainable development, while building the economy and society.²²⁵ Section 24 demonstrates that the right to a healthy environment is part of socio-economic rights. This right is often applied by the court to give a meaningful interpretation of the right to life.

Section 9(2) of the Constitution deals with the right to equality, including "the full and equal enjoyment of rights and freedoms". It declares that the state may take steps to protect or advance individuals or groups that have been disadvantaged by unfair discrimination, with the aim of promoting the achievement of equality. Without access to education, sufficient food, health care and housing, poor people will not be able to participate equally in the social life of the country. To ensure that the environmental rights under the Constitution are fulfilled, the government must follow transparent and reasonable procedures. Section 32 deals with the right of access to information, while section 33 deals with the right to a just administrative decision. Section 32 can be used by community groups to find out more about harmful industrial development that will have a detrimental effect on their life and well-being. These rights are not absolute and can be limited,

²²⁵ Section 24 reads as follows: "Everyone has right (a) to an environment that is not harmful to their health or well-being[;] and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".

provided the limitation is reasonable and justifiable in a democratic society based on human dignity, equality and freedom (section 36 of the Constitution).²²⁶

In order to effectively protect environmental rights, the government passed the National Environmental Management Act, 1998 (No. 107 of 1998), which creates a set of environmental principles that show the government how it should act. The government also passed the Promotion of Access to Information Act, 2000 (No. 2 of 2000). This Act outlines which information would be available and how to go about asking for it from the government and from private individuals.

Public participation in decision-making is another important area. The Promotion of Administrative Justice Act, 2000 (No. 3 of 2000) explains what the constitutional right to just administrative action means. The kind of environmental concerns that can be raised include destruction of plants and animals, pollution, loss of jobs and small businesses, and loss of property values. Government is obliged to make sure that development which meets present needs must not compromise the needs of future generations.²²⁷

Section 27(1)(b) of the South African Constitution guarantees the right of everyone to have access to sufficient food and water, while section 28(1)(c) gives children the right to basic nutrition. The environmental rights protected under the Constitution are closely related to the right of access to sufficient water. The environmental rights place duties on the state to prevent the pollution and ensure conservation of water resources. One of the central goals of the government's water policy is to ensure equitable access by all South Africans to the nation's water resources, and to end discrimination in access to water on the basis of race, class or gender. Section 38 lists the people who have the right to approach a competent court with allegations that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are —²²⁸

- anyone acting in their own interest
- anyone acting on behalf of another person who cannot act in their own name

226 See Glazewski, J. 2005. *Environmental law in South Africa* (Second Edition). Durban: LexisNexis Butterworths, p 15ff.

227 Razzaque, J. 2002 (online). *Human rights and the environment: The national experience in South Asia and Africa*. <http://www.unhchr.ch/environment/bp4.html>; last accessed 16 March 2008.

228 See Glazewski (2005:15ff).

- anyone acting as a member of, or in the interest of, a group or class of persons
- anyone acting in the public interest, and
- an association acting in the interest of its members.

Environmental law and policy in Namibia

Constitutional law

Article 95(l) of the Namibian Constitution stipulates clearly that –

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

...

- (l) *maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future;*

Thus, the Namibian Constitution lays the foundation for all policies and legislation in Namibia and contains two key environmental clauses with a human rights outreach, namely Article 95(l) and Article 91(c).²²⁹ In the light of this foundation, the following section will briefly monitor environmental policies and legislation applicable in Namibia.

International law

Namibia is party to various international human rights²³⁰ and environmental covenants,²³¹ treaties, conventions and protocols and is, therefore, obliged to conform to their objectives and obligations. As to the application of international

229 Supra.

230 As far as can be established, Namibia has formally recognised the African Charter in accordance with Article 143 read with Article 63(2)(d) of the Constitution. The provisions of the Charter have, therefore, become binding on Namibia, and form part of Namibian law in accordance with Articles 143 and 144 of the Constitution. See also Viljoen, F. 2007. *International human rights law in Africa*. Oxford: Oxford University Press, p 549f.

231 See e.g. Hinz, MO & OC Ruppel (Eds.). (Forthcoming). “Customary law, biodiversity and the protection of the environment: Case studies from Namibia”. Windhoek: Namibia Scientific Society, p 13ff.

law, after independence, a new approach was formulated, as embodied in the Namibian Constitution. Article 144 therein provides that –

[u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Thus, the Constitution explicitly incorporates international law and makes it part of the law of the land. Ab initio, public international law is part of the law of Namibia.²³² No transformation or subsequent legislative act is needed.²³³ However, international law has to be in conformity with the provisions of the Constitution in order to apply domestically. In case a treaty provision or other rule of international law is inconsistent with the Namibian Constitution, the latter will prevail. Article 144 of the Namibian Constitution mentions two sources of international law which will be applicable in Namibia: general rules of public international law, and international agreements binding upon Namibia. General rules of public international law include rules of customary international law supported and accepted by a representatively large number of states. The notion of *international agreements* refers, in the first place, to *treaties* in the traditional sense, i.e. international agreements concluded between states in written form and governed by international law,²³⁴ but also includes conventions, protocols, covenants, charters, statutes, acts, declarations, concords, exchange of notes, agreed minutes, memoranda of agreement, etc.²³⁵

It needs to be noted that not only agreements between states, but also agreements with the participation of other subjects of international law, e.g. international organisations, are covered by the term *international agreements*. In general, international agreements are binding upon states if the consent to be party to such treaty is expressed by –

232 See Tshosa, O. 2001. National law and international human rights law: Cases of Botswana, Namibia and Zimbabwe. Burlington: Ashgate Publishing Company, p 79ff.

233 Erasmus, G. 1991. “The Namibian Constitution and the application of international law in Namibia”. In Van Wyk, D, M Wiechers & R Hill. *Constitutional and international law issues*. Pretoria: VerLoren van Themaat Centre for Public Law Studies, p 94.

234 Definition in Article 1 of the Vienna Convention on the Law of Treaties of 1969, which entered into force in 1980.

235 See also the definition of *treaty* proposed by the International Law Commission, in Article 2(a) of the Draft Articles on the Law of Treaties, with commentary; available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf; last accessed 17 March 2008.

- signature, followed by ratification
- accession, where the state is not a signatory to a treaty, or
- declaration of succession to a treaty concluded before such a state existed as a subject of international law.

A treaty will be binding upon Namibia in terms of Article 144 of the Constitution if the relevant international and constitutional requirements have been met. A treaty has to have entered into force in terms of the law of treaties, and the constitutional requirements need to have been met. International agreements will, therefore, become Namibian law from when they come into force for Namibia.²³⁶ The conclusion of or accession to international agreements is governed by Articles 32(3)(e), 40(i) and 63(2)(e) of Namibia's Constitution. The executive is responsible for conducting Namibia's international affairs, including entry into international agreements. The President, assisted by the Cabinet, is empowered to negotiate and sign international agreements, and to delegate such power. It is required that the National Assembly agrees to the ratification of or accession to international agreements. A promulgation of international agreements in order for them to become part of the law of the land is, however, not required by the Constitution.²³⁷

Statutory law

Sectoral legislation covering the protection of the environment is wide-ranging in Namibia. Namibia as a country has numerous legislative instruments that provide for the equitable use of natural resources for the benefit of all. Within its legislative framework, Namibia has provided extensively for safeguard measures to protect the environment. The implementation of this legislative framework is a mammoth task. Although this paper is not the forum to introduce the said legal instruments dealing with the environment in Namibia, worth mentioning is the Environmental Management Act, 2007 (No. 7 of 2007), which was recently passed by Parliament. Its aim is to –

- promote the sustainable management of the environment and the use of natural resources by establishing principles for decision-making on matters affecting the environment
- establish the Sustainable Development Advisory Council

236 Erasmus (1991:102f).

237 (ibid.).

- provide for the appointment of an Environmental Commissioner and Environmental Officers, and
- provide for the process of assessment and control of activities which may have significant effects on the environment.

How far this new piece of environmental legislation will cross-fertilise in respect of protecting and implementing human rights will only be seen with time.

National policy

Despite the broad variety of existing national sectoral environmental legislation, recent policy and legislative reforms have created a unique opportunity for Namibia to incorporate environmental sensitivity, including for the sake of human rights protection. Namibia's Vision 2030²³⁸ was launched by the Founding President, Dr Sam Nujoma, in June 2004. The Vision's rationale is to provide long-term alternative policy scenarios on the future course of development in the country at different points in time up until the target year of 2030. Chapter 5 of Vision 2030 states the following:²³⁹

The integrity of vital ecological processes, natural habitats and wild species throughout Namibia is maintained whilst significantly supporting national socio-economic development through sustainable low-impact, high[-]quality consumptive and non-consumptive uses, as well as providing diversity for rural and urban livelihoods.

One of the long-term aims of Vision 2030 is the availability of clean, unpolluted water, and productive and healthy natural wetlands with rich biodiversity.²⁴⁰ Vision 2030 regards the sequential five-year National Development Plans (NDPs) as the main vehicles for achieving its long-term objectives.

In 1992, Namibia presented its Green Plan to the United Nations Conference on Environment and Development (UNCED) in Rio. As a direct result of UNCED,

238 Government of the Republic of Namibia, Office of the President. 2004. *Namibia Vision 2030: Policy framework for long-term national development*. Windhoek: AIM Publications; available at <http://www.npc.gov.na>.

239 (ibid.:167).

240 For more detailed information on wetlands in Namibia, see Ruppel, OC & S Bethune. 2007. *Review of Namibia's policy and legislative support to the sustainable use of wetlands in the Zambezi Basin: Report for IUCN*; available at http://www.ramsar.org/wn/w.n.namibia_review.htm.

the United Nations Framework Convention on Climate Change (UNFCCC) was established. The Convention became effective in March 1994, following ratification by the required number of governments. Namibia acceded to the Convention in 1995.²⁴¹

The successive NDPs will contain the goals and intermediate targets (milestones) that will eventually lead to the realisation of Vision 2030. NDP2,²⁴² which spanned the period 2001/2–2005/6, sought sustainable and equitable improvement in the quality of life of all the people in Namibia. The national development objectives were to —²⁴³

- reduce poverty
- create employment
- promote economic empowerment
- stimulate and sustain economic growth
- reduce inequalities in income distribution and regional development
- promote gender equality and equity
- enhance environmental and ecological sustainability, and
- combat the further spread of HIV/AIDS.

NDP3 spans the five-year period 2007/8–2011/2.²⁴⁴ The draft guidelines for the formulation of NDP3 were prepared in the latter part of 2006, and approved by Cabinet in December that year.²⁴⁵ The predominant theme of NDP3 is defined as accelerated economic growth through deepening rural development,²⁴⁶ while the productive utilisation of natural resources and environmental conservation are key result areas. Principal environmental concerns include water, land, marine, natural resources, biodiversity and ecosystems, drought, and climate change. Waste management and pollution will grow in significance with increasing industrialisation.

NDP3 recognises that, with the country's scarce and fragile natural resource base, the risk of overexploitation is considerable, and that sustained growth

241 See <http://www.dea.met.gov.na>.

242 Government of the Republic of Namibia. 2002. *Second National Development Plan (NDP2)*. Windhoek: National Planning Commission.

243 Ruppel & Bethune (2007:14), *supra*.

244 Text available at <http://www.npc.gov.na>.

245 *Guidelines for preparing the Third National Development Plan (NDP3): 2007/08–2011/12*; <http://www.npc.gov.na>; last accessed 13 January 2008.

246 (*ibid.*).

is highly dependent on sound management of these resources. The guidelines for preparing NDP3 stipulate that the renewable resource capital needs to be maintained in quantity and quality. This is to be achieved by reinvesting benefits into natural resources by way of diversifying the economy away from resource-intensive primary sector activities, and by increasing productivity per unit of natural resource input. Two NDP3 goals ensuring the protection of environmental concerns are the optimal and sustainable utilisation of renewable and non-renewable resources on the one hand, and environmental sustainability on the other.

Customary law

The Traditional Authorities Act, 2000 (No. 25 of 2000) provides certain powers, duties and functions to Traditional Authorities and their members.²⁴⁷ The Act regulates the establishment of a Traditional Authority for every traditional community which could consist of the designated and recognised Chief or head of that community, the senior traditional councillors, and traditional councillors appointed or elected in accordance with the Act. Inter alia, the Act empowers the Traditional Authority to —²⁴⁸

... ensure that the members of his or her traditional community use the natural resources at their disposal on a sustainable basis and in a manner that conserves the environment and maintains the ecosystems for the benefit of all persons in Namibia.

This implies that the onus is on the communities to maintain and ensure that they safeguard their way of living. This entails their customary laws as well, including the protection of the environment within traditional areas. The majority of indigenous Namibians still live in accordance with their respective customary laws. After independence, Namibia gave the same degree of recognition to customary law as it accorded to common law. This is contained in Article 66 of the Constitution, which states that both customary law and common law are to be recognised as far as they are not repugnant to the provisions of the Constitution.²⁴⁹ This leads to the conclusion that customary law should also reflect the recognition of human rights when it comes to the protection of the environment.

247 Section 3.

248 Section 3(2)(c).

249 Ruppel (Forthcoming), *supra*.

Human rights in the light of environmental challenges in Namibia

Climate change and poverty

A prognosis for Africa is that, by 2050, millions of persons will be suffering from water shortages associated with climate change. Indeed, climate change is already affecting people across Africa, and will wipe out efforts to tackle poverty on the continent unless urgent action is taken. Global warming means that many dry areas are going to get drier and wet areas are going to get wetter. The great tragedy is that Africa has played virtually no role in global warming – a problem which was primarily been caused by economic activity in rich, industrial nations. At a recent conference in Geneva on climate change and migration, United Nations officials said rising sea levels and intense storms, droughts and floods could force people from their homes and off their lands – some permanently.²⁵⁰ “Global warming and extreme weather conditions may have calamitous consequences for the human rights of millions of people,” was the way Kyung-wha Kang, UN Deputy High Commissioner for Human Rights, put it.²⁵¹

In the light of the above, it is predicted that agricultural production will decrease, suitable cultivation areas will be reduced, the length of growing seasons will be shortened, and yields will be compromised – all of which will affect food security and malnutrition. Local food supplies are expected to decrease due to decreasing fisheries, while coastal areas affected by a rise in sea levels will also be problematic. The social impacts of climate change will increase the vulnerability of specific groups and populations. This vulnerability has become a key element in human rights discussions, which focus on how flooding, devastated housing, changes in the supply of fresh and irrigation water, infectious diseases, prolonged droughts and subsequent forced migration, deforestation, and flooding, amongst others, will impact human lives. To mention but a few of the burning issues associated with climate change, there are poverty and hunger due to reduced livelihood assets; insufficient primary education caused by deteriorated infrastructure and displacement; child mortality as a result of extreme weather events; and maternal health problems stemming from the effects of weather and drought. Climate change can affect the capacity of vulnerable countries, communities, and

250 For example, large parts of northern Namibia have again been heavily flooded this year, forcing thousands of people – mostly the poorest – to evacuate their homes; see various articles in *New Era* and *The Namibian*, 14 March 2008.

251 Reuters, 20 February 2008.

and individuals to realise their human rights. It is important, therefore, to assess the impact of climate change on human rights.²⁵²

Exploitation of natural resources, uranium mining and atomic energy

Moreover, the international run for Namibia's natural resources continues.²⁵³ The expected depletion of fossil fuels like oil and gas and the resulting increase in electricity prices are forcing the world's energy industry to look at nuclear power to meet future needs for electricity provision. Namibia also came under the spotlight, with foreign investors from, amongst others, Canada, China, Japan, and Russia arriving in droves to secure supplies or mining rights, expecting a boom in uranium mining.²⁵⁴

252 Kiss & Shelton (2004:307), *supra*.

253 Goanikontes, Langer Heinrich, Rössing, and Trekkopje are names related to major Namibian mining projects. Other prospective projects include the Kudu gas field located 140 km offshore from Oranjemund, and the Kunene No. 1 oil drilling area along the Namibian coastline.

254 An article by Brigitte Weidlich in *The Namibian* of 4 January 2008 summarises the ongoing activities, as follows: "Rössing Uranium, Namibia's 30-year-old uranium mine, has extended its lifespan to 2026, despite being slated for closure barely two years ago. Rössing intends to develop two newly discovered uranium deposits east of the existing mine, which requires the construction of an additional wastewater (tailings) dam and the construction of an on-site sulphuric acid production plant. Consultants are currently drafting an environmental impact assessment (EIA) for the new developments, after a preliminary scoping report towards the end of last year. The acid plant is necessary to produce 'yellowcake' uranium from the ore. According to the scoping report, the acid plant will require 1 000 cubic metres of water daily ... Langer Heinrich Uranium (LHU) is the second uranium mine in Namibia after Rössing. It is situated in the Namib-Naukluft Park east of Walvis Bay and became operational 13 months ago. It belongs to an Australian mining company, Paladin Energy, formerly Paladin Resources[,] and has a mining licence until 2030. Several foreign mining companies, dominated by Canadian firms, hold over 60 exploration licences (EPLs) for uranium, ranging from Tsumkwe to the Skeleton Coast, Kaokoveld, Rehoboth, Lüderitz and even Warmbad. The majority of EPLs issued are for the Erongo Region. Since the year 2000, the price of uranium has risen from a low of US\$7 per pound to over US\$100 per pound in November 2007. Most energy analysts are predicting a global uranium shortage of some 45 000 tonnes or 100 million pounds over the next decade, unless significantly more mines are brought into production. Bannerman Resources from Australia holds exploration licences at Goanikontes in the Namib Desert. A full feasibility study will be undertaken this year [2008], with construction planned near Goanikontes in 2009 and production to start in 2010. It found significant uranium ore deposits, as far as 300 metres deep, over the 2.3-km-long stretch during drilling in December 2007. Canadian company Uramin holds EPLs at Trekkopje and Klein Trekkopje in the Namib Desert east of Arandis. It was bought by French government energy company Areva last year for US\$2.5 billion (about N\$17.5

Such extensive natural exploitation of resources not only brings destructive effects to ecosystems and habitats that support essential living resources, but these activities also need to be monitored with regard to their impacts on human rights. Only recently, Namibian environmental and human rights groups have joined ranks to oppose the government's plan to partner with Russia to build a nuclear plant, which is seen as a panacea to the country's electricity woes.²⁵⁵

International trade, globalisation and foreign investment: The Ramatex case

Notwithstanding the disputable question of whether or not market freedoms and freedom of trade have a human rights character of a fundamental nature,²⁵⁶ the recent Namibian case of Ramatex has demonstrated how the two fields of human rights and globalised investment can intersect and how human rights violations and environmental damage can occur concurrently. In 2001, the Ministry of Trade and Industry announced that it had succeeded in attracting a N\$1 billion (US\$143 million) investment project – ahead of South Africa and Madagascar, which had also been considered as investment locations – by the Malaysian multinational textile company, Ramatex. The plant turned cotton (imported duty-free from West Africa) into textiles for the United States market. This was achieved by offering concessions in the form of an export processing zone (EPZ).²⁵⁷ EPZs

billion). Uramin wants to mine those 'significant uranium deposits' for about 15 years should it receive the go-ahead from the Ministry of Mines and Energy. Areva agreed in 2007 to supply 35 per cent of its uranium production – including from Africa – for at least the next 14 years to China. Areva will also build, operate and supply two nuclear reactors in the Chinese province of Guangdong. Areva's Namibian uranium mining near Trekkopje requires about 20 million cubic metres of water per year. NamWater cannot supply sufficient amounts of water for the Trekkopje uranium mine project. Therefore, Uramin plans to build a 15 million cubic metre per year desalination plant near Wlotzkasbaken at the coast. The pipeline that will connect the proposed Trekkopje uranium mine to the desalination plant will traverse unique lichen fields only found in this area ...".

255 In a statement made to the South African Press Association on 29 March 2007, the NSHR Director, Phil ya Nangoloh, said that the "NSHR and environmentalist Earthlife Namibia have teamed up to roundly condemn the nuclear plant concept, urging the International Atomic Energy Agency to keep a keen eye on the developments".

256 See Petersmann, EU. 2005. "Human rights and international trade law: Defining and connecting the two fields". In Cottier, T, J Paulwyn & E Buerger (Eds.). *Human rights and international trade*. Oxford: Oxford University Press, p 29ff.

257 See also *New Era*, 14 March 2008.

are usually schemes to attract foreign direct investment. The Export Processing Zones Act, 1995 (No. 9 of 1995) exempts companies from sales or value added tax payable in Namibia, and from all customs or excise duties for goods imported into the EPZ or manufactured in the EPZ. This piece of legislation supports the establishment, development and management of EPZs in Namibia, which are demarcated either in terms of section 2 or section 19 of the Act, with the object of —²⁵⁸

- attracting, promoting or increasing the manufacture of export goods
- creating or increasing industrial employment
- expanding export earnings and foreign investment, and
- encouraging technology transfer and the development of management and labour skills in Namibia.

The City of Windhoek and the Ministry of Trade and Industry put together a scheme with an incentive package that included subsidised water and electricity, a 99-year tax exemption on land use, and over N\$1 billion million (US\$143 million) to prepare the site, including the setting up of electricity, water and sewerage infrastructure. From the beginning, a debate focused on controversies surrounding Ramatex's environmental impact and working conditions. Since 2002, continuous disputes concerning human rights protection and labour standards²⁵⁹ were topped by alleged environmental offences.²⁶⁰

The technology used by Ramatex to dispose of the waste water was inadequate and polluted Windhoek's water sources: waste water containing a high salt

258 Winterfeldt, V. 2007. "Liberated economy? The case of Ramatex Textiles Namibia". In Melber, H (Ed.). *Transitions in Namibia: Which changes for whom?*. Uppsala: Nordiska Afrikainstitutet, p 65ff.

259 According to *The Namibian* on 12 March 2008, a study carried out in 2003 found widespread abuses of workers' rights, including included forced pregnancy tests for women who applied for jobs; non-payment for workers on sick leave; very low wages and no benefits; insufficient health and safety measures; no compensation in case of accidents; abuse by supervisors; and open hostility towards trade unions, etc. Tensions boiled over on several occasions. After spontaneous work stoppages in 2002 and 2003, Ramatex finally recognised the Namibia Food and Allied Workers' Union (NAFAU) as the workers' exclusive bargaining agent in October 2003. The recognition agreement was supposed to pave the way for improved labour relations and collective bargaining. However, the union was unable to make progress on substantive issues, and on several occasions reported Ramatex to the Office of the Labour Commissioner for unfair labour practices and the company's unwillingness to negotiate in good faith.

260 Winterfeldt (2007:65ff).

content was pumped onto the ground, contaminating underground water with toxins from the wet processing section at the plant. Streams stemming from the factory carrying contaminated water threatened to pollute the water at the Goreangab Dam, one of Windhoek's major reservoirs. Textile dyes and other chemicals used in textile processing are known to contain heavy metals and other dangerous substances which can be highly toxic to the environment and, thus, to human beings. The factory has also been accused of disposing excess waste water carelessly. Residents in the neighbourhood of the works complained not only of the stench emanating from the disposed waste water, but also recorded irritation to their skin and respiratory tracts.²⁶¹

The recent closure of the Ramatex clothing and textile factory in Windhoek marked the end of one of the most controversial investments in Namibia since independence. The way in which the closure occurred once again showed the company's disregard for its workers as well as the host country. The company managed to mislead Namibia – and the government in particular – time and again by providing false information to hide its true intentions of using the country merely as a temporary production location.²⁶² Ramatex's decision to locate production in southern Africa was motivated by the objective to benefit from the Africa Growth and Opportunity Act (AGOA), which allows for duty free exports to the US from selected African countries who meet certain conditions set by the US government.²⁶³

The Ramatex example reflects the interrelationship between human rights, environmental, and labour law issues. It clearly points out the importance of ensuring people work in a safe environment – not only in respect of not contaminating it, but also as regards other negative impacts, e.g. on the resources of local communities that depend on these for their agriculture-based livelihoods.²⁶⁴ The case characterises liberal trade and globalisation which are often driven by mere investment and profit motives that can seriously threaten ecosystems, intergenerational equity, and the right to a clean environment.

261 *The Namibian*, 21 December 2004, 4 November 2005.

262 *The Namibian*, 12 March 2008.

263 The African Growth and Opportunity Act (AGOA) was signed into law on 18 May 2000 as Title 1 of The Trade and Development Act of 2000. The Act offers tangible incentives for African countries to continue their efforts to open their economies and build free markets. For further information, see <http://www.agoa.gov/>.

264 www.unep.org/labour_environment/TUAssembly/case_studies/Cappuccio-ITGLWF.pdf; last accessed 10 March 2008.

Conclusion

The right to development, the right to peace, and the right to a healthy environment are at the heart of third-generation human rights. Rights and responsibilities regarding the utilisation of environmental resources need to be distributed with greater fairness among communities, both globally and domestically. The environmental justice and international human rights movements are increasingly applying a rights-based strategy to confront global environmental devastation and to protect ecological habitats and the planet for future generations.

In order to advance the debate on the linkages between human rights and the environment, issues such as international trade, foreign investment and globalisation, the exploitation of natural resources and energy production need to be monitored. Water in Namibia is also a critical component of health and a healthy environment. The Ramatex example clearly points out that when governments answer too directly to international industries' interests, 'costly' environmental demands may be in the way, and governments make their citizens worse off in the end.

The South African Constitution takes into particular account the strong factual relationship between environmental degradation and the impairment of human rights. Under section 24 of that country's Constitution, everyone has the right to an environment that is not harmful to their health or well-being. Article 95(1) of the Namibian Constitution stipulates that the State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future.

The extensive natural exploitation of resources in Namibia does not only bring destructive effects to ecosystems and habitats that support essential living resources. These activities also have negative impacts on human rights. For the benefit of present and future Namibians, issues like public participation, access to information, access to justice, public action, the human right to water, poverty, and indigenous human rights, *inter alia*, will have to be focused on in more depth in order to assure intergenerational equity and the recognition of the human right to a clean environment in Namibia.

The protection and promotion of human rights in Namibia: The constitutional mandate of the Ombudsman

John Walters

Introduction

The meaning of the word *ombudsman* is derived from old Nordic or Scandinavian languages and literally means “representative”. In general, an ombudsman serves as a representative of the people, necessary in bridging the gap which oftentimes exists between formal state institutions (for example the judiciary and executive) and the citizenry. In particular, an ombudsman has the duty to represent citizens through the investigation of individual complaints which are brought before him or her.

The Constitution and the Ombudsman Act, 1990 (No. 7 of 1990) spell out the key mandate areas and powers of Namibia’s Ombudsman in regard to human rights violations, which includes the protection, promotion and enhancement of respect for human rights in the country. The Office of the Ombudsman has been given a unique mandate as a Human Rights Commission, therefore, demanding that the Ombudsman reports on the status of human rights in the country. It is clear, therefore, that the state wishes to submit itself to public scrutiny as regards human rights.

Chapter 3 of the Constitution of the Republic of Namibia contains the Bill of Rights, in which 15 fundamental human rights and 10 fundamental human freedoms are enshrined. Both the Constitution and the Ombudsman Act impose a duty on the Ombudsman to investigate allegations concerning the breach of fundamental human rights. In addition to those provisions, the Bill of Rights provides for the enforcement of fundamental human rights and freedoms. Article 25(2) states that –

[a]ggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the

Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

Fulfilling the mandate

In dealing with the human rights mandate, the Ombudsman has a two-pronged approach. In the first approach, a complaint will be received from an aggrieved person and investigated. If satisfied that a violation of a fundamental right or freedom has occurred, the Ombudsman may provide suitable remedies, including those provided for in the Ombudsman Act and in Article 25(2) of the Constitution. Because the Ombudsman strives to be seen as responsive to the needs of the public, the emphasis is on solving the problem rather than adopting a legalistic approach to it. We also strive not only to resolve complaints, but also to do it in a manner that would include educational and preventative elements.

The second approach is through outreach programmes and public education. This approach has not really received the necessary prominence, probably because of the multifunctionality of the Office. It has become apparent, though, that the low level of human rights complaints received could be due to a lack of public awareness about the Ombudsman's functions as well as about constitutional rights.

Selected case summaries

The number of complaints received for 2006 decreased to 2,060 compared with 2,257 the previous year. An analysis of the type of complaints shows that a small proportion comprise human rights matters: 177 complaints related to basic human rights violations. The category covers racial discrimination, wrongful arrest and detention, assaults, ill-treatment of prisoners and loss of their property, and undue delays in finalising appeals to the High Court.

Cases of racial discrimination

From 1996 to the time of writing, the Office of the Ombudsman received only three substantive racial discrimination complaints. These cases varied from minor disagreements between certain people, to ones that necessitated the Ombudsman

to provide detailed reports. One of these more serious cases culminated in the Ombudsman providing detailed recommendations which had the specific aim of fostering good human and interpersonal relations, and of creating a necessary precedent. It was recommended that –

- managers be exposed to a new way of thinking and accept that the past is over and that a new society is in the making where mutual respect, tolerance and acceptance are the benchmarks for good management practices
- induction courses be offered to all employees at institutions in order to ensure that theory (what is on paper) becomes practice (internalised and personalised in the minds of all), as it may help to foster better human relations
- it may be equally necessary to organise courses, involving all managers and staff, in human relations, labour relations and human rights, as some of the problems experienced by the staff hinge upon the working relationship with supervisors and between the different racial groups. Trust needs to be harnessed and credibility restored if the morale at the organisation is to be uplifted
- investment in people and managing diversity within organisations are new management concepts that need to be applied within the organisation concerned
- people of all races and sexes need to be appointed at all levels to reflect the diversity within the organisation, and to avoid situations of ‘us’ and ‘them’
- the concept of Affirmative Action needs to be fully explained and understood, since it seems there are still many staff members at the organisation concerned – especially on senior levels – who do not or do not want to understand or follow the letter and spirit of the Constitution
- an internal complaints mechanism, if non-existent, be established, and that staff be allowed to air their grievances without fear of victimisation
- management deal timeously with grievances within the organisation and with the culprits, and
- disciplinary hearings are conducted in such a manner that the employees feel they are fairly and justly treated. In addition, the composition of disciplinary committees (which are currently composed of white managers at the organisation concerned) need to become representative to avoid any perception of bias.

A case of unlawful detention

Mr X was convicted in the Magistrate's Court on 7 September 2005 on a charge of driving a motor vehicle with an excessive blood alcohol level and was sentenced to a N\$4,000 fine or one year's imprisonment. He could not pay the fine, so he had to serve the prison sentence. The matter was sent for review and, on 19 January 2006, the High Court set aside the conviction and sentence and ordered that the Magistrate dispose of the case according to law. Mr X should have been released from prison. However, on 2 February 2006, the Clerk of Court issued a summons for Mr X to appear in court on 28 March 2006. The summons was served on him in prison by a police officer on 9 February 2006. On 24 February 2006, the Ombudsman visited the said prison and was approached by Mr X who showed him the summons. After the Ombudsman had established that Mr X was not serving sentences on other cases, he approached the Clerk of Court to immediately issue a warrant of liberation. That was at about 11:00 on that day. When the Ombudsman visited the prison again at 16:00 that day to see whether Mr X had been released, he discovered that he had no. After further enquiries, Mr X was released at 17:00. The Office of the Ombudsman then assisted Mr X with an application for legal aid in order to institute a civil claim.

A case of wrongful arrest

Mr Y was arrested on 10 July 2007 without, according to him, being informed of the reasons for his arrest. He was booked in the registers of the police under his nickname, and charged under a certain criminal record (CR) number. However, somebody else had already been booked under that CR number. Besides this, Mr Y was detained for 47 hours and was released because he could not be linked to the commission of the offence. Our investigation revealed that, because there was no charge against Mr Y, he was booked under the CR number of another detainee. Mr Y applied for legal aid, but the Directorate of Legal Aid referred him to the Legal Assistance Centre instead. The Office of the Ombudsman intervened and the Directorate of Legal Aid then decided to grant him legal aid to institute a civil claim against the Ministry of Safety and Security.

Cases of justice delayed – justice denied

An example of how justice delayed can result in justice denied is that of Mr W, who was sentenced during May 2003 in the High Court to a term of imprisonment. He petitioned the Supreme Court for leave to appeal against his conviction and

sentence. His petition was granted on 29 July 2004. According to him, he struggled to get the matter enrolled at the Supreme Court. We received his complaint on 15 August 2006 and, with our intervention, the matter was eventually placed before the Supreme Court. On 15 October 2007, the Supreme Court set aside the conviction and sentence and Mr W was released from prison.

A second example is that of Mr Z and others, who were convicted on 11 March 2002 by the Regional Court and sentenced to different terms of imprisonment. They filed their notices of appeal and, on 15 March 2004, the matter was removed from the roll. Mr Z complained to the Office of the Ombudsman about the delay and, again with our intervention, the matter was set down for a hearing on 8 February 2006. Nearly five years after their conviction, the High Court set aside their convictions and sentences and released Mr Z and his co-accused. There are many more examples of similar incidents, but to record all of them will not serve the focus of the current paper.

Cases against the Namibian Police and Prison Services

For the period 2005–2007, the highest number of complaints received was against the Namibian Police and the Prison Services. The complaints included loss of prisoners' property by members of the Police, loss of prisoners' money by members of the Prison Service, unlawful arrest and detention, and assaults on prisoners – to mention but a few. When the Office of the Ombudsman receives a complaint from a prisoner of an assault on their person by either the Police or a prison warder, the matter is referred to the relevant Inspector-General for investigation. The Complaints and Discipline Unit of the Namibian Police is responsible for such investigations. Whenever the relevant Inspector-General refers such matters to the Unit, a copy of the referral letter is sent to the Office of the Ombudsman. However, after that, we struggle to obtain any progress reports or information relating to the matter from that Unit, even though we need to relay such information to the complainant. The slow process of investigation and failure to respond not only make our job difficult, but it also creates the perception that the Office of the Ombudsman is ineffective and has no relevance. For this reason, a meeting with the Police is on 2008's programme of activities so that the problems can be discussed and permanent solutions sought.

To comply with the Ombudsman's duty of oversight over Police conduct, the Office will soon start with an investigation, which will culminate in a report, to determine how many criminal charges were laid against police officers or prison

warders, how many the Prosecutor-General declined to prosecute, how many were prosecuted, how many are still pending, and the reasons for the delay in finalising the relevant investigation or prosecution.

It has become apparent that police officers need human rights training in order to prevent them from the potential to abuse their power, which usually results in a human rights violation. The Office of the Ombudsman, with the assistance of donors, is in the process of compiling and printing a comprehensive manual on human rights training for the Police. Each police station will have the full manual once they have been printed, and each police officer will receive a condensed version in the form of a pocket-sized booklet. The manual will consist of the following topics, amongst others:

- The Namibian Bill of Rights
- International Human Rights Standards and Policing
- Human Rights and Police Ethics
- Arrest
- Detention
- Use of Firearms
- Search and Seizure, and
- Human Rights Violations.

The Office of the Ombudsman also intends holding human rights training workshops in country's 13 Regions, where the manual will be distributed and discussed.

Special report on conditions prevailing at police cells throughout Namibia

During August and September 2006, the Ombudsman and Office staff visited police cells throughout the country, which culminated in a comprehensive Special Report that was submitted to Parliament on 23 November 2006. The visits to the police cells were prompted, *inter alia*, by the following:

- The constitutional and statutory duty to investigate matters in regard of which the Ombudsman has reason to suspect that fundamental rights and freedoms are being diminished or violated.
- During May 2006, a magistrate found that the conditions in which detainees were being kept at the Wanaheda cells were shocking and horrendous, and constituted a contravention of the spirit of the Constitution of the

Republic of Namibia. The condition which he saw persuaded him to release the accused on bail.

- Statements by the Minister of Safety and Security in the National Assembly in his 2005/6 budget speech, and
- A meeting between the Ombudsman, representatives of the magistracy, the Office of the Prosecutor-General and the Namibian Police held on 30 May 2006, to discuss ways to reduce the number of detainees in police cells.

As a result, several findings were made and subsequent recommendations were submitted to the National Assembly in a Special Report by the Office of the Ombudsman.²⁶⁵

High on the agenda of the Office's annual programme of activities are follow-up visits to Police holding cells to determine whether and how the Ministry of Safety and Security has complied with the recommendations contained in the Special Report. It is a fearful day when all detainees who were detained in such horrendous conditions approach "the Ombudsman to provide them with such legal assistance or advice"²⁶⁶ in order to institute civil claims against government for violation of their constitutional rights. In this regard, it should be mentioned what Acting Judge Angula said in an unreported judgment, delivered on 12 July 2007 in the matter of *Malcolm McNab & Others v Ministry of Home Affairs NO & Others*:

An arrested person has a right to be held in conditions which are not degrading. It is a violation of an arrested person's constitutional right to be held in such horrendous conditions. It is plainly unconstitutional and unlawful. We all have accepted the Constitution as our Supreme Law. We are all parties to this sacred contract. As a judge, I am oath-bound to uphold the Constitution for the benefit of all who live in Namibia. It is of no consequence to me that those who are responsible for the upkeep of holding cells say that they have no resources to maintain the holding cells in a clean and hygienic condition in compliance with the dictates of the Constitution. It has been held by this court that a lack of financial resources should not be a factor to be taken into account by a court in enforcing the fundamental rights enshrined in the Constitution. The State is constitutionally bound to find and make resources available, failing which it will be held liable for violation of the person's fundamental rights.

265 Walters, JR. 2006. *Special Report on Conditions prevailing at Police Cells throughout Namibia*. Windhoek: Office of the Ombudsman.

266 (ibid.).

Human rights awareness campaigns

Ombudsman Human Rights Advisory Committee

Having realised that –

- it is fundamentally important to communicate to the public in simple terms what rights are and where to complain should these rights be violated
- work in the formal education sector is an important long-term investment, but media campaigns, posters, brochures and other public awareness tools may have a more immediate effect
- the Office of the Ombudsman will benefit from collaborating with civil society organisations which are ‘closer to the ground’ and a source of knowledge and expertise, especially in the field of education and training activities and public awareness campaigns, and
- civil society organisations may greatly assist in channelling or directing complaints to the Office from the most remote areas,

in April 2006 the Ombudsman, in collaboration with NGOs, civil society organisations and the Council of Churches, established the Ombudsman Human Rights Advisory Committee. The purpose of this move was to create a forum for exchange and dialogue regarding all areas of human rights that could make a difference in the lives of Namibian citizens. The Committee, consisting of 20 members, meets once a month under the Chairpersonship of the Ombudsman, and comprises the founding parties as well as certain government ministry representatives. One of the highlights of the Committee’s activities thus far was to organise the *16 Days of Activism Against Gender Violence Campaign* from 25 November until 10 December 2006.

In its pursuit of cooperation with other national human rights institutions (NHRIs), on 15 February 2006 the Ombudsman applied for accreditation to the International Coordinating Committee of National Human Rights Institutions for the Promoting and Protection of Human Rights (ICC). The ICC is a representative body of NHRIs established for the purpose of creating and strengthening NHRIs which conform with the Paris Principles, which provide the basic requisites NHRIs need to have to ensure the fulfilment of their mandates in an independent and effective manner. These Principles have become the benchmark against which NHRIs are measured. The Paris Principles fall into four parts, as follows:

- Competence and responsibilities
- Composition and independence
- Methods of operation, and
- Authorisation to hear and consider complaints.

The disregard for civil and political rights are regularly denounced by human rights organisations, and the courts have progressively interpreted the provisions of the Constitution in such matters as the right to a fair trial, the right to legal representation, and the right to dignity. Through their regular covering of civil and political rights matters, the general media promotes awareness of those rights. The protection of human rights depends on people knowing about the rights they have, and about the mechanisms to enforce them.

Other awareness campaigns undertaken by the Office of the Ombudsman

Apart from the Ombudsman Human Rights Advisory Committee programme, the Office of the Ombudsman undertakes various other activities in order to educate the public about the rights applicable to them. One such initiative is the Constitution Day celebration, which was held on 9 February and 2006 and 2008, respectively. The theme for the 2006 event was “Ensuring that the Constitution remains a living document”, while its 2008 counterpart was “The citizens’ right to a living Constitution”.

The Office of the Ombudsman has also embarked upon a campaign to provide a platform where citizens can speak out. The platform comprises a series of public lectures under the theme of “The citizens’ right to accountability and transparency: Giving a voice to the people of Namibia”.

In addition, the first-ever *Ombudsman Newsletter* appeared in November 2006, coinciding with the 16 Days of Activism against Gender Violence Campaign, ahead of International Human Rights Day on 10 December 2006. The newsletter was distributed as a newspaper insert, with the purpose of making the general public aware of the programme for the 16 Days as well as other related information. The publication is intended to be a regular feature and a mechanism by means of which to inform and educate all citizens of their human rights and freedoms as enshrined in the Constitution, and how the Office of the Ombudsman can assist in protection and enforcing these rights.

Finally, as a result of the realisation that –

- violence against women and children has reached alarming heights and that no female is safe from becoming a victim of gender violence
 - the time has come to address this extreme form of abuse and find ways to stop it, and
 - the Ombudsman should interact with all communities and try to find ways for greater community-based prevention and better protection services,
- the Ombudsman decided to visit various communities to hold meetings with them and to address learners at schools.

Conclusion

Namibia is a dynamic society, with various issues constantly coming to the fore which it has to deal with. In this regard, the need for a vigilant office that can assist ordinary citizens is an indispensable necessity. As is clear from what has been mentioned above, in Namibia, the Office of the Ombudsman serves a vital and active role in being a representative of the people.

The Human Rights and Documentation Centre at UNAM

Oliver C Ruppel

Introduction

The Human Rights and Documentation Centre (HRDC) at the Faculty of Law of the University of Namibia (UNAM) serves the central mission of promoting human rights, the rule of law, and democracy in Namibia. This paper examines the role, history and mission of the Centre in the context of its mandate. Brief reference to various project and university partnerships will demonstrate the importance of networking, internationality, and the Centre's diverse fields of activity.

Dawn of the Faculty of Law at UNAM

Shortly after Namibia's independence, the University of Namibia (UNAM) was established by an Act of Parliament on 31 August 1992, as recommended by the Commission on Higher Education. With regard to its motto, "Education, Service and Development", UNAM's programmes are designed to meet national human resource requirements through quality teaching, research, consultancy, and community service.

The provision of facilities for legal education was one of the strong recommendations in the so-called Turner Report, which stated, *inter alia*, that

—²⁶⁷

[w]e have been impressed by the argument that in Namibia, law is a developmental subject; much of the current legal system was distorted by the tenets of apartheid. Although the ideology is now outlawed by the Constitution, a massive effort is needed to revise the legal system to make it a suitable expression of the Constitution.

²⁶⁷ Turner, JD. 1991. *Higher education in Namibia: Report of a Presidential Commission*. Windhoek: Government of the Republic of Namibia.

On 19 November 1991, the Cabinet of the Republic of Namibia approved the establishment of the Faculty of Law at UNAM. Thus, 1992 became a year of planning, and 1993 a year of implementation. The Law Faculty Subcommittee of the Office of the Vice Chancellor-Designate was put in place, and chaired by the Founding Dean of the Faculty, Prof. WJ Kamba. The late Adv. FJ Kozonguizi, Ombudsman of Namibia, functioned as its convener. The membership covered a broad spectrum, having representatives from all walks of the legal fraternity. The deliberations of the Subcommittee led to a comprehensive report on how the future Faculty should be shaped. After consultations with national and international experts, the report was eventually submitted to the Vice-Chancellor, and approved for implementation by the University by the end of 1992.

The Faculty of Law was officially inaugurated by the Chancellor, Namibia's Founding President, Dr Sam Nujoma, on 18 February 1994, and its first students were admitted the same year.²⁶⁸ In 2000, the Departments of Public Law and Jurisprudence, Private and Procedural Law, and Commercial Law were established. Today, the Faculty of Law holds the generic responsibility in Namibia for academic and professional legal training for the B Juris and LL B degrees. The Faculty also avails its services to members of the community by providing tailor-made programmes for the civil service, and legal aid to indigent persons who cannot afford the services of legal practitioners.²⁶⁹

The report on how the future Faculty should be shaped also contained recommendations on what developed into two separate centres at the Faculty, namely the Justice Training Centre (JTC) and the Human Rights and Documentation Centre (HRDC). Both Centres were created by way of contractual agreements between the Ministry of Justice and UNAM. The memorandum of understanding between the two parties concerning the establishment of the HRDC was signed on 16 April 1993 by the then Minister of Justice, Dr EN Tjiriange, and the Vice-Chancellor, Prof. Peter H Katjavivi.²⁷⁰

268 At the time of writing, the Faculty of Law had a total of 483 students.

269 The Faculty of Law has charged itself with the principal mission of producing high-quality graduates who are well-equipped to practice law and contribute to the development of law in Namibia, and who are endowed with the requisite academic and intellectual wherewithal to stand on their own in the international community. The Faculty is desirous to serve as a national and regional resource centre to undertake research which identifies the relationship between Namibian law and other elements in society within the overall objective of playing a meaningful role in the development and adaptation of the law to the rapidly changing socio-economic conditions in the country in particular and in southern Africa in general.

270 Today, Prof. Katjavivi is the Namibian Ambassador to Germany.

The formal launch of the JTC took place on 20 September 1993, while the HRDC was launched on the occasion of the Workshop on Human Rights Education and Advocacy in the 1990s, held in May 1993. Through the application of the Legal Practitioners Act, 1995 (No. 15 of 1995), the JTC presents a Legal Professional Training Course for all law graduates who wish to qualify for admission to practice law in Namibia. Since both the JTC and the HRDC have the status of Departments, the Directors of these Centres are ex officio members of the UNAM Senate.

History, mission and role of the HRDC and its UNESCO Chair

The HRDC

The HRDC is a semi-autonomous component of the Faculty of Law. In this respect, the Faculty of Law and the HRDC – namely the Dean of the Faculty and the Directorate of the Centre – traditionally cooperate closely.²⁷¹ Although the HRDC and the Ministry of Justice have a strong relationship, the Centre's academic independence is guaranteed by UNAM statutes. The HRDC 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 and the southern African region as a whole. The HRDC also organises and conducts training programmes for the broadest variety of target groups, and prepares and disseminates information on human rights and related issues.

The HRDC is funded both publicly and privately. UNAM provides office facilities, support services and remuneration for the Centre's staff, while grants are received from a number of national and international sources, including the Namibian government; the United Nations Educational, Scientific and Cultural Organisation (UNESCO); the Office of the UN High Commissioner for Human Rights (UNHCHR); and other sources.

271 For example, Prof. N Horn, the current Dean of the Faculty of Law, was the previous Director of the HRDC, whereas Prof. MO Hinz, the current holder of the UNESCO Chair at the HRDC, was Dean of the Law Faculty until 2004.

UNESCO Chair at the HRDC

In 1994, the UNESCO Chair for Human Rights and Democracy was established at the HRDC with UNESCO support. The Chair is linked to the HRDC and is part of the university-twinning (UNITWIN) Network of four southern African and four European universities.²⁷² The UNITWIN Network was established in 1992 under the auspices of UNESCO by the Rectors of the Universidade Eduardo Mondlane University (Mozambique) and Utrecht University (The Netherlands), and the Vice-Chancellors of the Universities of the Western Cape (South Africa), Namibia and Zimbabwe. The Network was joined by the Ruhr Universität Bochum (Germany) and Lund University (Sweden) in 1993, and the University of Porto (Portugal) in 1995. The Network aims at –

- contributing to the development of human resources
- supporting the building up and strengthening of research, teaching and training capacities as well as of scientific and technological transfer and capacity
- promoting an understanding of the social, economic, political and academic conditions, issues and problems not only in each of the twinned countries, but also in the southern African region as a whole, and
- stimulating academic and scientific discourse and an exchange of ideas.

One of the main features of the UNITWIN Network was the assignment of responsibilities for a cluster of disciplines to each of the southern African partners. For this reason, the UNESCO Chair was established. Its intention is to foster scientific advancement through high-level research and teaching in the relevant disciplines, to increase the knowledge base, and to serve as the nucleus of a centre of excellence. The holder of the UNESCO Chair is expected to be a specialist in human rights law. The Chair is also intended to assist in networking, and in exchanging and sharing experience and expertise in the field of human rights among participating universities within the Network.

The founding Dean of the Faculty of Law, the late Prof. Walter Kamba, was the first appointee to the UNESCO Chair for Human Rights and Democracy. The position is currently held by Prof. Manfred Hinz. The HRDC is deeply indebted

272 Hinz, MO. 2003. "The Human Rights and Documentation Centre and the Namibian UNESCO Chair: Human Rights and Democracy: Part of the UNITWIN Network for southern Africa". In Hinz, MO, N Horn & C Mchombu. *The human face in the globalising world, 1993–2003*. Windhoek, pp 5–10.

to both Professors for their strong engagement in moving the HRDC forward as an important component of the work of the Chair for Human Rights and Democracy. The Chair's main focus is to –

- promote awareness of human rights in Namibia and in the southern African region
- explore the concept of *constitutionalism* and its relationship to human rights and the rule of law
- explore the relationship between human rights and economic and socio-cultural development, and
- examine the management of the biophysical environment and development relevance of human rights.

Several activities have been undertaken as part of the programmes of the UNESCO Chair for Human Rights and Democracy and the HRDC. These include –

- capacity-building and training of law students in the field of human rights
- training of government officials in the skills of state reporting to international human rights organizations
- conducting of research and presentation of papers to the Law Reform and Development Commission on several issues, and
- development of a documentation centre for human rights materials.

Current activities and partnership projects of the HRDC

Activities and services

The Centre's activities include –

- research and publication in the field of human rights and related areas
- dissemination of information and materials for the use of individuals and institutions, and
- the training of law students, lawyers, judges, magistrates, traditional authorities and law enforcement officers in human rights.

To this end, the Centre collects, processes and disseminates human rights information in Namibia and southern Africa. The materials collected thus far consist of more than 6,000 documents, which include monographs, reports, and periodicals, as well as selected videos and CD-ROMs.²⁷³ The HRDC is a research

²⁷³ For further information, see http://www.unam.na/centres/HRDC%20brochure_2008.pdf; last accessed 15 March 2008.

Centre, meaning that – except for UNAM lecturers’ purposes – materials do not circulate outside the Centre. Admission to the Centre is open to the general public. The Centre provides access to its collection through a publication database. Entries in the database can be searched by author, subject, date of publication, publisher, or geographic region. Awareness services are offered, and information is disseminated to lecturers, researchers and students. Furthermore, the Centre collects newspaper clippings on human-rights-related issues in Namibia, and delivers online resource services. An extensive HIV/AIDS collection can be found in the specialised library, where a photocopying service is available. The broad compilation of bibliographic material on human rights is supported by electronic library services as well as referral services. In addition, various publication and research projects were able to be realised in the past few years, covering a broad spectrum of human-rights-related issues such as HIV/AIDS, gender, cultural rights, and indigenous knowledge – to name but a few.

Furthermore, the Centre provides advocacy and reviews the human rights situation in Namibia, gives consultancy, and contributes to capacity-building and advocacy in the field of human rights. In the light of the above, courses, conferences, seminars and workshops on human rights are organised on a frequent basis.

Lastly, the HRDC assists the University Central Consultancy Bureau (UCCB) with constantly improving UNAM’s knowledge and skills base by engaging its staff and students to participate in projects that contribute to the betterment of the social, political cultural, economic and environmental milieu of Namibia, the Southern African Development Community (SADC), and the African continent.

The HRDC and UNESCO Chair’s project partners

Various projects currently run under the HRDC and the UNESCO Chair for Human Rights and Democracy in cooperation with and with the assistance of national as well as international governmental organisations and NGOs. Hence, the HRDC is closely involved in projects on the rule of law and democracy with the KAF.²⁷⁴ One of the current projects deals with women’s rights in Namibia, while another is concerned with the SADC Tribunal. The Tribunal only became ready to receive cases in April 2007, and received its first complaint in October

274 <http://www.kas.de/namibia>; (last accessed 18 March 2008).

2007.²⁷⁵ A third project, also made possible with KAF assistance, is on the African human rights protection system.

The HRDC also works closely with the US Embassy in Windhoek. For example, the Embassy provides grants to conduct basic legal and human rights training in the country. Through the French Mission for Cooperation and Cultural Affairs, the HRDC offers staff at the Office of the Ombudsman training in advocacy and investigation skills to enable them to deal with human rights and environmental complaints. Apart from this, the HRDC and the Office of the Ombudsman²⁷⁶ have traditionally cooperated closely. Other assistance may come from recent discussions with the Spanish Ambassador to Namibia, which hold promise in terms of prospective cooperation in the field of children's rights and orphanages in Namibia. Financial assistance from the Embassy of Finland in Windhoek has enabled the HRDC to engage in various projects on customary law in Namibia.²⁷⁷ Other projects with the Finnish are planned on the issue of climate change and renewable resource management.

275 Case 2/2007 is that of *Mike Campbell v the Republic of Zimbabwe*. Campbell first appealed against seizure of his property at the Zimbabwean Supreme Court in March 2007, but took his case to the SADC Tribunal after what his lawyers said was an "unreasonable delay" by Zimbabwe's highest court in dealing with the matter. In December 2008, the Namibia-based Tribunal barred President Robert Mugabe's government from evicting Campbell from his Mount Carmel farm in Chegutu, pending a final ruling on the farmer's main application: thus challenging the legality of the Harare administration's controversial programme to seize white-owned land for redistribution to landless blacks. Campbell requested the SADC Tribunal to find Harare in breach of its obligations as a member of the regional bloc after it signed into law the Constitution of Zimbabwe Amendment No. 17 two years ago. The amendment allows Mugabe's government to seize farmland without compensation, and bars courts from hearing appeals from dispossessed white farmers. The white farmer also asked the Tribunal to declare Zimbabwe's land reforms racist and illegal under the SADC Treaty, adding that Article 6 of the Treaty bars member states from discriminating against any person on the grounds of gender, religion, race, ethnic origin or culture.

276 <http://ombudsman.org.na>; last accessed 10 March 2008.

277 For example, the Land and Minority Rights Project focuses on the most pressing issue for traditional authorities presently, namely land. Both in southern Namibia and in the area of Tsumkwe, traditional authorities feel threatened by the fact that the Communal Land Boards are not sensitive to their needs and newcomers are being advantaged. Research on the Communal Land Reform Act, 2002 (No. 5 of 2002) is conducted, focusing on the modus operandi and the results of the Board's actions, as well as the possible assistance that the Convention on the Rights of Indigenous Minorities can give these communities should the government decide to support the treaty. Another project concerned with customary law is the so-called Ascertainment Project. This project has the goal to collectively publish all the individual customary laws of Namibia.

Moreover, the UNESCO Chair is partnered with Biodiversity Transect Africa (BIOTA) Southern Africa,²⁷⁸ which is mainly funded by the German Federal Ministry of Education and Research.²⁷⁹ Interdisciplinary research projects concentrate on environmental studies in Namibia and the western parts of South Africa.²⁸⁰

University partnerships

Apart from the above-mentioned UNITWIN partners with the UNESCO Chair, UNAM's HRDC and the Faculty of Law have numerous university partnerships at international level, amongst which are the University of Bremen (Germany),²⁸¹ the University of Stellenbosch (South Africa),²⁸² the School of African and Oriental Studies at the University of London (England),²⁸³ and Stanford University (USA).²⁸⁴ With these partners, the HRDC aims to foster academic exchange towards excellence in research. Recently, the Munich School of Philosophy²⁸⁵ has drawn the HRDC's attention to a project on climate change and global poverty, which may lead to future cooperation. Moreover, recent discussions with the Finnish Embassy have led to the deliberation to expand and elaborate on partnerships in relevant fields with institutions of higher learning in Finland.

The Human Rights Forum of Namibia

In February 2008, the Namibian Human Rights Forum was informally established by various key actors who endeavour to promote respect for human rights, the rule of law, and democracy in Namibia. So far, the Forum consists of politicians, law professors, NGOs, legal practitioners, members of the Law Society, the Anti-corruption Commission, and the Office of the Ombudsman, amongst others. The Forum intends to monitor the human rights situation in Namibia and the SADC

278 <http://www.biota-africa.org>; last accessed 25 February 2008.

279 Hinz, MO. 2005. *Preliminary results of BIOTA II, S.11.4 Work package and prospects for BIOTA III*. Windhoek: Faculty of Law, University of Namibia.

280 See e.g. Hinz & Ruppel (Forthcoming), *supra*.

281 <http://www.uni-bremen.de>; 13 March 2008.

282 <http://www.sun.ac.za>; 13 March 2008.

283 <http://www.soas.ac.uk>; 13 March 2008.

284 <http://www.stanford.edu>; 13 March 2008.

285 <http://www.hfph.mwn.de/igp/klima>; 13 March 2008.

region. Its objective is to promote human rights and protect the national democratic space by highlighting potential threats and abuses.

The Forum recently requested the HRDC to investigate the legal and social conditions associated with Police and holding cells in Namibia. The findings of this report, coupled with those of the Ombudsman's 2006 report on the same matter,²⁸⁶ depicted that holding cells throughout the country were continuously beset by poor sanitary conditions, overcrowding, insufficient food supplies, unsafe infrastructure, stagnant water, lack of access to medical care facilities and potable water, and insufficient bathroom and shower facilities.²⁸⁷

Conclusion

The HRDC is an active and important institution when it comes to safeguarding, upholding and encouraging respect for human rights, the rule of law and democracy in Namibia and southern Africa. The Centre provides advocacy, reviews the human rights situation, and contributes to capacity-building in the field of human rights law in Namibia. The HRDC's UNESCO Chair contributes significantly to scientific advancement through high-level research, teaching and networking. Highlights in its history include high degree of involvement by members of the Centre in research and community service, and the contribution the Centre has made to legal education in respect of human rights in Namibia through its academic programmes and project outputs. Members of the Centre also serve as consultants on human rights issues to a range of national and international institutions. On a national level, the HRDC cooperates closely with, amongst others, governmental and non-governmental organisations, legal practitioners, members of the Law Society, the Anti-corruption Commission, the Office of the Ombudsman. Internationally, the HRDC aims to foster academic exchange towards excellence in research with various renowned institutions of tertiary education around the globe.

286 Walters, JR. 2006. *Special Report on Conditions prevailing at Police Cells throughout Namibia*. Windhoek: Office of the Ombudsman.

287 A report by the HRDC on the conditions at Police and holding cells in Namibia will be published soon.

International human rights norms and standards: The development of Namibian case and statutory law

Nico Horn

Introduction

The founding fathers and mothers of the Namibian nation made international and human rights law binding upon Namibia, a part of the laws of the country.²⁸⁸ This means that all the human rights instruments ratified by Namibia are directly applicable in the Namibian legal system. No enacting law is necessary to make the UN human rights covenants and treaties applicable.

Namibia has ratified the following UN human rights instruments:

- International Covenant on Economic, Social and Cultural Rights (ratified 28 November 1994)
- International Covenant on Civil and Political Rights, including Optional and Second Optional Protocols (ratified 28 November 1994)
- Convention for the Elimination of all Forms of Racial Discrimination (ratified on behalf of Namibia by the UN Committee for Namibia on 11 November 1982)
- Convention for the Elimination of Discrimination against Women (ratified 23 November 1992); Optional Protocol (ratified 26 May 2000)
- Convention against Torture and other Acts of Cruel, Degrading and Inhumane Treatment or Punishment (ratified 28 November 1994)
- Convention on the Rights of the Child (ratified 30 September 1990)
- Optional Protocol: Sale of Children (ratified 16 April 2002)
- Optional Protocol: Armed Conflict (ratified 16 April 2002), and
- Rome Statute of the International Criminal Court (ratified 25 June 2002).

While the Constitution does not demand a legal framework for the treaties to be

²⁸⁸ Republic of Namibia. 1990. *The Constitution of the Republic of Namibia*. Windhoek: Ministry of Information and Broadcasting, Article 144.

implemented in Namibian domestic law, it is not always possible to obtain the results aimed at by the treaties without any domestic intervention.

The Torture Convention is a case in point. In terms of the Convention, all members are expected to criminalise torture. Torture has never been criminalised in Namibia. Instead, the prosecutorial authority has always opted to prosecute for assault with the intent to do grievous bodily harm – a common law crime. At first sight, this seems to be a perfect solution since assault with the intent to do grievous bodily harm is a serious offence, and the presiding magistrate or judge can impose a reasonably long prison sentence if the assault caused serious injuries.

However, the definitions of the two crimes are totally different. While *torture* often constitutes a physical attack, it is not always the case. The European Union guidelines for police officers include actions that do not even require that the body of the victim be touched. Long periods of interrogation while a suspect is not allowed to sit down; is deprived of sleep, food or water; playing loud music and shining bright lights while a victim is sleeping – all these constitute *torture*, but do not comply with the elements of *assault*. The best an accused can hope for once s/he is brought before court after an interrogation that constituted psychological torture is that any confession of admission made will be declared unconstitutional and inadmissible as evidence. Under Namibian law, the innocent victim of psychological torture will not be able to lay a charge against his/her torturer and the torturer will never give account for his/her actions in a criminal court.

Even when *torture* constitutes a violent attack that causes grievous bodily harm, there are still good reasons why the requirements of the Torture Convention will not be fulfilled by the prosecution of *assault*. Firstly, one of the reasons for specific anti-torture legislation is to emphasise the serious nature of the crime and to allow the presiding officer to impose a sentence that will reflect it. *Torture* and *assault* are never exactly the same crime. The intention of the torturer is obtain information by inflicting pain or discomfort. It is the evil of the torturer's intent and the psychological effects on the victim that demand special treatment of the crime.

The successful implementation of any treaty by a member state depends on good communication by that state to her people. Not only do state officials need to

know the boundaries of state power, the state's subjects also need to be well informed of their rights if those rights are to be protected. If the domestic courts treat torture simply as a serious form of assault, the public will never be educated to understand the severe effects of torture on the lives of those subjected to it.

The fact that the so-called War on Terror has led many old democracies to become soft on torture²⁸⁹ makes it even more important for all members of the Torture Convention to comply with the treaty's requirements and make torture a specific crime. If not, the examples of the powerful nations in their 'war on terror' will become the example the rest of the world follows.²⁹⁰

Since the treaties ratified by Namibia form part of Namibian law, is it not possible for the law enforcement agencies to apply the treaties and prosecute violators of the Torture Convention? However, since the treaty as an international instrument does not include a penalty clause, it cannot form the object of a criminal offence. The Committee against Torture has acknowledged that, despite the broad framing of Articles 4, 5, 10 and 11, the Torture Convention is not entirely self-executing; and even if a constitution allows for the direct effect of international law – as Namibia's does – a domestic legal framework is necessary for the implementation of the important aspects.²⁹¹

Thus, while the Namibian Constitution provides for the direct implementation of the human rights treaties, it seems almost impossible to implement those treaties

289 See e.g. the statement of US Secretary of Defense, Donald Rumsfeld, stating that the infliction of pain to obtain information does not constitute *torture*; or the recent statement of US Attorney General A Gonzalez that *torture* only occurs when the infliction of pain leads to organ failure. See Center for Constitutional Rights. 2006. *Report on torture and cruel, inhumane and degrading treatment of prisoners at Guantanamo Bay, Cuba*. New York, NY: Center for Constitutional Rights. The latest development in the US is a Bill that not only deprives so-called enemy combatants from the habeas corpus remedy, but also provides for legal torture.

290 See e.g. the response of Gen. M. Shalli to cross-examination relating to alleged torture during the military and police action following the failed secession attack on strategic places in Katimo Mulilo in northern Namibia. See Menges, W. 2003. "Shalli on warpath in treason case". *The Namibian*, 29 October 2003.

291 See Committee against Torture. [n.d.]. *Summary Records of the 28th meeting*, 29 April – 17 May 2002, and *Note 15, of the 30th meeting*, 28 April – 16 May 2003. Geneva: Office of the High Commissioner for Human Rights. For a discussion of the criminalisation of the offences listed in of Article 4 in domestic law, see Ingelse, C. 2001. *The UN Committee against Torture*. The Hague: Kluwer Law International, pp 337–360.

in the legal process without a legal framework. An investigation into the jurisprudence of Namibian courts since independence shows that human rights treaties have had almost no effect on the domestic legal processes. One searches in vain for an indication that the High and Supreme Courts give serious consideration to these instruments.²⁹²

In conclusion: Despite the liberal approach of the Namibian Constitution, the UN human rights instruments are not receiving the prominence one would have expected. The courts still expect the legislator to provide a legal framework for the implementation of treaty principles.

Second-generation rights and the Constitution

The Constitution of the Republic of Namibia has an entrenched Bill of Rights.²⁹³ However, with a few exceptions,²⁹⁴ second-generation – or social and economic – rights are not included in the Bill of Rights. One needs to page through government policy to find economic and social rights.²⁹⁵ Even in Article 95 of the Constitution, important social and economic rights like the right to housing and clean water are only indirectly guaranteed.

In addition, while the Bill of Rights includes the right to legal representation of one's choice in the fair trial section (Article 12), the right to legal aid is only dealt with in Article 95(h). One needs to analyse Article 95(h) to understand why the two complementary Articles – the right to legal representation and the right to

292 A case in point is the now well-known *Frank* case. The Human Rights Committee, the treaty body of the International Covenant on Civil and Political Rights, and other treaty bodies have given several advisory opinions on the meaning of the word *sex* as a category for protection. Almost without exception it included *sexual orientation* as a category. However, the Namibian Supreme Court opted to ignore the jurisprudence of international human rights law and followed the narrow interpretation of the Zimbabwean courts, defining *sex* as a category as “men and women”. See *The Chairperson of the Immigration Selection Board v Frank & Another*, 2001 NR 107 (SC).

293 Chapter 3.

294 For example, the right to own property (Article 16), the right to primary education (Article 20), and the right to form unions and withhold labour (Article 21).

295 See Article 95, which lists the following: the right to equality, the right to public health, the right to form independent trade unions and other workers' rights, the right to fair and reasonable access to public facilities, the right to pensions, the right to social benefits for certain categories, the right to equal opportunities and legal aid, and the right to a living wage.

legal aid – do not follow one another immediately, but are separated by another 83 Articles:

- (h) *a legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases **with due regard to the resources of the State**; ... (emphasis added)*

Someone has the discretion to decide which cases qualify for legal aid with due regard to the resources of the state. While the constitutional fathers possibly never intended this Article to mean that long, difficult and expensive cases do not qualify for legal aid, this is exactly how the Legal Aid Board has interpreted it at times.²⁹⁶ This does not mean that the Board has not at other times made decisions that complied with a broad interpretation of the right to legal representation and legal aid.

In a recent case, the Legal Aid Directorate settled a case where one of the accused in the Caprivi high treason case refused to accept legal representation by a lawyer employed by the Directorate. The Directorate agreed to provide the accused with a private practitioner.²⁹⁷

Article 95(h) is a good illustration of how social and economic rights will be dealt with in terms of the Namibian Constitution. The government will always be tempted to hide behind a lack of resources when the granting of rights may place a financial burden on the state.

296 In the case of *State v Jacobs*, an unreported case of the High Court of Namibia in 2001, three accused were arraigned on counts of fraud. The case involved the transfer of money from the foreign exchange division of the bank to private accounts. The evidence was built around inter-bank memoranda, transfer documents, debit and credit notes, negotiable instruments, etc. Since the Board correctly envisaged that the trial would be long and that a senior counsel would be needed to deal with the mountain of paper evidence and the difficult factual issues, legal aid was denied. As a consequence, an accused who was eventually sentenced to 15 years' effective imprisonment had to handle her own defence for almost half of the trial. See also the Caprivi secession case, *Samboma & Others v The State*, an unreported case of the Supreme Court of Namibia, delivered on 7 June 2002, where the Supreme Court intervened when the Minister of Justice refused to consider legal aid for more than a hundred people accused of high treason.

297 The lawyer was both a prosecutor and a magistrate before he joined the Legal Aid Directorate.

The effect is clear: unlike the fundamental freedoms of Chapter 3, social and economic rights cannot be enforced under all circumstances. Their enforcement is dependent upon the availability of state resources. Consequently, although Namibia has ratified the Covenant on Economic and Social Rights, it will be extremely difficult for an aggrieved citizen to obtain a court order compelling the state to grant the social and economic rights emanating from that Covenant.²⁹⁸

Thus, despite the provisions of the Namibian Constitution, in practice, the direct application of UN instruments did not exclude the need for a legal framework to enforce the citizen's human rights.

The role of the courts in implementing human rights

Introduction

The courts almost immediately established themselves in the new constitutional dispensation. The early judgments caught the attention of the international community. In Africa, the courts were praised as a forerunner of constitutional interpretation in southern Africa.

Initially, the new spirit was clearly demonstrated in the criminal courts. In *State v Acheson*,²⁹⁹ the High Court refused a postponement for the state in the highly emotional case against the alleged murderer of the South West African People's Organisation (SWAPO) activist, Anton Lubowski. He was fatally shot in front of his house on Luxury Hill on 12 September 1998, a mere six months before independence.

Acheson, an Irish citizen, was suspected to have killed Lubowski or at least to have assisted the covert South African Civil Cooperation Bureau to do so. Lubowski joined SWAPO in 1984 and played an important role in the mobilisation of the internal struggle against apartheid and the South African occupation of Namibia. He also played an important role in making the necessary preparations for the return of the SWAPO leadership from exile. He also spearheaded the election campaign with others.³⁰⁰

298 The Legal Assistance Centre recently took a case of a woman in an informal settlement who did not have running water. The case against the City of Windhoek was settled before it went on trial, which is unfortunate for jurisprudential development.

299 *State v Acheson* 1991 (2) SA 805 (Nm).

300 (ibid.:820).

The murder of Anton Lubowski was a highly emotional event. It shocked the Namibian community, especially the SWAPO Party. Judge Ismail Mahomed, later to become the second Chief Justice of Namibia, reflected on the emotional aspects of the case (he was not the Chief Justice at the time):

Firstly, the murder of Adv. Lubowski is a matter of very fundamental public importance. It is common cause that Mr Lubowski was a prominent public figure who was a member of the present governing party and was during his lifetime generally perceived to be a vigorous proponent of the right of the Namibian people to self-determination and to emancipation from colonialism and racism – ideals which are now eloquently formalised inter alia in the preamble to the Namibian Constitution and arts [Articles] 10 and 23.

Referring to the difficult choice between the emotions of a nation and the constitutional rights of an accused, the Judge made the following comments on constitutionality:³⁰¹

The Constitution of a nation is not simply a statute that mechanically defines the structures of government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the constitution must therefore preside and permeate the process of the judicial interpretation and judicial direction.

When it became clear that the suspected co-accused – without whom the Acting Prosecutor-General did not want to start the hearing – were not going to be extradited by the South African authorities soon, the judge was confronted with the possibility to use the case to implement a constitutional approach to bail applications, or for that matter, criminal procedure, and suffer the consequences, or to toe the populist line.

The judge took the first option. He based his decision on a definite emphasis on constitutional rights. And he made it clear that the law required him –

... to exercise a proper discretion having [regard] not only to all the circumstances of the case and the relevant statutory provisions, but against the backdrop of the constitutional values now articulated and enshrined by the Namibian Constitution of 1990.³⁰²

301 (ibid.:814).

302 (ibid.:813).

If the Constitution becomes the foundation of all legal interpretation, especially in criminal procedure, the judge pointed out that the constitutional insistence upon the protection of personal liberty in Article 7, the respect for human dignity in Article 8, the right of an accused to be brought to trial within a reasonable time in Article 12(1)(b), and the presumption of innocence in Article 12(1)(d) are crucial to its tenor and spirit.³⁰³

In a case questioning the validity of corporal punishment, the Supreme Court had the first opportunity to express itself on a constitutional issue. It was confronted with the values of the Namibian people.³⁰⁴ The case had all the elements of high drama. The constitutional issue at stake was —³⁰⁵

... whether the imposition and infliction of corporal punishment by or on the authority of any organ of State contemplated in legislation is in conflict with any of the provisions of [Chapter] 3 of the Constitution of the Republic of Namibia and more in particular [Article] 8.

The Criminal Procedure Act, 1977 (No. 51 of 1977) and several other statutes made provision for whipping of both adult and juvenile male convicts.³⁰⁶ Proclamation 348 of 1967 gave authority to the Customary Courts to impose corporal punishment —³⁰⁷

in accordance with ... Native law and custom.

Schools in pre-independent Namibia followed a policy of corporal punishment that was approved by the Department of Education. The educational rules were often just a smokescreen. Namibian learners, including girls, received indiscriminate corporal punishment in the pre-independent era.³⁰⁸

303 (ibid.:813).

304 *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State* 1991(3) SA 76 NmS 178 SC.

305 (ibid.:178).

306 See *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State*, pp 181–185 for the full list of legislation quoted by the court.

307 See sections 3(2) and 4(2).

308 The author's Grade 7 daughter attended the Jan Möhr Secondary School in Windhoek in the late 1980s, where both boys and girls as young as 11 received corporal punishment – an arrangement approved by the Parents' Committee.

The court stated at the outset that the question whether a specific punishment was inhuman or degrading was a value judgment:³⁰⁹

It is[,] however[,] a value judgment which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic.

The emphasis on the “... norms, aspirations, expectations and sensitivities of the Namibian people” is somewhat complicated: how can the court establish exactly what constitutes these aspects of the Namibian soul? To say that these norms and values are expressed in the Constitution and national institutes does not really help. The Constitution gives us only general principles in this regard and, up until this Supreme Law’s inception, the national institutes expressed themselves by allowing corporal punishment.

Consequently, the question remains unanswered. For the rest of the judgment, the court evaluated several other jurisdictions with similar provisions in their constitutions as well as international instruments and some South African judgments; it came to the conclusion that corporal punishment was indeed degrading and inhuman.³¹⁰

Due process and the Constitution

Most of the constitutional issues in the Namibian courts dealt with the right to a fair trial and other civil and political rights. Article 12 of the Constitution of the Republic of Namibia guarantees a fair trial. Over the years, the South African government introduced amendments to the Criminal Procedure Act and other legislation to assist the state in its prosecutorial effort. The latter Act was made applicable to Namibia in 1977. The amendments and other legislation created presumptions, reversed the onus of proof, limited access by the defence to evidential material before the trial (maintaining that the Police docket was privileged), and allowing inadmissible evidence under certain circumstances.

309 *Ex Parte Attorney-General, Namibia: in re Corporal Punishment by Organs of State*, p 189.

310 (*ibid.*:189–193).

The adversarial legal system added to the vulnerability of accused persons. If one bears in mind that the new Criminal Procedure Act was promulgated in 1977, the political agenda becomes clearer. It was the time of the so-called Total Onslaught, a phrase used by the then State President, PW Botha, to emphasise the alleged international communist attack on South Africa and its policies.

Before 1977, the mandated territory of what was then South West Africa had a Criminal Ordinance under which criminal prosecutions took place. While the Ordinance and the Criminal Procedures Act were similar, there were a few substantial differences – the most important of which being that the independence of the Attorney-General³¹¹ (the head of prosecutions in Namibia) was guaranteed, unlike his South African counterparts, who worked under the authority of the Minister of Justice. With the escalation of the border war against SWAPO and the involvement of the South African Defence Force in Angola, the last thing the South Africa's military headquarters in Pretoria wanted was an Attorney-General that did not toe the government line in Windhoek. Consequently, in 1977, the Attorney-General of the High Court of South West Africa was placed under the authority of the South African Minister of Justice.

It was inevitable that the new emphasis on rights and the powers of judicial review would move criminal procedure to the main arena of constitutional jurisprudence. The court was the place where people experienced the power of the state. Therefore, it is not surprising that most of the constitutional cases in Namibia involved the rights of convicted criminals and alleged foul play in the course of the criminal investigation or the early stages of the trial.

In the courts, accused people felt the effects of a reversed onus, namely a presumption aiming at preventing the accused to exercise some of his/her most fundamental due process rights like the right to remain silent, the right not to incriminate oneself, or the right to know the full spectre of the state's case against one.

While the Constitution did not necessarily introduce rights unknown before independence, it lifted due process rights to a new level. Since the competent courts could review laws and strike them down if they were unconstitutional,

311 The South African/South West African Attorney-General was the equivalent of the post-independence Prosecutor-General in Namibia and the Director of Public Prosecutions in South Africa.

the legislator could no longer take away fundamental rights and maintain a false image of legality.

Consequently, the Bill of Rights became an important instrument in the hand of criminal defence lawyers to ensure a fair trial for their clients. The courts became champions of human rights. However, there was also a backlash. Victims of crime, the Police and the prosecutorial authority experienced the new dispensation as criminal-friendly. Criminals were let off the hook because of what the Police and prosecutors perceived to be technical constitutional issues. The escalation of crime also did not help to create a spirit of understanding and appreciation for the Bill of Rights amongst ordinary Namibians. The populist politicians were not helpful either. After every high profile criminal case they called for the death penalty or made statements to the effect that criminals had given up their human rights by committing crime.

The prosecutorial authority took a while to make peace with the Bill of Rights. Initially, the state vigorously opposed all applications of a constitutional nature. However, in 1999, at the Annual Conference of the International Association of Prosecutors in Beijing, China, the Namibian delegation signed the Human Rights Charter for Prosecutors.³¹²

Several elements of a fair trial were argued before the High and Supreme Courts in the first five years of independence.

There were, however, issues that only came on the agenda of the Namibian courts after they had been resolved in favour of accused persons before South African courts. A case in point is the right to be warned of the right to legal representation.

While the issue of legal representation was raised in several cases before 1997, it was only in *State v Kapika & Others*³¹³ in 1997 that the courts, following a

312 Myjer, E, B Hancock & N Cowdery (Eds.). 1999. *IAP Human Rights Manual*. The Hague: International Association of Prosecutors. See also Cowdery, N. 1999 (online). *The IAP Standards and their significance: President's message, 4th Annual Conference of the International Association of Prosecutors, Beijing*; available at http://odpp.nsw.gov.au/speeches/IAP%20STANDARDS%20paper_h.htm; last accessed 16 March 2008. Namibia was represented by Prosecutor-General Hans Heyman, Advocates LN Campher and L du Pisani, and Dr N Horn.

313 1997(1) NR 286 (HC).

ruling by Judge Froneman in South Africa, looked seriously at the right of an accused to be warned that s/he has a right to legal representation. I shall return to this issue below.

After the *Acheson* case, the legal fraternity raised issues of constitutionality on a regular basis. And the courts did not hesitate to declare provisions offending the Constitution unconstitutional.

In one of the first cases concerning a reversed onus, *State v Titus*,³¹⁴ a full bench of the High Court concluded that the mere reversal of onus did not negate the presumption of innocence and the right not to testify against oneself. The court used the so-called rational connection test, and quoted the American case *Tut v the United States of America*.³¹⁵ The decision was overturned by the Supreme Court in *State v Shikunga & Another*.³¹⁶ However, this shows the High Court was not as liberal and open-minded in the first five years after independence as it is often made out to be.

The argument of the court in *State v Titus* fails to address the real issue, namely whether the reversed onus demands of the accused to *de facto* prove his/her innocence. However, as the court later pointed out in *State v Pineiro*,³¹⁷ the American test that the court relied on dealt with a somewhat different scenario, namely where evidence had already been led, and the court had to decide if the evidence could be allowed despite the fact that the onus of proof had shifted.

The High Court was quick per Justice Levy in to make a better choice from the jurisprudential history of Namibia. The rigid approach in the *Titus* case was abandoned for the test of the Constitution in the *Pineiro* case. The test set out by Judge Levy is, as stated above, a simple one. To put it another way, who is obliged to carry the final burden of guilt: the presumption or the state? Consequently, the court ruled that the presumption of guilt in the Sea Fisheries Act, 1973 (No. 58 of 1973) contradicts the presumption of innocence contained in Article 12(1)(d) of the Constitution.³¹⁸

314 1991 NR 318 (HC).

315 319 US 463.

316 1997 NR 156 (SC), 2000 (1) SA 616 (NmS).

317 1991 NR 424 (HC), p 416.

318 (ibid.).

The old question concerning the conclusions that a court can make from the decision of an accused who fails to testify was raised in *State v Haikele & Others*³¹⁹ and *State v Kamajame & Others*.³²⁰ In the latter case, which was specifically overturned by *State v Shikunga & Another*,³²¹ the court still held that that silence by the accused person where an innocent man would have spoken can amount to admission. More soundly, and in line with the developments since 1990, the court ruled in the *Haikele* case that the privilege of an accused against self-incrimination means that the state has to prove all the elements of the crime. The mere fact that an accused does not give evidence cannot remedy deficiencies in the state's case.

In *State v D & Another*,³²² the court per Justice Frank said in an obiter dictum that the cautionary rule for single female witnesses in sexual offences could be contrary to the non-discriminatory clause, since it operates from the presumption that female complainants are likely to lie and lay false charges.

Not all attempts to adapt the common law went the way of the defence. In *State v De Bruyn*,³²³ the High Court was invited to accept the defence of entrapment developed in the United States, and declare evidence so obtained inadmissible. The defence of entrapment does not deal with all police traps, but only those *of a person not otherwise predisposed to commit an offence by a government official who then instigates prosecution against such person*. While the court stated that such action would be intrinsically unfair, it assumed (without deciding) that such conduct is so unfair that evidence so gathered should be excluded as being prejudicial to the right of the accused to a fair trial as intended in Article 12(a) of Constitution of the Republic of Namibia. Yet, the court decided that not all police traps are illegal.

In other cases, the common law obligation of a presiding officer to assist an accused, especially if she is undefended, were placed within a constitutional framework. In *State v Khoeinmab*,³²⁴ the court held that it is a gross irregularity not to allow an accused person to address the court. Since it affects the fairness of the trial, it cannot be remedied.

319 1992 NR 54 (HC).

320 1993 NR 193 (HC).

321 1997 NR 156 (SC).

322 1991 NR 371 (HC).

323 1999 NR 1 (HC).

324 1991 NR 99 (HC).

In *State v Scholtz*,³²⁵ the Supreme Court ruled that the state was obliged to disclose the content of the police docket. In the pre-constitutional era, the docket was considered privileged.

Foreign case law, especially Canadian and US jurisprudence, played an important role in this process. Constitutionality was not totally new in Namibia's history: colonial South Africa had had a written Constitution, and Namibia's interim government, which was semi-autonomous at times between 1978 and independence, had also adopted a Constitution with a Bill of Rights. The Constitution of the Republic of Namibia, however, brought with it a democratic culture and a constitutional linkage to international law. Article 144 states that, in interpreting the Constitution, the courts shall, amongst other things, consider international law.

The judgment of Justice Dumbutshena in *State v Scholtz* illustrates the way in which the courts dealt with international law in the years immediately after independence:³²⁶

Any system of justice that tolerates procedures and rules that put accused persons appearing before the courts at a disadvantage by allowing the prosecution to keep relevant materials close to its chest in order to spring a trap in the process of cross-examining the accused and thereby secure a conviction cannot be said to be fair and just. Full disclosure is in accord with articles 7 and 12 of the Constitution. It would be wrong to maintain a system of justice known to be, in some respects, unfair to the accused. The right to disclose has acquired a new vigour and protection under the provisions of articles 7 and 12 of the Constitution. English cases cited above are proof beyond doubt that non-disclosure leads to the denial of justice.

For disclosure to be effective it must be done at the earliest possible time [– in] some instances soon after arrest and in others long before the accused is asked to plead and in some cases only after the witness has given his evidence in chief

The principal feature of the judgment is the presentation of the common custom of disclosure that developed in the England, Wales and Canada. In terms of constitutional interpretation, the judgment is somewhat of an embarrassment, however. It relies first and foremost on the development in England and Wales,

325 1998 NR 207 (SC).

326 *Supra*, p 447.

which jurisdiction had the same privileged rules until 1961. However, the jurisdiction has no written Constitution, a fact that the judge acknowledged:³²⁷

But what is significant for our purposes is that these developments have taken place in England and Wales without a Bill of Rights and without the benefit of a written Constitution.

Legislation supporting the UN instruments

As we have already noticed, the Namibian courts were reluctant to apply the principles of the instruments without the back-up of a legal framework. While the courts were generally more than willing to apply the principles of the Constitution both in the civil and criminal courts, it hardly ever referred to the instruments in their judgments.

Parliament has now implemented several laws to strengthen the human rights components of the Namibian legal framework. However, there is also a trend to challenge earlier human rights judgments with new conservative legislation. Most of these laws have not yet been challenged in the courts (some have been signed into law, but have not been implemented).

We shall first look at the legislation that has played a positive role in the implementation of international human rights law in Namibian domestic law.

The Married Persons Equality Act, 1996 (No. 1 of 1996)³²⁸

Under South African common law, in some instances, husbands had marital power over their wives. This rule was repealed by the Act. Other legislation and common law rules that discriminated against wives were all repealed.

The effect of the changes was that married women became fully emancipated, with the right to enter into contractual agreements, own property, act as directors of companies, and bind themselves as surety.

The most important aspect of the Act was the abolishment of the common law rule that the husband is the paterfamilias, or head of the family or household. Following the Act, either spouse can act as head of the household or they can

327 (ibid.:442).

328 Enacted 28 May 1996.

act together in this capacity as partners. Consequently, Namibia became one of the first African countries to fully comply with Article 16 of the Convention on the Elimination of Discrimination against Women (CEDAW). Article 16 of the Convention deals with equality of males and females in all spheres of life. Presently, there are still 24 nations that have entered reservations against Article 16, mostly because of the cultural and religious belief that the husband is always the head of the family.³²⁹

Some Churches and traditional authorities also complained that it was either against the Bible, their faith, or African traditions.³³⁰ However, the Act was accepted by the vast majority of the Namibian people and opposition to it soon came to an end.

However, the Act did not change the fate of women living in rural areas under a traditional authority. The authorities by and large maintained the position of the paterfamilias in their communities. The only remedy for an enlightened rural woman is to enter into a civil rather than a customary marriage.

The government is presently busy with the preparation of an amendment to the Act that will rule out bigamous and polygamous marriages, both in the civil and customary sphere.³³¹ Government's initial idea was to limit customary polygamous marriages to a total of four spouses. However, should a man enter into a civil marriage before or after entering into one or more customary marriages, a line is drawn and he cannot enter into a subsequent customary marriage.³³²

While traditional authorities, especially those from north-eastern Namibia, blamed Western or capitalist pressure for the proposed Bill, the pressure was applied much closer to home. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which was adopted by

329 These countries include Bahrain, Brunei Darussalam, the Cook Islands, Djibouti, the Holy See, Iran, Kazakhstan, Kiribati, Republic of Korea, the Marshall Islands, Mauritania, Micronesia, the Principality of Monaco, Myanmar, Nauru, Niger, Niue, Oman, Palau, Qatar, San Marino, Saudi Arabia, the Solomon Islands, Somalia, Sudan, Swaziland, Syria, Tonga, Tuvalu, and the United Arab Emirates.

330 The Act is not applicable to customary law marriages.

331 One of the drafters of the proposed Bill, Dianne Hubbard, wrote an article in *The Namibian* in 2005, stating that the Bill would outlaw all polygamous marriages.

332 Discussion with several ministers in Katima Mulilo; conference in preparation of Community Courts, May 2004.

African Heads of State on 10 July 2003, called for the total abandonment of polygamy.

The idea of a Protocol developed in Africa when activist women groups such as Women in Law and Development in Africa and the African Centre for Democracy and Human Rights Studies lobbied the African Commission on Human and Peoples' Rights at a conference held in Lomé, Togo in March 1995.³³³

The fate of rural widows living under some of the customary laws was also not addressed in the Act. In many communities a widow cannot inherit. The rule developed in a time when a widow was taken into the kraal (homestead) of her late husband's eldest brother. Her needs were taken care of by her new husband. Her late husband's estate went to his mother and sisters in compensation for having raised him.

In a modern society, where even rural women are entering the workplace and share the responsibility with their husbands to build a joint estate, these customary laws no longer make sense. When a woman's husband passes away, even the property that she helped him to acquire goes to his mother. And if the emancipated rural widow refuses to be dealt with like an inheritance, and refuses to move in with her husband's brother, she is left on the street with no assets.³³⁴

In Namibia, traditional authorities have limited legislative powers. They can make their own customary laws, provided that these are in line with the Constitution and relevant legislation. At least one such authority has already used this power to repeal the community's customary laws that prevent wives from inheriting, thus bringing these laws in line with the rights of women.³³⁵

333 Delport, E. 2004 (online). *The African regional system of human rights: Why a Protocol on the rights of women?*. Available at <http://www.powa.co.za/documents/sadc%20-intro%20african%20system%20and%20draft%20protocol.doc>; last accessed 2 October 2006.

334 For a perspective on all aspects of women and inheritance laws in Namibia, see Hubbard, D (Ed.). 2005?. *The meanings of inheritance*. Windhoek: Gender Research and Advocacy Project, Legal Assistance Centre. See also LAC. 2005. *Women's land and property rights – The missing link: Proposals for the reform of inheritance laws in Namibia*. Windhoek: LAC.

335 Centre for Applied Studies (Compilers). 1993. *Laws of Indonga*. Windhoek: Centre for Applied Social Studies.

While Namibia has done exceptionally well in bringing its domestic law in line with the expectations of both CEDAW and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, there are still serious cases where old customs and traditions seriously affect the right of women, especially rural women.

The Combating of Domestic Violence Act, 2003 (No. 4 of 2003)

This Act is closely related to the protectionist Articles of CEDAW and the Convention on the Rights of the Child.

While CEDAW does not directly address the issue of violence, its emphasis on equality and the dignity of women and its position on respect for women obviously make violence a contradiction of everything that the Convention stands for. In 1993, the UN General Assembly adopted the Declaration on the Elimination of Violence against Women. While this is not an Optional Protocol, it does provide a framework and guidance for member states who wish to protect women from violence in terms of the provisions of CEDAW. Charlotte Bunch describes the importance of the Declaration as follows:³³⁶

This Declaration was a landmark document in three ways: It framed violence against women within the dialogue on human rights; it identified being female as the primary risk factor for violence; and it broadened the definition of gender violence to include all aspects of women's and girls' lives.

The Combating of Domestic Violence Act follows the guidelines of the Declaration. Although the wording is gender-neutral, its application is primarily directed at the protection of women and children. The Act provides for protection orders and several other measures (e.g. the seizure of weapons) to protect vulnerable family members from violent spouses, partners and guardians. It also defined several crimes related to violence in the home.

With South African and Tunisia, Namibia is among only three African countries that have enacted legislation against domestic violence, and one of only 46 countries worldwide.³³⁷

336 Bunch, C. 2006. *The intolerable status quo: Violence against women and girls*. Geneva: UN Children's Fund. Available at <http://www.unicef.org/pon97/40-49.pdf>; last accessed 25 September 2006.

337 (ibid.).

Protection of women and children against sexual offenders

The Combating of Immoral Practices Amendment Act, 2000 (No. 7 of 2000)

This amendment makes sexual intercourse or sexual acts with children under the age of 16 an offence punishable by a fine not exceeding N\$40,000 or imprisonment for a period not exceeding ten years.

The weakness in the Act is the fact that it opted for 16 years as the age of maturity, whereas the Convention on the Rights of the Child made 18 the age of maturity.³³⁸ It is also not applicable if the offender is older than the victim by up to three years.

The Act does not apply to married people, both in civil and customary marriages. Presently, a girl as young as 15 can get married without permission from the Minister of Home Affairs.

The Combating of Rape Act, 2000 (No. 8 of 2000)

This Act extended the protection of vulnerable people (including young boys) against sexual exploitation, molestation and rape. Before the implementation of the Act, rape was a common law crime. *Rape* was extremely narrowly defined as vaginal penetration by a male penis, and was difficult to prove. Consequently, other serious forms of rape, such as oral or anal penetration, were seen as *indecent assault*, which is not as serious as rape.

The definition of *rape* was further broadened by including the insertion of any object into the body of the victim, as well as any form of genital stimulation. Whereas *consent* was the real issue of the common law crime, the Act included consensual sex under the definition of *rape* if it took place under coercive circumstances.

Coercive circumstances include the application of physical force to the complainant or to a person other than the complainant; threats; circumstances where the complainant is under the age of fourteen years and the perpetrator is more than three years older than the complainant; circumstances where the

338 Article 1.

complainant is unlawfully detained; circumstances where the complainant is affected by physical disability or intoxicating liquor or any drug or other substance; sleep; and circumstances where the complainant is influenced to believe s/he is having sex with someone other than the perpetrator.

The Act is gender-neutral. Consequently, it also protects small boys and teenagers, who in the past had to rely on a lesser common law offence – sodomy.

The Act provides for mandatory prison sentences for different categories of offenders. The sentences are high when it involves children under the age of 16, which complies with the Convention on the Rights of the Child; where a parent or guardian is the perpetrator; where the child is younger than 13; where the victim has suffered serious injuries; and where a perpetrator has previously been convicted under the Act or for rape under common law.

The Act acknowledges rape within marriage, making Namibia one of fewer than 20 countries worldwide to criminalise marital rape.³³⁹ South Africa is the only other African state that provides for prosecution of rape within marriage.

The Children's Status Act, 2007 (No. 6 of 2007)

The Act went through several phases and was referred to a Select Committee before eventually being enacted in 2007.

The Act removes the stigma attached to so-called illegitimate children. Under Namibian common law, *illegitimate children* (children born out of wedlock) were prohibited from inheriting.

The father of a child born out of wedlock formerly had no right of access to his child, but had the obligation to pay maintenance. This derogated from the child's right to know and have a relationship with the parent concerned. The Act now gives all parents of children born out of wedlock rights of access.

The Act also moves away from the so-called 'tender age' principle. The principle assumed that it was in the best interests of a child of seven or younger to stay

³³⁹ The other countries are Australia, Austria, Barbados, Canada, Denmark, France, Germany, Ireland, New Zealand, Norway, Poland, South Africa, Spain, Sweden, Trinidad and Tobago, the United Kingdom, and the USA.

with its mother.³⁴⁰ The new Act looks at the interests of the child without presumptions.

The Act has been contentious from the outset. Initially, men in Parliament complained that it was still biased against fathers, which resulted in the Bill being sent back for further consultation.

On the other hand, the LAC and others have expressed serious concerns regarding a section in the Act granting automatic joint custody to both parents. The LAC's concern is based on the fact that Namibia has experienced serious logistical problems with a vast percentage of unmarried fathers who avoid paying maintenance. For the LAC, this is a clear indication that many fathers are not fit parents. They suggest an amendment which will leave custody issues in the hands of the court to make a decision in the best interests of the child.³⁴¹

Legislation dealing with issues of racism and apartheid

Article 23(1) of the Constitution makes provision for the criminalisation of racial discrimination and the practice and ideology of apartheid:

The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices.

However, while Parliament has passed legislation to prohibit racial discrimination, there is still no legislation to prohibit the ideology of apartheid. While the practice of apartheid is partly covered by the Racial Discrimination Prohibition Act, 1991 (No. 26 of 1991), the drafters of the Constitution seem to have had more in mind. The wording of the Constitution and specifically the word *ideology* seems to refer to legislation similar to the German legislation prohibiting the promotion of Nazism.

340 For the creation of a family advocate to serve the interests of the child in custody cases, see Burman, S & F McLennon. 1996. "Providing for children? The family advocate and the legal profession". In Keightley, R (Ed.). 1996. *Children's rights*. Kelwyn: Juta and Co, pp 69–81.

341 See a letter in *The Namibian*, 3 March 2006, supported by several NGOs, individuals and Churches.

Thus, there are no laws to prevent Namibians from propagating an ideology of apartheid. It is possible that the legislator eventually decided that freedom of speech was a higher value that needed to be protected, or that apartheid, as a political ideology, had died a natural death, making such legislation unnecessary.

Nonetheless, the Racial Discrimination Prohibition Act does prohibit the dissemination of ideas on racial superiority.³⁴²

Racial Discrimination Prohibition Act, 1991 (No. 26 of 1991) and Racial Discrimination Amendment Act, 1998 (No. 26 of 1998)

The Racial Discrimination Prohibition Act prohibits discrimination at the workplace and public amenities, as well as other forms of differentiation and discrimination based on race or ethnic origin. However, because section 11(1)(b) of the Act was found to be too wide and a hindrance to free speech,³⁴³ the wording was changed in an Amendment Act.

Over the years, only a few people have been prosecuted under the Act. It may be an indication that Namibia experiences a fair deal of racial harmony. However, it may also indicate that the absence of a clear anti-hate-speech clause, and the fact that *public conduct* is an element of a contravention of the use of discriminatory language, renders the Act inadequate in terms of eradicating all forms of racial discrimination in Namibia.

Labour legislation

The Labour Act, 1992 (No. 6 of 1992) laid the foundation for sound labour practices in Namibia. Those who have employment are protected by an Act that followed the Conventions and Protocols of the International Labour Organisation. The Act also prohibits forced and child labour.

342 Even the extreme right wing of the apartheid era now denies that it is based on an ideology of racial superiority. In the last days of South African control over Namibia, apartheid was portrayed as a policy of treating people as 'equal but separate' – hence the second-tier ethnic administrations of the Transitional Government of National Unity. However, the dishonesty of the policy was exposed by the fact that the second-tier Administration for Whites received a share of taxes paid totally out of proportion to the number of whites in the county and to taxes paid to other second-tier administrations

343 *State v Smith & Others* 1997 (1) BCLR 70 (Nm).

However, the Act does not solve the problem of unemployment, and it excludes the most vulnerable members of the labour market from essential rights, i.e. farm workers and domestic workers are excluded from overtime arrangements for weekend work.

Unlike the Constitution, the Act includes sexual orientation as a category of persons against whom employers may not discriminate.³⁴⁴

A new Labour Act came into operation in 2007 (No. 11 of 2007), but it did not improve the position of the weakest groups in society. It also no longer refers to sexual orientation as a category of non-discrimination, but opted for the less controversial word *sex*, without defining it.³⁴⁵

In addition, the new Act does not make provision for day labourers, and it does not set a minimum wage. Namibia is undoubtedly in dire need of a legal framework to develop and guarantee the social and economic rights of the most vulnerable section of the labour force.

Legislation in tension with the UN instruments

Not all Namibian legislation has been human-rights-friendly. There are several instances where the legislator has opted to either ignore international human rights law or even legislate in a manner that opposes human rights standards.

To use but one example, the new Criminal Procedure Act, 2004 (No. 25 of 2004), which has been promulgated but not yet enacted, diametrically opposes human rights standards. It seems as if the legislator wanted to overturn or annul the judgments of the Supreme Court on human rights and constitutional standards.³⁴⁶

344 In the new Labour Act, which had already been promulgated in 2004, but had not yet been enacted and was actually finally discarded before it came into operation, *sexual orientation* is dropped as a non-discriminatory category. This is in line with the anti-gay lobby in government which became extremely vocal after 1996. The *Frank* case followed suit, and found that *sexual orientation* is not a category listed in the non-discriminatory clause of the Constitution (Article 10(2)). *Sex*, according to the Supreme Court, means “men and women”. See *The Chairperson of the Immigration Selection Board v Frank & Another*, *supra*.

345 Section 5(2)(a).

346 For a critical discussion of the Act, see Horn, N & J Schwikkard. 2008. *Commentary on the Criminal Procedure Act of 2004*, *Namibian Law Library*, Vol. 1. Windhoek: Orumbonde

Earlier in this paper, reference was made to the Supreme Court decision in *State v Scholtz*, which makes state disclosure obligatory. In an attempt to compensate the state, the new Act makes provision for defence disclosure.³⁴⁷ However, the latter provision violates not only the constitutional right of an accused not to disclose his or her defence before the trial, but also the right to remain silent. The right to a fair trial, guaranteed by the International Covenant on Civil and Political Rights (ICCPR), will undoubtedly be violated by the Act once it comes in operation.

The Namibian Constitution allows Parliament to overturn Supreme Court judgments with new legislation.³⁴⁸ Therefore, the making of a law that contradicts a Supreme Court judgment or judgments is not unconstitutional as such. However, the new Act will eventually have to pass the test of constitutionality. Therein lies at least some consolation.

Conclusion

Both the Namibian legislator and the courts have gone a long way since independence to create a human-rights-sensitive society. After the oppression of the apartheid regime, the process to create a legal framework where human rights are respected and protected will take a while.

There are, however, also indications that Namibia has become less liberal and less sensitive in respect of human rights issues since 1996. The gay and lesbian debacle and the consequent *Frank* judgment, the lack of a legal framework for social and economic rights, and the flagrant neglect of basic human rights in the new Criminal Procedure Act are all warning lights that Namibian society needs to remain sensitive to human rights issues.

The government has done more than any other country in Africa to bring its domestic legislation in line with the UN human rights instruments, but much more still needs to be done.

Press Namibia. For a discussion on disclosure, see Dausab, Y. 2008. *The disclosure provisions in terms of sections 113, 114 and 115 of the Criminal Procedure Act (CPA): Their potential effect on the right to a fair trial*. Windhoek: OrumbondePress.Namibia, pp 81–100.

347 Section 114.

348 See Article 81 of the Constitution.

The implementation of international and regional human rights instruments in the Namibian legal framework

Francois-Xavier Bangamwabo

Introduction

Human rights violations occur within states rather on the high seas or in outer space outside the jurisdiction of any one state.³⁴⁹ Thus, it follows that effective protection and enjoyment of human rights has to come from within the state. True, the international human rights system does not place human rights abusers in political bankruptcy, nor does it take over the administration of recalcitrant states in order to assure the enjoyment of rights and/or compensate the victims of human rights violations. On the contrary, the international human rights system seeks to persuade or put pressure on member states to meet their international obligations under human rights instruments that they have ratified or to which they have acceded.

There are only two ways through which states can comply with their legal international obligations as contained in treaties: firstly, by observing or respecting their national laws (constitution or statute law) which are consistent with international norms; and secondly, by making those international norms or obligations part of the national legal or political order, that is, they become *domesticated* (internalised or incorporated). The domestication of these international norms or obligations is the main focus of the current research, with an emphasis on Namibian legal system. Thus, this paper seeks to address the following issues:

- How does Namibia meet its obligations under ratified treaties?
- What are the measures or policies taken by the Namibian state to implement or comply with its international obligations as contained in ratified human rights instruments?
- What is the role of domestic courts in this regard?

349 See Steiner, HJ, P Alston & R Goodman (Eds.). 2000. *International human rights in context: Law, politics, morals* (Second Edition). Oxford: Oxford University Press, p 987.

One thing needs to be kept in mind from the outset: this research is not concerned with human rights violations within Namibia; rather, the thrust is on the domestication and implementation of some major human rights instruments, as ratified or acceded to by Namibia. Before entering the hot waters of the debate, it is worth examining, albeit very briefly, the concept of *domestication* of international human rights law, i.e. its incorporation into national law.

Domestication of international human rights law

As stated earlier, the onus is upon a national legal system to determine the status and force of law which will be accorded to treaty provisions within such legal system. Indeed, it is only when a human rights instrument and its provisions have become part and parcel of domestic law that national courts and quasi-judicial bodies will be able to apply them to cases brought before them by private individuals or organisations.

Traditionally, scholars posit two approaches in respect of the reception of international law into the national legal system, characterising countries as either *monist* or *dualist*.³⁵⁰ *Monists* view international and national law as part of a single legal order. Under this approach, international law is directly applicable in the national legal order. There is no need for any domestic implementing legislation: international law is immediately applicable within national legal systems. Indeed, to monists, international law is superior to national law.³⁵¹ This approach is common in France, Holland, Switzerland, the USA, many Latin American countries, and some francophone African countries. It is worth noting that Namibia, through Article 144 of its Constitution, has adopted the monist approach.³⁵²

350 (ibid.).

351 See also McDougal, Myres. 1959. "The impact of international law upon national law: A policy-oriented perspective". *South Dakota Law Review*, 4, 25:27–31.

352 Article 144 of *The Constitution of the Republic of Namibia* reads as follows: "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia." Thus, all human rights instruments ratified or acceded to by Namibia are part and parcel of its domestic law and should be applied as such, unless they are in conflict with an existing Act of Parliament, or where they are not in conformity with the supreme law of the land, i.e. the Constitution.

Dualists, on the other hand, view international and national law as distinct legal orders. For international law to be applicable in the national legal order, it must be received through domestic legislative measures, the effect of which is to transform the international rule into a national one. It is only after such a transformation that individuals within the state may benefit from or rely on the international – now national – law. To the dualist, international law cannot claim supremacy within the domestic legal system, although it is supreme in the international law legal system. This method of incorporation is commonly applied in the United Kingdom, Commonwealth countries, and most Scandinavian jurisdictions.

While the monist/dualist debate continues to shape academic discourse and judicial decisions, it is unsatisfactory in many respects. The debate focuses on the source or pedigree of norms, and ignores the substance of the norms at issue. By creating a dichotomy between norms on the basis of their sources, we risk being blinded from assessing the merits of the contents of the norms at issue. International and national law have traditionally addressed relatively different issues: the former concentrating on the relationships among states, and the latter on relationships among persons within national jurisdictions. In recent times, however, there is a gradual convergence of interest, and the ultimate goal of both systems is to secure the well-being of individuals. This common goal manifests itself in human rights law, environmental law, and commercial law, i.e. areas where there is increasing interaction between national and international law.³⁵³ Thus, international and national law have a lot in common, and an attempt to compartmentalise or isolate them will be analytically flawed and practically inapposite at present.

The theoretical problems with the monist/dualist paradigm aside, the relationship between international law and national law has important practical implications for both systems and their subjects. The relationship determines the extent to which individuals can rely on international law for the vindication of their rights within the national legal system, and has implications for the effectiveness of international law, which generally lacks effective enforcement mechanisms.

³⁵³ Thus, private individuals have become subjects of international human rights law, particularly in regard to the recent creation of ad hoc UN International Criminal Tribunals to prosecute individuals who have committed crimes against humanity, war crimes, genocide, and other violations of international humanitarian law. Among these are the International Criminal Tribunal for the Former Yugoslavia; the Rwanda Tribunal in Arusha, Tanzania; the Special Court for Sierra Leone; and the Hybrid Chambers for Cambodia.

In a nutshell, it is worth remarking that international law does not dictate that one or the other of the aforesaid methods should be used. Thus, what matters most is the internalisation of international legal obligations within national laws, and their subsequent implementation by domestic courts and quasi-judicial bodies. It follows, therefore, that the method by which treaties become national law is a matter in principle to be determined by the constitutional law of a ratifying state, rather than a matter ordained by international legal order.³⁵⁴

The benefits of incorporation are self-evident. The fact that international human rights instruments are internalised into domestic law gives national authorities the opportunity to afford redress in cases of human rights violations before such cases are taken to regional or international judicial or quasi-judicial fora. This way, protracted proceedings in a forum that is both remote from and unfamiliar to the claimant can be spared. The settlement of litigations on the national level, saving both time and money, always remains the preferable option.

The domestication of international human rights treaties by Namibia

The Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court (herein referred to as *the Rome Statute*) was adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (ICC) on 17 July 1998.³⁵⁵ The Rome Statute entered into force on 1 July 2002 after the ‘magic number’ of 60 ratifications was reached on 11 April 2002. Following this entry into force, the first Session of the Assembly of State Parties was held from 3 to 10 September 2002. On this occasion, both the Elements of Crimes over which the court has jurisdiction and the Rules of Procedure and Evidence were formally adopted.³⁵⁶

354 See Leary, Virginia. 1982. “International Labour Conventions and National Law”. In Steiner et al. (2000:999–1000), *supra*.

355 As corrected by the procès-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001, and 16 January 2002.

356 See Schabas, William A. 2006. “First prosecutions at the ICC”. *Human Rights Law Journal*, 27, 1–4:26.

Major international human rights instruments ratified or acceded to by Namibia and other countries in the southern African region

Country	CAT* Rat./Ac.*	CEDAW* Rat./Ac.*	CERD* Rat./Ac.*	CRC* Rat./Ac.*	ICCPR* Rat./Ac.*	ICESCR* Rat./Ac.*	OPAC* Rat./Ac.*	OPSC* Rat./Ac.*	RSICC* Rat./Ac.*
Angola	12/09/89	17/10/86	-	04/01/91	10/04/92	10/04/92	-	-	07/10/98
Botswana	08/09/00	19/08/96	20/02/74	13/04/95	08/12/00	-	24/09/03	24/09/03	08/09/00
Dem. Rep. of Congo	18/03/96	16/11/86	21/04/76	27/10/90	01/07/77	01/02/77	11/11/01	11/11/01	11/04/02
Lesotho	-	22/08/95	04/11/71	09/04/92	09/12/92	09/12/92	24/09/03	21/09/03	06/09/00
Madagascar	-	17/03/89	07/02/69	18/04/91	23/03/76	03/01/76	-	-	18/07/98
Malawi	11/06/96	12/03/87	11/06/96	01/02/91	22/03/94	22/03/94	-	07/09/00	19/09/02
Mauritius	09/12/92	09/07/87	30/05/72	02/09/90	23/03/76	03/01/76	-	11/11/01	05/03/02
Mozambique	14/09/99	16/04/97	18/04/83	28/05/94	21/10/93	-	06/03/03	06/03/03	28/12/00
Namibia	28/11/94	23/11/92	11/11/82	30/10/90	28/02/95	28/02/95	16/04/02	16/04/02	25/06/02
South Africa	10/12/98	15/12/95	10/12/98	16/07/95	10/03/99	3/10/94	30/06/03	30/06/03	27/11/00
Swaziland	-	26/03/04	07/04/69	06/10/95	26/06/04	26/06/04	-	-	-
Tanzania	-	20/08/85	27/10/72	10/07/91	11/09/76	11/09/76	24/04/03	24/04/03	20/08/02
Zambia	07/10/98	21/06/85	04/02/72	05/01/92	10/07/84	10/07/84	-	-	13/11/02
Zimbabwe	-	13/05/91	13/05/91	11/10/90	13/08/91	13/08/91	-	-	17/07/98

* The abbreviations represent the following:

Ac acceded to

Rat ratified

CAT Convention against Torture and other Acts of Cruel, Degrading and Inhumane Treatment or Punishment

CEDAW Convention for the Elimination of Discrimination against Women.

CERD Convention for the Elimination of all Forms of Racial Discrimination

CRC Convention on the Rights of the Child

ICCPR International Covenant on Civil and Political Rights

ICESCR International Covenant on Economic, Social and Cultural Rights

OPAC Optional Protocol to the Convention on the Rights of the Child: Armed Conflict

OPSC Optional Protocol to the Convention on the Rights of the Child: Sale of Children

RSICC Rome Statute of the International Criminal Court

It is worth noting that the ICC is already operational and there are three situations (cases) referred to it for prosecution.³⁵⁷ However, considering its tender age, we are yet to benefit from its jurisprudence.

As indicated in the above table, Namibia became a state party to the Rome Statute on 25 June 2002. Needless to say, the Rome Statute is part of Namibian law and, therefore, binding on the state in accordance with Article 144 of the Namibian Constitution.³⁵⁸ Undoubtedly, the Rome Statute imposes legal obligations and expectations on member states. These are, *inter alia*, —³⁵⁹

- (i) *to ensure effective prosecution of most serious crimes of concern to the international community as a whole;*
- (ii) *to put an end to impunity for the perpetrators of these crimes;*
- (iii) *to contribute to the prevention of such crimes; and*
- (iv) *to exercise national criminal jurisdiction over those responsible for international crimes.*

At this stage, it is important to remark that the subject-matter jurisdiction (jurisdiction *ratione materiae*) of the ICC extends to four crimes, namely —³⁶⁰

- the crime of genocide
- crimes against humanity
- war crimes, and
- the crime of aggression.

In addition to the legal obligations emanating from the Rome Statute, state parties are also encouraged and expected to incorporate the crimes as defined in the Rome Statute within their national legislations. Although the domestication seems an absolutely essential condition for the enforcement of international law within national jurisdictions, very few countries are prepared to incorporate serious international crimes into their own municipal penal codes.

Thus, through ratification of the Rome Statute, Namibia has undertaken the following legal obligations:

357 See the Situation in Uganda (ICC-02/04), the Situation in Democratic Republic of Congo (ICC-01/04) and Prosecutor v Lubanga (ICC-01/04-01), and the Situation in Darfur referred to the ICC by the UN Security Council in terms of Article 13 of the Rome Statute.

358 *Supra*, footnote 4.

359 See Preamble to the Rome Statute of the ICC.

360 See Article 5 of the Rome Statute.

- To incorporate the four crimes and their elements as defined and provided for in the ICC Statute into its domestic laws
- To exercise its criminal jurisdiction over those responsible for international crimes, and
- To contribute to the prevention of such crimes both within its territory and elsewhere.

These three legal obligations are interlinked; indeed, the first and second obligations listed overlap, in that no criminal prosecution of serious international crimes will be possible unless the domestic laws are amended to include and reflect these crimes and their respective elements. This is the duty of the Namibian legislature.³⁶¹

Equally relevant to the above legal obligations is the concept of *complementarity*. Paragraph 10 of the preamble to the Rome Statute states that –

... the International Criminal Court shall be complementary to national criminal jurisdictions.

In addition, Article 17(1) provides that –

... a case will not be admissible by the ICC when it is being investigated and/or prosecuted by a state that has jurisdiction over it.

It follows, therefore, that only when states are unwilling or unable to investigate and/or prosecute are cases before the ICC deemed to be admissible. The terms *unwilling* and *unable* are fully explained in Article 17(2) and (3).

All in all, the principle of complementarity reaffirms the argument that the implementation of international human rights instruments squarely depends on the domestic legal framework. This principle also reflects the widely shared view that systems of national justice should remain the front-line defence against serious human rights abuse, with the ICC only serving as a backstop. Therefore, state parties to human rights instruments are called upon to play their vital role

361 In my recent discussion with a lawyer who is responsible for the Human Rights Directorate within the Ministry of Justice, I was informed that the Namibian government had not yet taken the necessary steps to incorporate crimes as defined by the Rome Statute into its domestic laws.

and comply with their legal obligations, failing which the enjoyment and benefits of human rights will remain a pie in the sky.

The NSHR petition and the Rome Statute

A discussion on the implementation and domestication of the Rome Statute within the Namibian legal framework cannot be complete without looking at the recent highly publicised saga involving the petition by the National Society for Human Rights (NSHR) to the ICC.³⁶² In terms of this petition, the local human rights NGO wants the ICC to investigate and/or prosecute the Founding President and Father of the Nation, Dr Sam Nujoma, and other Namibians for crimes allegedly committed during the liberation struggle against the then apartheid regime.

The NSHR petition raises two important legal issues with regard to the jurisdictional powers of the ICC:

- Firstly, is the permanent criminal court legally empowered to hear cases involving crimes committed before the entry into force of the Rome Statute? In other words, does the ICC have retrospective jurisdiction, and
- Secondly, is the so-called continuous crimes doctrine part of the Rome Statute?

To adequately address these two issues, one has to look at the provisions of the Rome Statute creating the ICC. Article 11(1) of the Statute states that —³⁶³

... the court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

The above provision is buttressed by Article 24 of the same Statute, which deals with non-retroactivity *ratione personae*. Under the latter Article, it is clearly spelt out that no person can be held criminally responsible for conduct prior to the entry into force of the Rome Statute.

Articles 11 and 24 are in fact quite closely related, and there were some proposals to merge them during the drafting of the Statute. The reading and construction of

³⁶² See *The Namibian*, 30 July 2007 and 3, 6, 7 and 17 August 2007. See also *New Era*, 3 and 7 August 2007.

³⁶³ As mentioned earlier, the Rome Statute creating the ICC entered into force on 1 July 2002.

these two Articles, therefore, evidence that the ICC is a prospective institution in that it cannot exercise jurisdiction over crimes committed prior to the entry into force of its Statute.³⁶⁴ According to Prof. William A Schabas, a pre-eminent jurist in the field of international criminal law, the idea of retrospective jurisdiction was unmarketable and was never seriously entertained at the Rome Conference at which the Statute was discussed.³⁶⁵ This was mainly because very few states were prepared to recognise an international court with such ambit.

The second issue is the so-called continuous crimes doctrine upon which the NSHR bases the admissibility of its case. For instance, the *continuous crimes* concept may present itself in the case of ‘enforced disappearance’, which is a crime against humanity punishable under the Rome Statute. Someone might have disappeared prior to the entry into force of the Statute, but the crime would continue after entry into force to the extent that the disappearance persisted.

In determining whether or not continuous crimes are prosecutable by the ICC, one again needs to find an answer from the piece of legislation which creates the court. True, the issue of continuous crimes was discussed and deliberated upon at length at the Rome Conference. However, at the end of the Conference, nothing concrete on the topic was agreed upon; in fact the final document does not contain any provision with regard to continuous crimes.³⁶⁶

Coming back to the NSHR petition and taking into consideration the foregoing discussion, it is very difficult to understand how the ICC would entertain the petition. Will the court’s prosecutor and judges amend and/or bend the legislation so as to accommodate this scenario? It is common cause that prosecutors and judges, be they international or national, do not make laws. Rather, their primary role is to interpret existing laws.

As regards the domestication and implementation of the Rome Statute by the Namibian government, the author of this research is not aware of any legal or

364 See Schabas, William A. 2004. *Introduction to the International Criminal Court* (Second Edition). Cambridge: Cambridge University Press, p 69.

365 (ibid.:70).

366 Surprisingly, the Drafting Committee for the Rome Statute had appended a footnote on para. 1 of Article 24, which read as follows: “[T]he question has been raised as regards a conduct which started before the entry into force and continues after the entry into force”; see UN Doc. A/CONF. 183/C.1/L.65/REV.1, P.2. However, this footnote was removed and, consequently, the final document does not reflect anything on continuous crimes.

administrative measures put in place by Namibia to comply with its obligations as spelt out in the said Statute.³⁶⁷

The International Covenant on Civil and Political Rights under Namibian law

Introduction

This part of the research focuses on domestic laws and policies put in place by the Namibian government with a view to implementing and complying with its legal obligations under the International Covenant on Civil and Political Rights (ICCPR).

Both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are often referred to as the *International Bill of Rights*. This is because they contain all fundamental human rights and freedoms which are included, almost verbatim, in all major international and regional human rights instruments as well as the constitutions of all modern states. The ICCPR was adopted by the UN General Assembly in 1966 and entered into force in 1976. Namibia became a state party to the ICCPR on 28 February 1995, and by virtue of Article 144 of the Namibian Constitution, the Covenant is part of Namibian municipal laws. The effect of Article 144 of the Namibian Constitution vis-à-vis the ICCPR is that the rights and freedoms provided therein are enforceable within Namibia by either its judicial or quasi-judicial bodies.

Civil and political rights as domesticated and implemented by Namibia

Article 2(2) of the ICCPR provides that –

... state parties to the ICCPR are duty bound to take the necessary steps, in accordance with their constitutional processes, to adopt such legislative or other measures as may be necessary to give effect to the rights contained in that Covenant.

To see whether the Namibian government complies with the above provision, one has to look at the Constitution of the Republic of Namibia, the supreme law of the land.³⁶⁸

367 See *supra*, legal obligations under the Rome Statute; see also footnote 11, *supra*.

368 See Article 1(6) of the Constitution of the Republic of Namibia.

Indeed, Namibia has a justiciable Bill of Rights, which is incorporated into the country's Constitution. A reading of Chapter 3 of Namibia's Constitution reveals that all fundamental human rights and freedoms contained in the ICCPR are also provided for and protected by the Namibian Bill of Rights.³⁶⁹ Briefly, the following fundamental rights are enshrined in the Namibian Constitution:

- The right to life
- The right to personal liberty
- The guarantee against torture or cruel, inhuman or degrading treatment or punishment
- The guarantee against slavery and forced labour
- The right to the protection of the law and the guarantee against discrimination on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status
- The guarantee against arbitrary and unlawful arrest and detention
- The right to a fair trial
- The right to privacy
- The right to private property
- The right to marriage and to found a family, and
- The right to participate in peaceful political activity.

In addition, all fundamental freedoms are enshrined in Article 21 of the Constitution. These are –

- freedom of speech and expression
- freedom of thought, conscience and belief, which includes academic freedom in higher institutions of learning
- freedom to practise any religion
- freedom to peaceful assembly
- freedom of association, which includes freedom to form and join associations or trade unions and political parties
- freedom of movement within the country
- freedom to reside and settle in any part of Namibia, and
- freedom to practise any profession, or carry on any occupation, trade or business.

³⁶⁹ Article 5 of the Namibian Constitution states that all fundamental rights and freedoms enshrined in Chapter 3 are obliged to be upheld and respected by all organs of the government (legislature, executive, judiciary) and its agencies.

The above freedoms may, however, be restricted by a law as long as such restriction is reasonable in a democratic society, and is required in the interests of public policy or the sovereignty and integrity of Namibia.³⁷⁰

Besides the aforementioned fundamental rights and freedoms, the Namibian Bill of Rights also addresses the issue of administrative justice. Thus, Article 18 of the Constitution reads as follows:³⁷¹

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

Thus, private individuals are entitled to approach courts of law in order to challenge decisions made by administrative bodies or authorities if they believe that those decisions are unfair and/or unreasonable.

In addition to the above civil and political rights, the Constitution enshrines the right to enjoy, practise and profess one's culture. The right to education is also provided for in the Namibian Bill of Rights.³⁷² Nevertheless, other economic, social and cultural rights, as embodied in the ICESCR, are not justiciable in that they are not enshrined in the Namibian Bill of Rights. Having said that, it is worth remarking that the Constitution provides that the Namibian government is obliged to promote and maintain the welfare and good standard of living of its people through the adoption of appropriate policies.³⁷³ The major problem with regard to the implementation and enforcement of economic and social rights as enshrined in the ICESCR is that such implementation is dependent upon the resources available in a state party; thus, these rights themselves are limited by a lack of resources.³⁷⁴ This scenario is in fact acknowledged by the Covenant itself if one reads Article 2 of the ICESCR.³⁷⁵

370 See Article 21(2) of the Constitution.

371 This constitutional right was buttressed by the High Court of Namibia in the case of *The Chairperson of the Immigration Selection Board v Frank & Another* 1999 NR 257, p 258, para. G.

372 See Articles 19 and 20, respectively, of the Constitution.

373 For a further reading on these policies, see Article 95 of the Constitution.

374 See *Soobramoney v Minister of Health* (Kwazulu-Natal), Constitutional Court of South Africa, Case CCT 32/97, 27 November 1997; available at www.law.wits.ac.za/judgenebts/soobram.html; last accessed 20 October 2007.

375 Briefly, Article 2 of the ICESCR provides that the realisation of the rights recognised in the Covenant by state parties depends on the availability of resources and also on international assistance and cooperation.

Coming back to the civil and political rights recognised and protected by the Namibian Bill of Rights, Article 24(3) of the Constitution spells out a number of rights which cannot be derogated from or suspended even if a state of emergency has been declared. These are, inter alia, —³⁷⁶

- the right to life
- the right to legal representation
- the guarantee against torture and other cruel or inhuman treatments or punishments
- the protection against discrimination on any ground as stipulated in Article 10, and
- the right to a fair trial by a competent and impartial tribunal.

It is also important to note that the fundamental rights and freedoms enshrined in the Namibian Bill of Rights are not absolute, in that such rights and freedoms may be limited by an Act of Parliament in as much as the requirements for such limitation are met. Article 22(a) states that –

... [a]ny law providing such limitation shall be of general application and shall not negate the essential content of such right.

Additionally, the law which limits the right or freedom in question is obliged to specify clearly the extent of such limitation and to identify the affected right and/or freedom.³⁷⁷ If one looks at the rules and principles of international human rights law vis-à-vis derogation and limitations of rights, one would come to the conclusion that Articles 22 and 24 of the Namibian Bill of Rights fully comply with such rules.³⁷⁸

The protection and enforcement of civil and political rights within Namibia

Article 5 of the Namibian Constitution reads as follows:³⁷⁹

376 With regard to derogation from and suspension of some rights and freedoms under the Constitution, see Article 24 (1), (2) and (3).

377 See Article 22 (b).

378 See e.g. General Comment No. 5, 31/07/81, Derogation of Rights (Article 4): CCPR General Comment, Office of the High Commissioner for Human Rights.

379 See Chapter 3 of the Constitution.

The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies, and by all natural and legal persons in Namibia, and shall be enforceable by the Courts ...

The above constitutional provision is buttressed by Article 25(2), which entitles aggrieved persons who claim their fundamental rights or freedoms guaranteed by the Constitution have been infringed or threatened to approach a competent court for a remedy. In addition, paragraph 4 of Article 25 empowers the court dealing with cases of human rights violations to award monetary compensation to the victims.

Besides the courts of law, the Office of the Ombudsman also plays a significant role with respect to the protection of human rights. Although this Office does not have the power or mandate to hear cases involving human rights violations with a view to awarding monetary compensation or any other remedy, alleged victims of human rights violations may approach the Ombudsman for legal assistance and advice.³⁸⁰ The Ombudsman is empowered to investigate allegations of human rights violations *meru motu* or after receiving a complaint from an individual. The independence and impartiality of the Office of Ombudsman are protected in terms of Article 89(2) of the Constitution.

Undoubtedly, the Namibian Bill of Rights is justiciable and in fact it fully complies with the legal obligations as spelt out in Article 2(3) of the ICCPR which provides that victims of human rights violations should be awarded remedies. It is worth noting that the whole purpose and *raison d'être* of international human rights law is founded on compensation of victims of human rights abuse and violations. In the absence of such remedies and redress, human rights law becomes fictional and abstract.

The creation of the Office of the Ombudsman is also in accordance with the Paris Principles on National Human Rights Institutions.³⁸¹ However, it is submitted that the Ombudsman's Office should be strengthened in terms of its mandate and resources, so as to effectively and efficiently fulfil its noble objectives.³⁸²

380 See Article 25(2) and 91(d) of the Namibian Constitution.

381 The Paris Principles on National Human Rights Institutions were adopted by UN General Assembly Resolution 48/134 of 20 December 1993.

382 See Inter-Ministerial & Technical Committee on Human Rights. 2004. *Initial Report on ICCPR*. Windhoek: Ministry of Justice, p 60.

Unlike some countries, Namibia does not have a Human Rights Commission. The mandate of such a Commission is mainly to monitor the protection and promotion of human rights on behalf of the government. Thus, in Namibia's jurisdiction, it is the Ministry of Justice that has the final responsibility for the promotion and protection of human rights on behalf of the government.³⁸³ To this end, the Ministry ensures that existing laws and Bills are in accordance with the rights and freedoms recognised and enshrined in the Constitution. When it comes to implementing and realising specific human rights contained in various human rights instruments ratified or acceded to by Namibia, the Ministry and/or the government agency responsible for the specific items under the instrument are responsible for the implementation of the recognised rights.³⁸⁴ In realising human rights recognised by the Constitution and other human rights instruments, the various Ministries and governmental agencies are assisted by both governmental organisations and NGOs engaged in various socio-economic activities and in the field of human rights promotion, protection and education.

Finally, Namibians who claim that their rights or freedoms have been violated and who fail to obtain redress from domestic courts may submit individual complaints to the Human Rights Committee in New York.³⁸⁵ This option is provided for in the First Optional Protocol to the ICCPR, to which Namibia is a state party.³⁸⁶ For an individual to file a complaint with the Committee, s/he first needs to have exhausted all the local remedies available in the jurisdiction concerned.³⁸⁷ In assessing whether or not local remedies have been exhausted, the Committee considers factors in the complainant's country such as the availability of remedies, the independence and impartiality of the judiciary, and respect for the rule of law. Upon receiving an individual complaint, the Committee adjudicates on the merits of the alleged violations. In the event that the Committee believes that human rights abuses have occurred, then it transmits its views and recommendations to the concerned state party. More often than not, the Committee may recommend that the complainant (or the victim of human

383 (ibid.:48).

384 (ibid.:49).

385 This is a quasi-judicial body responsible for the monitoring of the implementation of the rights enshrined in the ICCPR. It is established in terms of Article 28 of the Covenant.

386 See First Optional Protocol to the ICCPR, Article 1.

387 (ibid.:Articles 2 & 5).

rights abuse) be awarded remedies.³⁸⁸ Article 4(2) of the Protocol provides that, within six months of receiving the Committee's views, the receiving state is obliged to revert to the Committee, clarifying the matter and informing it whether or not action had been taken to remedy the complainant's situation.

However, it is worth remarking that the decisions of the Human Rights Committee are not binding on state parties; rather, they are merely recommendations on how to improve the implementation and realisation of rights and freedoms recognised under the ICCPR.

Namibia and the legal obligation under Article 40 of the ICCPR

Under Article 40 of the Covenant, state parties are legally obliged to submit reports on measures they have adopted to give effect to and realise the rights recognised in the ICCPR. The reports have to indicate factors and difficulties, if any, in implementing the Covenant. The Human Rights Committee, established in terms of Article 28 of the Covenant, is responsible for studying these reports, and may generally comment on or add their recommendations to them. The reports need to be submitted within one year of the entry into force of the ICCPR for the state party concerned. In cases where the initial report has been submitted, the Human Rights Committee may request the submission of subsequent reports any time it deems necessary and appropriate.³⁸⁹

In order to comply with the obligations associated with Article 40, Namibia submitted its initial report to the Human Rights Committee in 2004 – after a delay of over eight years.³⁹⁰ After studying and deliberating upon the Namibian initial report, the Committee came up with concluding observations and recommendations.³⁹¹ In the ensuing paragraphs, the discussion centres on positive aspects as well as grey areas of these observations and recommendations.

388 For example, *Toonew v Australia*, Communication No. 488/1992, Human Rights Committee, 31 March 1994, UN Doc. CCPR/C/50/D/488/1992, in which the Committee held that the Tasmanian Criminal Code (*the Code*), which made private homosexual conduct a criminal offence, violated Article 17 guaranteeing the right to privacy. The Committee also found that the repeal of the infringing provisions, i.e. sections 122(a) and (c) and 123 of the Code would be an effective remedy.

389 See Article 40 (1), (2), (3), (4) and (5) of the Covenant.

390 See Human Rights Committee, CCPR/C/NAM/2003/1.

391 Human Rights Committee, 2216th meeting (CCPR/C/SR.2216), 26 July 2004, or Doc. CCPR/CO/81/NAM.

Among the positive aspects, the Committee noted –

- the speedy establishment of democratic institutions in Namibia since independence
- the abolition of the death penalty for all crimes
- the constitutional provision which incorporates rules of international law and international agreements into Namibian municipal laws³⁹²
- the creation of the Office of Ombudsman,³⁹³ and the enactment of a legislation which eliminates discrimination between female and male spouses, i.e. the Married Persons Equality Act³⁹⁴ (in fact, this piece of legislation is in line with Article 3 of the Covenant, which prohibits discrimination and inequality between men and women)
- the right to legal representation in regard to indigent litigants,³⁹⁵ and
- the drafting of the Children's Status Bill,³⁹⁶ whose main purpose is to eliminate all inequalities between children born within and out of wedlock (the Bill has been assented to by the President and has since become law).³⁹⁷

As regards recommendations, the Committee urged the Namibian government to urgently take the necessary steps to make torture a specific statutory offence.³⁹⁸ The onus is, therefore, on the legislature to comply with this obligation: in Namibia, as in many common law jurisdictions, torture is still considered a common law offence to be charged as either assault or *crimen injuria*.

Article 26 of the ICCPR prohibits any discrimination on any of the following grounds: race, sex, religion, colour, and language. The above provision is echoed by Article 10 of the Namibian Constitution. Whether the prohibition of discrimination on the ground of sexual orientation is protected by the Constitution

392 See Article 144 of the Namibian Constitution.

393 Although the Committee observed that the Office of the Ombudsman should be strengthened and given more resources in order to fulfil its mandate.

394 No. 1 of 1996.

395 See the Legal Aid Act, 1990 (No. 29 of 1990). Indeed, the right to legal representation is one of the main components of the right to a fair trial. More often than not, the right to legal representation is hampered by a lack of resources in developing countries. Very few litigants in both criminal and civil matters are able to afford a private attorney.

396 No. 6 of 2004.

397 See the Children's Status Act, 2006 (No. 6 of 2006). However, the Act was not yet in force by the time of writing this research.

398 See para. 7 of the Concluding Observations.

is an issue which was addressed in *The Chairperson of the Immigration Selection Board v Frank & Another*.³⁹⁹ In this case, the High Court of Namibia found that
—⁴⁰⁰

... Article 10 of the Namibian Constitution provided for equality before the law and prohibition of discrimination on any ground, including sex.

The learned court, using Article 21(1)(e) of the Constitution, further held that same-sex relationships were recognised by the Constitution. At this point it is important to remark that the High Court finding was overturned by the Supreme Court, which held that the Constitution did not recognise same-sex relationships.⁴⁰¹

Thus, in paragraph 22 of its Concluding Observations, the Committee notes the absence of anti-discrimination measures or legislation for sexual minorities such as homosexuals. Since Namibian society is very conservative, it is uncertain whether or when a law on anti-discrimination on the ground of sexual orientation will be considered. In fact, like in many other African countries, sodomy remains a prosecutable crime in Namibia.⁴⁰²

The Optional Protocol on the Involvement of Children in Armed Conflicts

The Optional Protocol on the Involvement of Children in Armed Conflicts (OPAC) is the first Protocol to the Convention on the Rights of the Child. It was adopted by the UN General Assembly on 25 May 2000,⁴⁰³ and came into force on 12 February 2002. Namibia ratified the Protocol on 16 April 2002, only two months after its entry into force. As its title indicates, Its core purpose is to prevent the involvement of children in armed conflicts.⁴⁰⁴ State parties to the Protocol are expected to ensure that children are not engaged in armed conflict

399 1999 NR 257.

400 (ibid.:258, para. J).

401 See *The Chairperson of the Immigration Selection Board v Frank & Another*, 2001 NR 107 (SC), p 108.

402 This is a common law offence.

403 See Resolution A/RES/54/263.

404 In international law, *conflicts* are characterised as being of an international nature, i.e. a conflict involving two or more states, and not internal civil wars.

and that places that are significant to children's welfare, such as schools and hospitals, are not targeted in armed conflicts.⁴⁰⁵

The OPAC and Namibian domestic laws

Article 1 of the Protocol deals with state parties' obligation towards members of their armed forces who are younger than 18. This Article requires state parties to ensure that members of their armed forces who have not attained 18 years of age do not engage in direct hostilities. In this regard, Namibia enacted the Defence Act,⁴⁰⁶ which regulates, inter alia, the actions and conduct of members of armed forces during hostilities. For instance, section 28 of the Act provides that *any* member of the forces may be called for mobilisation. Section 30(2) of the Act further 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, section 7 of the Act lays down the requirements and conditions to be met for one to join the forces. However, the latter section does not lay down the minimum age for recruitment into the armed forces.

The Namibian Constitution protects children from economic exploitation and from performing work that may be hazardous to or interfere with their education, or likely to be harmful to their health or physical, mental, spiritual, moral or social development.⁴⁰⁷ For the purpose of this constitutional provision, *child* is defined as a person younger than 16, whereas the Protocol defines *child* as a person younger than 18. Since the Defence Act does not stipulate the minimum age for recruitment into the armed forces, and since the same legislation fails to distinguish between members who may be called for mobilisation, it remains ambiguous whether the Namibian statute law complies with the legal expectations required by Article 1 of OPAC. In addition, the Namibian statute does not prevent members of the armed forces who are below the age of 18 from engaging in armed conflict.

Equally relevant is the minimum age in respect of voluntary recruitment. Article 3 of OPAC provides that, within two months of ratification, state parties to the Protocol are expected to deposit a declaration stipulating the minimum age of

405 See the Preamble to the Protocol.

406 No. 1 of 2002.

407 See Article 15(2).

voluntary recruitment as well as the safeguards adopted to ensure that such recruitment is not coerced. In addition, each recruit's parents or guardians need to be informed of their child or charge's intentions.

Article 4 of OPAC deals with the recruitment of child soldiers in countries ravaged by conflicts of a non-international character, such as civil and ethnic wars. Under this Article, OPAC prohibits armed groups or rebel movements from enlisting children under the age of 18 for purposes of engagement in hostilities. As discussed earlier herein, Namibia is a state party to the Rome Statute establishing the ICC. The Rome Statute criminalises the enlisting and conscription of child soldiers in international as well as non-international armed conflicts.⁴⁰⁸ One notable ongoing prosecution before the ICC involves a certain Lubange, the leader of a Congolese rebel movement titling itself *Forces Patriotiques pour la Liberation du Congo*.⁴⁰⁹ Lubange was arrested by the Democratic Republic of Congo (DRC) government, which then referred the case to the ICC for prosecution under Article 12(2)(a) and (b) of the Rome Statute. Lubange is being charged with and prosecuted for enlisting and conscripting children under the age of 15 years into his forces. The warrant against Lubange further indicated that there were reasonable grounds to believe that such child soldiers indeed participated in hostilities.⁴¹⁰ Although there is no armed conflict in Namibia, one can convincingly argue that the above provisions equally apply to Namibia, considering the effect and relevance of Article 144 of the Namibian Constitution vis-à-vis ratified international agreements.

In regard to the implementation and enforcement of the provisions of OPAC, state parties are expected to take all necessary legal, administrative and other measures with a view to incorporating such provisions into their respective national jurisdictions.⁴¹¹ In addition, Article 6 of the Protocol calls upon state parties to, inter alia, make the principles and provisions contained in the Protocol widely known to adults and children alike. Furthermore, state parties should ensure that all persons used or recruited in armed conflict contrary to the provisions of OPAC are demobilised. Such persons should also be assisted physically as well as psychologically in their reintegration into normal civilian life.⁴¹²

408 See Article 8(2)(b)(xxvi) and 8(2)(e)(vii) of the Rome Statute.

409 *Prosecutor v Lubange*, ICC – 01/04-01/06-8.

410 See Schabas (2006:35).

411 Article 6 (1) of the OPAC.

412 Article 6 (2) and (3) of the Protocol.

The number of former child soldiers within the borders of Namibia is not easy to ascertain. However, their presence is likely because Namibia shares a border with Angola – a country with a high number of former child soldiers who may have crossed over into Namibia. Moreover, Namibia has refugee camps which accommodate asylum seekers and refugees from war-torn-countries such as Burundi, the DRC, Rwanda, and Somalia. The conscription of child soldiers in these countries is no secret, so the presence of former child soldiers in these refugee camps is a high possibility.

In complying with and implementing Article 6(3) of OPAC, therefore, Namibia is expected to ascertain the presence, if any, of former child soldiers within its territory with a view to assisting them physically as well as psychologically. In this regard, the efforts of the Namibian government, in collaboration with the UN High Commission for Refugees, to accommodate and assist asylum seekers and refugees are commendable. Nevertheless, due to some grey areas⁴¹³ in domestic legislation on the topic, implementation of and compliance with the provisions of the present Protocol are not easy to assess.

Conclusion

In this research, the author has attempted to assess the domestication and implementation of human rights instruments by the Namibian government. The focus, therefore, was on policies, legal and administrative measures adopted by Namibia with a view to complying with and implementing its legal obligations, as spelt out in ratified human rights instruments. The first section gives an overview of the rules and principles of international law with regard to the domestication of international law within municipal law. There are two methods used to incorporate international law into national legal systems, namely the monist and dualist approaches. Namibia, through Article 144 of its Constitution, adopted the monist approach. As discussed earlier, in terms of this approach, international law is immediately applicable within national legal frameworks. All in all, one could argue that Namibia's constitutional and legal framework is conducive to the process of domestication of the rules of international law and international agreements.

The benefits of the domestication of human rights instruments within the Namibian legal system are self-evident. Undoubtedly, this gives both national

413 See page 20 (*supra*), where some of these grey areas are discussed.

authorities and private individuals the opportunity to afford and obtain redress in cases of human rights abuses and violations, before complaints are taken to regional and international judicial or quasi-judicial fora. This way, protracted proceedings in a forum that is both remote from and unfamiliar to the individual complainant can be spared.

In the second section, the author looked at some of the human rights instruments ratified by Namibia as well as other countries in the region. Three instruments were chosen and analysed *in extenso* with a view to ascertaining their domestication and implementation by Namibia, namely the Rome Statute of the International Criminal Court, the International Covenant on Civil and Political Rights, and the Optional Protocol on the Involvement of Children in Armed Conflicts.

In regard to the Rome Statute, the author is not aware of any legal or administrative measures adopted by the Namibian government to comply with and implement its obligations under the Statute. Perhaps one can argue that it is too early to assess the realisation and implementation of this Statute, considering that the ICC is still in its infancy.

Concerning the ICCPR, with the exception of few problematic areas discussed in this paper, one should commend the efforts being made by the Namibian government in realising and implementing the rights recognised by the Covenant.

Finally, the paper deals with the domestication and implementation of OPAC. After an overview of the provisions of the Protocol and the Namibian statute on the topic, it is not clear whether or not Namibia complies with its legal expectations under this Protocol. Therefore, legislative and administrative measures need to be adopted that will internalise and implement these legal obligations. As stated earlier, the onus is now on the legislature, with the assistance of relevant ministries and other government agencies, to see to it that the legal framework is reformed in such a way that all relevant obligations as outlined are fulfilled.

The universality of human rights: Challenges for Namibia

Salome M Chomba

Introduction

This paper discusses Namibia's adherence to its international human rights obligations with regard to civil and political rights as well as to women and children's rights. The paper will outline a number of recommendations that the state can utilise in order to fully implement and enforce international human rights instruments in its domestic laws. The instruments to be discussed here include –

- the Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- the Convention against Torture and other Acts of Cruel, Degrading and Inhumane Treatment or Punishment (CAT)
- the Convention on the Elimination of Discrimination against Women (CEDAW), and
- the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

Looking at Namibia in general, the country has in many ways failed to fulfil its international obligations in terms of failing to report to the Committees set up for each Convention, and in many cases by failing to implement and enforce the obligations set out in the instruments concerned in its domestic laws.

Civil and political rights

Articles 7 and 26 of the International Covenant on Civil and Political Rights (ICCPR) deal with the prohibition of torture, and freedom from discrimination based on race, sex or colour, respectively.⁴¹⁴ Namibia is a signatory to this Covenant, as well as to CERD and CAT, which deal specifically with the aforementioned freedoms. These two Conventions will be dealt with separately

⁴¹⁴ These Articles are based on the UN Declaration on Human Rights and are enshrined in the Namibian Constitution in Articles 8 and 10, respectively.

below in order to establish how Namibia has implemented them into its domestic law.

Convention on the Elimination of All Forms of Racial Discrimination

The main objective of this Convention was to guarantee equality amongst people by trying to eliminate racial discrimination at all costs. Namibia became a party to this Convention on 11 November 1982, when the UN Committee for Namibia ratified it on behalf of the Namibian people.⁴¹⁵

The Committee for the Elimination of All Forms of Racial Discrimination is charged with monitoring states' compliance with CERD. As part of this compliance, states are expected to report to the Committee on measures taken by them to bring their respective countries in line with their legal obligations under international law. The latest report handed in by Namibia is the combined report⁴¹⁶ of its 8th to 12th periodic reports, spanning the years from 1997 to 2005.

Historically, Namibia was a victim to the apartheid era that took place in South Africa. As a result of this ideology, a number of discriminatory laws were transplanted into Namibian domestic law. Examples of such laws are the Administration of Estates Act,⁴¹⁷ the Intestate Succession Ordinance,⁴¹⁸ and the Native Administration Proclamation.⁴¹⁹ These laws regulated the administration of and succession in deceased persons' estates. Problematic was the distinction made between the administration of the estates of whites and so-called coloureds,⁴²⁰ on the one hand, and blacks on the other. The law applicable to testate succession – that is, where the deceased left a valid will – for whites and coloureds was the Administration of Estates Act; where the aforementioned

415 The UN Committee on Namibia was formed in 1955. Its main task was to represent the aspirations of Namibia at international fora since South Africa's illegal occupation of Namibia left the country with no legitimate international representation.

416 CERD/C/NAM/12. At the time of writing this article, the UN Committee had not yet made any comments on the report; so, for the purposes of this article, the combined 3rd to 7th reports handed in in 1996, namely CERD/C/275/Add.1, will be referred to. See also Appendix 2.

417 No. 66 of 1965.

418 No. 12 of 1946.

419 No. 15 of 1928.

420 People of mixed descent.

racial group(s) did not leave a valid will, the estate was regulated by the Intestate Succession Ordinance. For blacks, the Native Administration Act applied to both testate and intestate succession. These statutes were racially discriminatory, not least in that the system dealing with the affairs of whites and coloureds was clear and straightforward compared with that for blacks. For example, the estates of whites and coloureds were administered under the supervision of the Master of the High Court. For blacks, there was no proper system of administration, especially where the deceased left no valid will. Since the abolition of these discriminatory laws in an independent Namibia, all deceased persons' estates are dealt with under the Estates and Succession Amendment Act.⁴²¹

After independence, the Namibian government adopted a policy of national reconciliation whereby people were expected to forgive one another for the wrongs committed in the past and forge ahead in a conciliatory tone. This can be seen throughout the Constitution, which is the supreme law of the country. At the onset of the Government's policy of national reconciliation, Namibian society seemed to have fully accepted the differences that were so blatant during the colonial era. They seemed to have accepted that the race or colour of a person was not important in the quest of the country's progress. However, despite the country's efforts to curb racial discrimination, it continues to be a problem in Namibia. There remains an undertone of unspoken segregation between blacks and whites. Another particular problem is the existence of severe tribalism, which extends to marriages as well as politics. For example, Namibia's 1995 country report to the Committee for the Elimination of All Forms of Racial Discrimination stated that there was no visible discrimination along racial lines in trade unions or political parties. Nevertheless, this was not entirely true: the ruling party, SWAPO, predominantly comprises Owambo-speaking people, whilst the National Unity Democratic Organisation (NUDO) is run by the Herero-speaking people, the United Democratic Front (UDF) by Damaras, and the Monitor Action Group (MAG) and the Republican Party (RP) by Afrikaans-speaking whites.

The first case arising out of allegations of racial discrimination was in 1995. Racist statements had allegedly been directed at white police officers who had beaten black persons engaged in a peaceful demonstration. Charges were brought against the then Director of the Namibian Broadcasting Corporation (NBC), a

421 No. 15 of 2005. There are currently some cases at the Master of the High Court that deal with black estates.

journalist employed by the NBC, and a certain Mr Hans Goagoseb, who had made the statements. The prosecution that was brought under the 1991 Act was withdrawn in September 1995. Namibia's CERD country report for 1995 stated that proceedings had only been instituted in protection of a specific sector of society, namely white police officers, although they had actually violated the human rights of peaceful demonstrators.

A similar case is that of *Kauesa v Minister of Home Affairs*,⁴²² where Kauesa appeared on national television and made racial comments against white police officers. In *casu*, the High Court stated that freedom of speech can be limited by the fundamental rights relating to dignity, equality and non-discrimination and legislation enacted in accordance with the Constitution, namely the Racial Discrimination Prohibition Act, and that a corollary to these was a prohibition on *hate* or *racist speech*, which the court defined as speech inciting hatred and prejudice on the grounds of race, colour, ethnic origin, creed or religion. The Court gave a number of compelling reasons why hate speech was not protected under the mantle of the freedom of speech and expression. These included that

- it could break down public order
- it could give rise to an atmosphere of racial hatred and insensitivity, fostering acts of palpable violence and discrimination
- it diminished and denied equality and dignity to the target of vilification, and
- not only was it offensive, it also caused real harm to the target group and to society as a whole, leading to discrimination and violence.

Therefore, the above case shows that freedom of speech and expression is guaranteed only to the extent that it does not curb the rights of others or create a state of instability in the country. The rights of all persons are guaranteed and, as such, no particular person or group of persons is in a position of superiority over others.

A final case was that brought against Hannes Smith, Editor of the *Windhoek Observer* newspaper, who published an advertisement on 17 August 1994 in which the seventh anniversary of the death of Rudolf Hess, Adolf Hitler's deputy, was glorified. Smith was charged with contravening the Racial Discrimination Prohibition Act, given the history of Nazism.

422 1995 NR 102 (HC).

Namibia's 1995 CERD country report also expressed the hope that the Racial Discrimination Prohibition Act would not be used to stifle criticism where it was necessary, unless it amounted to crude racist speech or incitement.

Implementation of the CERD in Namibia

Namibia has succeeded in enacting some legislation that is in line with this Convention, as follows:

Racial Discrimination Prohibition Act, 1991 (No. 26 of 1991)

This Act caters for the criminal punishment of certain acts and practices of racial discrimination and apartheid in relation to public amenities, and so on. The Act does not adequately cover the provisions of the Convention, however. For example, it does not define what is meant by the term *racial discrimination*.⁴²³ What it does define is *racial group*, which refers to –⁴²⁴

... a group of persons defined by reference to colour, race, nationality or ethnic or national origin.

Another example of the inadequacy of the Act becomes clear if one compares it with Article 6 of the Convention. Article 6 states, inter alia, that –

State Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Generally speaking, the Namibian Constitution offers various remedies to aggrieved persons under Article 25(2), Article 78 (through the courts), and Article 12 on fair trial. However, section 18 of the Act provides that –

423 In terms of Article 1, *racial discrimination* means “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”.

424 Section 1.

No trial for an offence under this Act shall be instituted without the written authority given personally by the Prosecutor-General in each case.

In its concluding remarks and observations on the combined report handed in by Namibia,⁴²⁵ the Committee were of the opinion that this provision places a severe and unusual obstacle in the way of persons wishing to institute criminal proceedings. This went against the very issue that the Committee was trying to address in terms of effective and adequate remedies to aggrieved persons. Taking into account the number of cases that the Prosecutor-General's office received for prosecution, it would be impossible to have a matter set on the roll if only the Prosecutor-General in person could allow for prosecution to take place. The Committee concluded that, if section 18 were deleted and a few changes were made to the Act, then this statute would be an effective remedy for all aggrieved persons and it would comply with the Convention.

In addition to the above Act, the following statutes are also applicable in combating racial discrimination in Namibia:

- The Affirmative Action (Employment) Act, 1998 (No. 29 of 1998): This legislation provides for the achievement of equal opportunity in employment in accordance with Articles 10 and 23 of the Constitution
- The Cultural Institutions Act, 1969 (No. 29 of 1969): This legislation provides for the payment of government subsidies to cultural institutions, and
- National Art Gallery of Namibia, 2000 (No. 14 of 2000): This Act provides for the establishment of the NAGN and for the objects therein, which ensures the preservation of Namibia's cultural heritage; the NAGN houses works from cross-sections of Namibian society.

In addition to these pieces of legislation, the Constitution of the Republic of Namibia provides further relief for aggrieved persons in Article 23(2), Article 10 and Article 25(2). Namibia has also signed, ratified or acceded to the following international instruments pertaining to racial discrimination and culture:

- Convention concerning the Protection of the World Cultural and National Heritage 1972: Namibia acceded to the Convention in April 2000, and
- The SADC Protocol on Culture, Information and Sport, 2001: Namibia ratified the Protocol in December 2002.

⁴²⁵ *Concluding observations and remarks by the Committee on the Elimination of All Forms of Racial Discrimination for Namibia*, CERD/C/304/Add.16.

Following on the above international and domestic laws ratified and/or enacted by the Namibian government, the Committee had the following observations to make about Namibia's country report:⁴²⁶

- The Committee commended the government for its frankness in the report, and for its general compliance with the guidelines for the preparation of state party reports. However, the Committee noted that the report lacked economic, social and demographic indicators that would have assisted in evaluating the country's situation with regard to racial discrimination.
- The Committee also noted that some discriminatory social attitudes that were prevalent and tolerated in certain parts of the population were one of the factors impeding the implementation of the Convention.
- Some of the positive aspects of the report included the following:
 - That, despite the social and economic difficulties being faced by the country, important steps had been taken by the government since independence to eliminate racial discrimination, notably through the policy of national reconciliation
 - The policy of affirmative action in sectors such as education and employment
 - The inclusion of a Bill of Rights in the Constitution, the Racial Discrimination Prohibition Act and subsequent legislation passed to reinforce this Act, such as the Agricultural (Commercial) Land Reform Act, 1995 (No. 6 of 1995), and
 - Recognition of the efforts being made by the Master of the High Court and the Law Reform and Development Commission to amend and repeal outdated or discriminatory legal provisions.
- The Committee expressed the following concerns about the situation in Namibia:
 - That, despite the affirmative action measures taken to eliminate social and economic disparities, black people and coloureds, who comprised approximately 95% of the population, still faced discrimination in areas such as access to property, employment, and health care
 - The persistence of a dual legal system regulating personal status such as marriage and succession (this dual system has since been abolished and all cases are treated equally in a non-racial manner),⁴²⁷

426 (ibid.).

427 All reported cases are now dealt with under the Administration of Estates Act.

- The lack of information relating to the implementation in law and practice of Article 5 of the Convention, as well as on the situation of vulnerable groups, particularly the San/Bushmen⁴²⁸
- That not enough is being done in Namibia concerning the implementation of the CERD. This is evident in that Namibia has failed to fulfil its reporting obligations under CERD. Consequently, the Committee had to hold a session without having received Namibia's report in 2006.⁴²⁹ The Committee wrote a letter dated May 2006 addressed to Martin Andjaba of the Permanent Mission of the Republic of Namibia to the UN, which suggested that the state may actually need to resort to seeking outside help in order to comply with its obligations under the CERD. Looking at the letter, one notices that Namibia still has many issues to address regarding the implementation of this Convention. One of the issues that arises is that the Namibian government still has not provided adequate information on how ethnic minorities such as the San and the people of the Caprivi Region are integrated into the implementation process of the Convention. Another problem that the Committee brought to light was the issue of affirmative action as postulated in Article 23(2) of the Namibian Constitution. The constitutional provision alone is not sufficient to guarantee that racial discrimination is prohibited.

Recommendations

- There needs to be supplementary legislation to echo the provision on affirmative action.
- The Racial Discrimination Prohibition Act also does not deal adequately with racial discrimination. One of the shortcomings of this piece of legislation, in the words of Nico Horn,⁴³⁰ is that it only caters for public conduct or display of discriminatory behaviour, and not those actions carried out by persons outside the public eye. Also, from the language of the Act, it is difficult to establish whether such a complaint is catered

428 Despite recent efforts by the Deputy Prime Minister, Dr Libertine Amathila, to bring some sort of development to the San, they still remain the most neglected group in Namibia.

429 See Annexure 1; note also the questions that the Committee raised in connection with the failure of the state to report.

430 Footnote 32, *supra*.

for and can be adjudicated on in the courts of law. There is, therefore, a strong need for a specific anti-hate-speech clause in legislation that will cater for all forms of racial discrimination and its subsequent elimination in Namibia.

- Namibia should emulate the South African example of the elimination of racial discrimination. The majority of South Africans suffered at the hands of a white minority government during the apartheid era, where racial superiority of whites over blacks was rampant. After democratisation in 1994, the state made tremendous efforts to eradicate racial discrimination at all costs. This involved the Human Rights Commission, the Office of the Ombudsman, the state itself, and other key stakeholders in South Africa. In addition to the aforesaid, and in addition to the constitutional provisions and the Bill of Rights, South Africa has other Acts of Parliament aimed at eradicating racial discrimination. The framework that the South African government has created also provides for remedies and specialised dispute resolution mechanisms to expedite the enforcement of the rights protected in the Convention and in relevant domestic laws.⁴³¹ Accordingly, the South African government's report to the CERD suggests that the country has complied with its obligations under Article 1 of the Convention to date. Accumulatively, South Africa has succeeded in creating a national policy for the eradication of racial discrimination – even though there is still a gap between the actual state of affairs in South Africa and what the law stipulates.
- Namibia should seriously consider the recommendations brought forward by the Committee on measures to be taken, and should also seek the counsel of the Office of the Commissioner of Human Rights in South Africa in complying with its reporting obligations.
- Another issue that the state should address in its policies and legislative implementations is that of eliminating xenophobia as a particular kind of racism aimed specifically at foreigners. It seems to me that black-on-black racism is the worst kind of racism there is, although most times when the word *racism* is used one only thinks of whites against blacks and vice versa. Namibia also needs to be applauded for its efforts to eliminate racial discrimination, but must go the extra mile to eradicate racism totally or deal more firmly with cases that surface.

431 An example is the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (No. 4 of 2000).

Convention against Torture and other Acts of Cruel, Degrading and Inhumane Treatment or Punishment

To prohibit and prevent torture and other acts of cruel, degrading and inhumane treatment or punishment, CAT was adopted and opened for signature, ratification and accession by UN General Assembly Resolution 39/46 of 10 December 1987. Namibia acceded to the Convention on 28 November 1994. It is pertinent at this point to mention that the provisions in this Convention are only applicable to persons who have been deprived of their liberty and are in detention.

To monitor the implementation of the Convention by all state parties, Article 17 of the Convention established a Committee against Torture. As a consequence of this body, state parties are obliged to make periodic reports to the Committee. Namibia submitted its initial report in 1995; a subsequent report was due in 1999, but no report has been put forward to date and there seems to be hardly any effort to bring existing legislation in line with the Convention or to enact new legislation.

In other jurisdictions where the so-called War on Terror has taken root, anti-terrorism legislation has been enacted to curb terrorism and to punish perpetrators of terrorism for their acts, regardless of the fact that some of the methods of interrogation used amount to torture. Namibia has also joined in the fight against terrorism through the introduction of a Terrorism Bill.⁴³² An attempt will be made in this paper to ensure that anti-torture legislation is enacted in Namibia, tailored to honour the Torture Convention, and that any incidents of torture do not become as pronounced as those in the USA with its policy on the War on Terror.

It is no secret that torture has been a part of Namibia's history and is still going on in post-independence Namibia.⁴³³ According to the state report submitted by

432 *New Era*, 22 May 2007; "Anti-terrorism workshop held in Windhoek", by a staff reporter. The article reported that the Ministry of Justice had held a workshop to address the issue of enacting legislation on terrorism in Namibia in support of the War on Terror around the world since the 11 September 2001 attacks in the US.

433 Reports show that prison inmates were allegedly tortured or treated in a cruel, inhumane and degrading manner, or that they had been brutalised by Police and the Special Field Force. For example, the National Society for Human Rights reported in February 2006 that nine members of the Namibian Police were accused of torturing five suspects at the Keetmanshoop police precinct. The suspects claimed they had been beaten repeatedly and shocked with an electric device during the interrogation.

Namibia to the Committee against Torture,⁴³⁴ Namibians were routinely tortured and assaulted by South African and South West Africa Territory Force soldiers and by members of the South West African Police during the illegal occupation of Namibia by South Africa. However, after independence, and in accordance with the government's policy of national reconciliation, many of the Namibian members of these forces were taken up in the employ of the Namibian Defence Force and the Namibian Police Force. The report also states that it was —⁴³⁵

... to cure the mischief of the erstwhile colonial experience that Article 8(2)(b) of the Namibian Constitution was included ...

This Article provides that —⁴³⁶

No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

In addition to this Article being in the Bill of Rights and being wholly justiciable, freedom from torture is entrenched by way of Article 24(3). This means that, even in a state of war or after a declaration of emergency, a suspension of this right is prohibited. In practice, however, this has not been respected. During the Caprivi secession attempt,⁴³⁷ several of the secessionists claimed to have been tortured and there was evidence to support this.⁴³⁸ It seems that the right was indeed suspended during that period in order to extract answers from the group accused of disrupting peace and stability in the country.

The report prepared by the government for the Committee against Torture included information on, inter alia, —⁴³⁹

... article 8 of the Constitution which prohibits torture; the justiciable Bill of Rights; measures and laws related to extradition and expulsion; training for law enforcement, defence and prison service personnel; medical services in prisons; safety checks and

434 CAT/C/28/Add.2: Namibia's country report handed in in 1997.

435 (ibid.).

436 Republic of Namibia. 1990. *The Constitution of the Republic of Namibia*. Windhoek: Ministry of Information and Broadcasting.

437 The uprising took place from late 1999 to early 2000.

438 Amnesty International. 2003 (online). *Namibia: Justice delayed is justice denied: The Caprivi Treason Trial*. <http://www.amnesty.org/en/library/info/AFR42/001/2003>; last accessed 12 March 2008.

439 <http://www.hri.ca/fortherecord1997/vol2/namibia.htm>; last accessed 23 May 2007.

other procedures in police detention and prisons; police conduct and misconduct; complaints, investigations, proceedings and compensation; rules of evidence and the admissibility of “confessions” obtained through pressure.

The report also includes a summary commentary on a number of individual cases illustrating violations, complaints, investigations, and the results of proceedings, where undertaken.

As already stated above, Namibia has failed in its international obligations pertaining to CAT. Even though the Constitution outlaws torture in terms of Article 8(2), and Article 144 allows for the direct application of international law instruments to which Namibia is a party, *torture* is still not defined or expressly prohibited in any legislation in Namibia as per the requirements of Article 1 of the Convention. The Constitution merely makes mention of its prohibition and that the right to freedom from torture is inviolable. In the NSHR’s 2006 *Human Rights Report*,⁴⁴⁰ it adopted the definition of *torture* offered by the International Committee of the Red Cross, which includes –⁴⁴¹

... any other prohibited active or passive methods of abuse or severe deprivation, including inhuman, cruel, humiliating, and degrading treatment, outrages upon personal dignity and physical or moral coercion.

This definition to a certain extent broadens the definition of *torture* contained in CAT in that it includes moral coercion, for example. This initiative taken by a human rights body to entrench the definition of *torture* in the Namibian context is applauded.

In Namibia’s country report to the Committee against Torture,⁴⁴² the state submitted that even though there was no express definition for *torture* in the Constitution or other legislation, –

... it can safely be assumed that in a case in which the definition of torture becomes an issue, the definition in Article 1 of the Convention will be given judicial recognition and will be used as an aid to interpretation.

To reiterate the state’s disapproval of torture or acts related to it, in the landmark case of *Ex parte Attorney-General, Namibia: In re corporal punishment by*

440 NHR. 2006: *Namibia Human Rights Report*. Windhoek: NSHR.

441 (ibid.:107).

442 CERD/C/NAM/12.

organs of the State,⁴⁴³ the Supreme Court declared corporal punishment imposed or inflicted by or upon the authority of a state organ to be illegal.

In terms of Article 2 of CAT, state parties are obliged to take administrative, judicial or legislative measures to prevent acts of torture from occurring within their jurisdictions. Provision also needs to be made for torture never being justified – whether it be under a state of emergency or war, or on the basis that it came from superior orders. All in all, each state is obliged to take effective measures to prevent torture. The character of these measures is at the discretion of the state, but whatever measures are taken have to be effective. Thus, the obligation under Article 2 is not only to prohibit acts of torture, but also to prevent them. This Article is said to be an umbrella provision, in that many of the provisions in CAT are elaborations of the general obligation of Article 2(1) to take measures to prevent torture.⁴⁴⁴

Namibia's country report noted that, under Article 2 of CAT, torture is considered to be a serious criminal or civil wrong that is capable of attracting either criminal or civil proceedings. This is the case in that either the state or the victim of the offence can institute an action. When it comes to state-sponsored torture, law enforcement agencies have been observed to be the ones most in need of control in that most reports that arise are due to acts perpetrated by these agencies. Therefore, the government has laid down administrative directives aimed at preventing torture from occurring in the Police.⁴⁴⁵ These instructions are used as teaching materials during the training of police officers. The first question that comes to mind is whether these directives are effective, and whether they are actually being followed by the Police. After having observed numerous incidents and having read various reports of alleged cases of people being tortured by the Police, I believe the measures taken are not effective: despite the 'training' that the Police go through, cases of torture and other cruel, degrading and inhuman treatment are on the rise and occur more frequently now. A further problem is that one never hears about these offences being prosecuted. In this regard, see for example the Caprivi secessionists' case, where a number of the accused alleged

443 1991 NR 178.

444 Inglese, C. 2001. *The UN Committee against Torture: An assessment*. The Hague: Kluwer Law International, p 242.

445 Basic training of police recruits in Namibia; see also the Namibian Police Manual. This manual was compiled by the Legal Assistance Centre and was used at a workshop to instruct police officers. It contains and explains provisions from major international conventions, including CAT.

that they had been tortured while the case was being investigated. To date, the alleged perpetrators have not been prosecuted because the actual treason case was given precedence as being more serious and thus requiring more attention.

Namibia's country report to the Committee against Torture highlights the existence of a Complaints and Discipline Division within the Namibian Police Force. This Division is responsible for investigating charges of assault and inhuman treatment brought against police officers. A major problem being experienced by this Division is the lack of personnel to promptly and efficiently investigate cases. The Legal Assistance Centre also expressed its concern about the inadequacy of the existing procedure for investigating and prosecuting complaints against members of the Police. The LAC suggested that the government should look into the establishment of an independent authority dealing with complaints against the Police, with sufficient funds and personnel to deal with all the complaints that are laid.⁴⁴⁶ Since such a body would be impartial, cases of alleged torture would actually take off and be prosecuted without fear or prejudice. The independent body, with its own personnel and resources, would be preferable to the Police investigating state-sponsored torture whilst being supported financially by the state: this would simply amount to the Police biting the hand that feeds them, and crimes would in all likelihood not be prosecuted.

Article 24(3) on derogation states, *inter alia*, that –

[n]othing contained in this Article shall permit a derogation from or suspension of the fundamental rights and freedoms referred to in Articles ... 8

This Article is in line with Article 2(2) of CAT, in that it does not permit derogation from the right to freedom from torture under any circumstances: it is an inviolable right. According to Article 1(6) of the Constitution, the latter is the Supreme Law of Namibia – and, as such, it ought to be adhered to at all times regardless of there being a state of war or unrest in the country. Thus, the alleged torture of the Caprivi secessionists and all other similar incidents by law enforcement officers contravenes both international and domestic law.

Torture has not been formally criminalised in Namibia. Hence, perpetrators of this atrocious crime are prosecuted under common law. Indeed, Namibia's country report to CAT stated that all acts of torture or cruel, inhuman or degrading

⁴⁴⁶ *Concluding observations and comments of the Committee against Torture, CAT/C/XVIII/CRP.1/Add.4.*

treatment or punishment were considered common law offences,⁴⁴⁷ that is, not regulated by statute. According to the report, the law that regulates attempts to commit crime and conspiracies to commit crime apply to both common law and statutory crimes.

In accordance with Article 2 of the Convention, the courts in Namibia have the discretion to sentence a person convicted of torture to either a prison term or a fine. The severity of the punishment usually depends upon the degree of gravity of the act that was committed.⁴⁴⁸ I believe this is still not enough, in that it still does not follow fully the provisions of this Article. Torture is not a common law offence: it should – and, indeed, ought – to be regarded in terms of specific legislation so that the proper and appropriate punishment is given for it.

It also follows that our courts, by prosecuting acts of torture under the common law offence of assault, only cater for physical torture. Referring to the definition of *torture* in Article 1 of CAT, the act of torture constitutes the infliction of both severe mental and physical pain. This shows that, where a victim alleges that s/he has suffered mental torture, the prosecutorial team would have nowhere to turn in order to submit their claim; in turn, the Namibian courts would not have an appropriate punishment for the crime. Even if, by implication, the courts decided to make use of the provision in Article 1 of CAT by virtue of Article 144 of the Namibian Constitution, CAT is not self-executing, and it does not contain any punitive measures. As a result, state parties to the Convention are obliged to devise a strategy that will prevent and prohibit torture through criminalising it. Since Namibia does not have a penal code that could regulate such matters, perpetrators of this atrocious crime get off scot-free since the principle of legality finds application.

Concerns raised

Some of the concerns raised by the Committee against Torture in their concluding observations and recommendations for the initial report submitted by Namibia in 1994 are repeated here so that the stakeholders involved in the enactment of laws take due regard of the issues at hand. The concerns are as follows:

447 The prosecutorial body opts to prosecute alleged offenders for assault or assault with intent to do grievous bodily harm.

448 In *State v Michael Matroos* 1992 NR, the accused, a police officer, was charged with torturing a suspect to death. The High Court in this case felt bound to order a custodial sentence “... in order to emphasise the strong disapproval” of the court.

- That torture is still rampant in Namibia: There are a number of reported cases of human rights abuses by members of the Special Field Force and the Namibian Defence Force.
- That no specific definition of *torture* exists in any penal legislation; as a matter of fact, Namibia does not have penal legislation.
- That no specific legislation deals with torture: As a result, the Committee was of the opinion that the Namibian courts could not adhere to the principle of legality or to Article 4 of CAT. This is evidenced by the fact that the prosecutorial authority prosecutes alleged offenders based on assault because no specific legislation on torture exists.
- That there still seems to be a backlog of cases due to a lack of judicial personnel: As a result, the pre-trial detention of accused persons is lengthy.
- That there has been a failure to impartially and promptly investigate and prosecute perpetrators of torture that occurred before or after independence.

Recommendations

In the light of the above concerns, the Committee made the following recommendations:⁴⁴⁹

- Namibia should enact legislation that clearly defines the crime of torture as envisaged in Article 1 of CAT.
- Not only should torture be criminalised, it should also take into account that evidence obtained by means of torture is inadmissible.
- Since there is never any justification for torture, the Terrorism Bill should take this into account and strike that balance between the fight against terrorism and the fight against torture.
- Law enforcement personnel, medical personnel such as doctors and nurses, and other related personnel should be educated about and trained in respect of the prohibition of torture and other cruel, inhuman and degrading treatment or punishment in accordance with Article 10, and with regard to the criminal liability of those that commit acts of torture. In Denmark, it was found that medical personnel were involved in the whole torturing process, in that they knew which methods would be most effective and would have the most effect on victims. Government

449 CAT/C/XVIII/CRP.1/Add.4: The Concluding observations and comments on the initial report by Namibia to the Committee against Torture.

and stakeholders should look into this so as to ensure that our medical personnel are not involved in the commission of this horrific crime, and if they are, then they should be prosecuted for it.

- The Prisons Act, 1998 (No. 17 of 1998) permits certain members of the judiciary, public service and religious leaders to visit and inspect detention centres and make observations. Such visits should be done on a regular basis so as to keep constant checks on the situation in prisons. Also, instead of leaving the comments, recommendations and observations with the officer in charge at the detention centre, these should be made known to an independent authority dealing specifically with complaints against the Police.
- A national human rights commission should be established as a separate body from the Office of the Ombudsman. The Human Rights Advisory Committee, as an extension of the latter Office, is not enough. Such national human rights commission ought to be independent with its own budget and personnel, and should deal specifically with human rights violations. The public should have access to this commission, and its existence should be made known so that people can lodge their complaints.
- The backlog of cases at the Prosecutor-General's office should be looked into so as to ensure prompt and impartial justice to all victims, and particularly victims of torture. This is in view of the number of reported cases of alleged torture by the Police and the Namibian Defence Force.
- The state should ratify the Optional Protocol to the Convention against Torture. Article 1 of the Protocol states its objective as being –

... to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.

This will be in addition to the visits that are already allowed by the state to specified people. This will ensure that a second opinion of the situation in the detention centre is obtained in the event of cover-ups.

- The state should further make a declaration in terms of Article 22(1) of CAT, namely that –

[a] State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall

be received by the Committee if it concerns a State Party to the Convention which has not made such a declaration.

Such declaration would make the prosecution of torture a speedy process, in that individuals could have the opportunity to take their cases directly to the Committee against Torture instead of waiting for the Namibian courts to prosecute – something which might never happen.

- The Committee also called for a prompt and impartial investigation into the disappearance of former members of SWAPO in terms of Article 12 of CAT. Furthermore, where it was reasonably believed that those disappearances amounted to torture or other cruel, degrading or inhuman treatment, then the dependants of the deceased victims should be afforded fair and adequate compensation. This statement is akin to the one made by the NSHR Director, Phil ya Nangoloh, in his submission to the International Criminal Court.⁴⁵⁰ This controversial topic has sparked various debates, including one in Parliament.
- Rehabilitation centres should be established so that victims of torture can be given the necessary help they need to get over their psychological problems and recover from the abuse they suffered at the hands of the perpetrators of torture.

Conclusion

In conclusion, Namibia still has a long way to go before it fully complies with its international obligations under CAT. In terms of legislation, the lawmakers have huge lacunae to fill in order to bring the law in line with the Convention. This will essentially involve the amendment of some legislation and the enactment of new legislation dealing particularly with torture. It may also be important that the country enact legislation that can draw the line between the War on Terror and the need to protect the right of persons not to be subjected to torture.

⁴⁵⁰ The submission was that the Founding President of Namibia, Dr Sam Nujoma, should be tried and charged with human rights violations that were allegedly perpetrated against Namibians during the liberation struggle.

Women and children's rights

Optional Protocol on the Sale of Children

The Optional Protocol on the Sale of Children (OPSC) was adopted and opened for signature, ratification and accession by UN General Assembly Resolution A/RES/54/263 of 25 May 2000, and entered into force on 18 January 2002. Namibia ratified the Protocol on 16 April 2002. Its first and subsequent country reports were due from 2004 onwards, but none have been submitted to date.

The Protocol is one of two such instruments to the Convention on the Rights of the Child. The OPSC deals specifically with preventing the exploitation of children with particular regard to trafficking, prostitution and pornography. In its Preamble, the Protocol declares that state parties to the Protocol need to recognise that, amongst the vulnerable groups at risk of sexual exploitation, the girl child ranks as most at risk, and is disproportionately represented among the sexually exploited.

The following factors were considered to be the main contributors to the problems sought to be resolved by the OPSC: underdevelopment, poverty, economic disparities, dysfunctional families, lack of education, and gender discrimination. These factors are a particular burden on many developing countries, and need to be addressed in order to overcome these problems. Also, member states believed that raising public awareness of this hazard, i.e. the sale of children for prostitution or pornography, is needed in order to reduce consumer demand for the sale of children, child prostitution and child pornography.

Although Namibia has not yet filed its country report with the Committee on the Rights of the Child concerning this Protocol, a number of legislative measures can be said to be directly applicable and in line with this instrument. These include the following:

- **The Labour Act, 2004 (No. 15 of 2004):** The Act clearly states that children under the age of 18 are not allowed to do any form of skilled work.
- **The Extradition Act, 1996 (No. 11 of 1996):** The use of children for the purposes stated above is an extraditable offence, and perpetrators of such offences can be dealt with under this Act.
- **The International Cooperation in Criminal Matters Act, 2000 (No. 9**

of 2000): This Act facilitates the provision of evidence and the execution of sentences in criminal cases, as well as the confiscation and transfer of the proceeds of crime.

- **The Indecent Photographic Matter Act, 1967 (No. 37 of 1967):** This Act makes it an offence to possess indecent or obscene photographic materials.
- **The Combating of Immoral Practices Act, 1980 (No. 2 of 1980):** The Act deals with the prohibition of prostitution and other issues pertaining to immoral practices such as the possession of pornographic material.
- **The Children’s Act, 1960 (No. 33 of 1960):** This Act makes it an offence for a parent, guardian or custodian of a child to “cause or conduce or allow a child to reside in a brothel”. The Act could be said to be instrumental in combating the demand for child prostitutes.
- **The Criminal Procedure Act, 2004 (No. 25 of 2004):** As provided in the Protocol, children need to be protected in the criminal process because of their vulnerability. Section 189 of this Act provides for the protection of children as vulnerable witnesses. The children envisaged under the said section are those under the age of 18 who have suffered sexual or indecent offences, and against whom domestic violence offences have been committed, as well as those who, as a result of physical or mental disabilities, fear intimidation by the accused or any other person. In addition to this, whenever children are involved in the criminal process, court sessions are usually held in camera not only to protect the identity of the child, but also to avoid the usual publicity of court cases.

However, even with these pieces of legislation in place, the OPSC has not been fully complied with. There are still some lacunae that need to be filled by specific legislation that will deal specifically with the provisions set out in this instrument. A commendable action that the country has taken is its involvement with the Southern African Regional Network against Trafficking and Abuse of Children (SANTAC).⁴⁵¹ SANTAC deals mainly with the issue of human trafficking within the southern African region, especially the trafficking of children for sexual abuse. SANTAC’s mission is –

[t]o build synergies amongst Southern African institutions or individuals to fight all manifestations of child abuse, in particular child sexual abuse, commercial sexual exploitation, child labour and trafficking of children for any exploitative purpose, through advocacy, education, awareness, law reform, rehabilitation and services for the victims.

451 www.againstchildabuse.org/en/why_santac; last accessed 12 November 2007.

It is highly commendable that Namibia is a part of this initiative as it shows the country's commitment to protecting its children against abuse. This is, of course, in addition to national laws already in place.

There are, however, some problems which Namibia faces, namely child labour and suspected child trafficking. There have been reports of suspected child labour in the country, especially in rural areas. This is despite the labour laws in place, and it is in contravention of International Labour Organisation Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Labour. The Ministry of Labour and Social Welfare is currently conducting research to unearth the truth of this suspected exploitation of children.

Another issue of concern, especially in southern Africa, is human trafficking. It has been widely reported that human trafficking seems to be a lucrative business in the region, with South Africa being the main destination in most cases. Although not exclusively, the girl child has been identified as the main victim in this business. The unsuspecting girls, due to poverty, are lured into this dangerous circle by the prospects of finding greener pastures that will enable them to take care of themselves and their families. Upon arrival in South Africa, they are sold and forced into prostitution and other forms of labour. Though there are no confirmed reports of human trafficking in Namibia, particularly of children, 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.⁴⁵² The girls were apparently held as sex slaves at separate shacks east of Johannesburg. This incident ought to set off alarms bells for the legislative bodies as well as the government so as to prevent future incidents.

According to SANTAC's assessment of the situation in Namibia, the government has taken the following steps to bring national legislation in line with its commitments to children in respect of the UN Convention on the Rights of the Child:

- A special course in gender sensitivity has been introduced at the Police training centre

⁴⁵² CEDAW/C/NAM/2-3, handed in in 2005.

- Safe houses have been opened
- NGOs have opened centres for counselling, places of safety, and court preparations, amongst other things, and
- NGOs have trained and sensitised the Police and the judiciary to crimes of sexual exploitation and assault.

Recommendations

- The government needs to take into account the growing concern that child trafficking is high in the SADC region, and should investigate whether children in Namibia are at risk and if any incidents have occurred.
- The government should look into the issue of so-called street kids. There is an increasing number of street kids in the capital, and I believe they are the most at risk of being trafficked for prostitution or manual labour.
- Public awareness campaigns should be launched so that people are made aware of this problem and that their children need to be protected.
- The government should look into the adoption laws that are in place in the country because it has been observed that traffickers have found loopholes in the adoption laws that enable them to ‘adopt’ children and then sell them for exploitation purposes.

Convention on the Elimination of Discrimination against Women

For the purposes of the discussion on the enforcement of women’s rights in this paper, I will concentrate on the issue of gender-based violence, which is a particular problem in Namibia. Though such violence is also perpetrated against men, the main victims of crimes such as rape and domestic violence are women, and the perpetrators are predominantly male. The legislature has, in terms of Article 3 of CEDAW, taken the following legislative measures to ensure the –

... full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.

Combating of Rape Act, 2000 (No. 8 of 2000)

As rape is a violent reality in Namibia and only a small percentage of rape or attempted rape cases are reported to the Police, it is sometimes difficult to

prosecute the perpetrators. With the enactment of this legislation, however, sexual offenders are being brought to book almost every day. However, despite the Act – which, in my opinion, is the strictest piece of legislation Namibia as a state has enacted in respect to sexual offences – rape is an ever-increasing phenomenon in our communities. Statutory rape is a strict liability crime and so it is not necessary to prove, for example, that the victim was a minor: it only matters that s/he in fact was raped or subjected to attempted rape. There seems to be no leniency where rape is concerned, especially where children are involved, and this is very commendable on the part of the judiciary.

Combating of Domestic Violence Act, 2003 (No. 4 of 2003)

Domestic violence is another prevalent crime in Namibia. The local newspapers usually carry at least one article a day on domestic violence. Husbands beat up their spouses and their children, and the one place that people ought to feel safe in, the home, has become the most dangerous place to be. The Act sets out how the law should be applied, but because victims of domestic violence do not always report the abuse, perpetrators cannot be made accountable for their actions.

The Act stipulates that protection orders can be applied for by any person in a domestic relationship. This proves that the Act is gender-neutral, albeit the majority of domestic violence cases are against women. The problem is that women still do not report cases of abuse to the Police because it goes against tradition (since marriage is seen as a private thing), they are ignorant of the law and their rights, they fear being killed, or even because the man is the breadwinner of the house – and if he is locked up, there will be no income in the household.

A problem that I see with this Act is that it does not appear strict enough. One wonders what happens when application is made for a protection order: even if the offender is ordered to maintain a certain distance from the victim, s/he is still free to roam the streets and still poses a threat. Also, many victims of domestic violence tend to forgive their partners, who return to them under the pretext of change. This is the time when most women are at a higher risk of being killed. Women do not receive adequate protection either under this Act or by the government, since the issue of domestic violence is trivialised: governments across the globe do not give this crime due recognition as a serious human rights violation.

Some of the cases of domestic violence are so egregious that the relevant Act cannot even be applied. For example, a woman had been shot seven times by her partner and upon noticing that she had not yet died, the man proceeded to get a panga⁴⁵³ to finish her off by cutting her throat. Although she was saved by someone and rushed to hospital, she later succumbed to the injuries and died. It is my submission that such cases should be treated as torture instead of domestic violence *strictu sensu*. This submission is based on international trends that seek to broaden the definition of *torture* to include domestic violence. It is argued that the two crimes share essential elements, so domestic violence can be said to be a form of torture. I agree with this contention, and strongly urge that this be taken into consideration.

Inheritance under customary law

Another area that needs to be addressed to ensure the enjoyment of rights by women is the issue of inheritance under customary law. The government has failed to adequately address this problem, but it is imperative that it be discussed for the furtherance of women's rights.

Recommendations

On paper it seems that women's rights have been advanced and that they are increasingly enjoying such rights. However, many would agree with me that the majority of women are still unaware of their rights and, as such, are not enjoying them. For example, I believe that government policies and laws should target women in the rural areas in particular. Awareness campaigns need to be organised in the various local languages so that legislation is presented to these women in a familiar medium, so as to better educate them about their entitlements. The Police should also be sensitised about the seriousness of the problem being faced, and their obligation to act on information that is given to them. The Women's Conference held in June 2007 suggested that a campaign be launched to signal zero tolerance for gender-based violence, in an effort to curb the spurt of cases of violence against women and children in the country. Furthermore, all Namibian stakeholders should work together to deal with the problems the state is facing.

453 Bladed African tool like a machete; *Concise Oxford English Dictionary* (2002).

Conclusion

In conclusion, I can safely say that Namibia needs to put more effort into its implementation and enforcement of international human rights instruments. The argument that Article 144 of the Constitution allows for direct application of international law is not sufficient to cater for all the Conventions. If one looks at any one of the Conventions discussed above, it is clear that none of them contains a punitive clause; neither do they prescribe proper and appropriate punishment for the contravention of the provisions therein. These measures are left to the discretion of states, and hence, it is vital that effective administrative, judicial and legislative measures are taken by states to prevent the various prohibited acts.

The rule of law in sub-Saharan Africa – An overview

Peter Shivute

Introduction

The *rule of law* is the notion that the powers of state and government can be exercised legitimately only in accordance with the applicable laws and according to laid down procedures. Thus, the legitimacy of all organs of state and its institutions must have roots in the law. And as administrative lawyers in common law jurisdictions would say: the exercise of any power of state or government must be traceable to an applicable written law and procedure. In this regard, every public office-bearer and every public official is accountable for every act done that the law does not authorise, as is any private person. Doubtless, as a principle, the rule of law is intended to be a safeguard against arbitrary and capricious governance and abuse of power, and to enforce limitations on the power of the state and all its institutions of government.

The hallmarks of respect for the rule of law include separation of powers of the executive, the legislature and the judiciary; regular, free and fair elections in which the electorate are asked to freely choose their rulers; an independent and impartial judiciary, coupled with an independent, fearless and vibrant legal profession; free and independent media institutions; and equality of the people before the law.

What has gone before denotes the principle of legality which underlies the concept of the rule of law. In that sense the principle conduces to what John Adam referred to in his draft of the constitution of the Commonwealth of Massachusetts in 1780, as “a government of laws and not of men”.⁴⁵⁴

454 Massachusetts Constitution, Part the First, Article XXX. The Article in its entirety reads: *In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.*

It could be said that, in that parochial sense, the concept of *the rule of law* in itself says nothing of the justness and fairness of the laws. The upshot is that, if that narrow view is taken of the rule of law, states which do not respect human rights can carry on business as usual without the observance of the rule of law. But it is non-controversial that the rule of law is considered a prerequisite for democracy and democratic practice. It cannot, therefore, be contradicted that the rule of law plays a crucial role in the protection and promotion of human rights, democracy and good governance.

The role of the rule of law in a free and democratic society

Yet again, the role of the rule of law goes beyond the narrow parameters of legality. In 1959, at an international colloquium of over 185 judges, lawyers and law academics from some 53 countries meeting, in India, as the International Commission of Jurists, made the Declaration of Delhi regarding the fundamental principle of the rule of law. At that important conference, the late Lord Denning, the eminent English jurist, observed the following:⁴⁵⁵

The Rule of Law is not confined to the negative aspects of preventing the Executive from abusing its power. It has a positive aspect involving the duty of government, not only to respect personal rights but to act positively for the well-being of the people as a whole.

Thus, apart from its enduring relevance in the promotion of “government of laws and not of men”,⁴⁵⁶ democracy, and political and civil rights, the rule of law must also be seen as an instrument for the promotion of social and economic development and social justice – which in themselves are conducive to peace and security. In its social and economic role, the function of the rule of law is to ensure that the objective of development is to bring about sustained and meaningful improvement in the welfare of the individual and to bestow the wealth of the country on all members of society. If unjustified privileges, extreme income disparities and social injustices are the order of the day in a country, then development fails and the rule of law is thrown out of the window.

455 For a summary of the proceedings of the conference, see the website of the International Commission of Jurists, <http://www.icj.org>; last accessed 18 March 2008.

456 Supra, footnote 1.

The conditions necessary for the maintenance of the rule of law

The maintenance of the rule of law is extremely important because it is the bedrock on which democracy and democratic practice are anchored.

Constitutionalism is a sharp instrument for ensuring the maintenance of respect for the rule of law. And, it is further submitted, constitutionalism is only attainable to a marked degree in states where there exists an independent and impartial judiciary, that is, a judiciary that is independent from the pressures of the executive, legislature and private persons and institutions; a judiciary that is fearless to apply the law in all cases, even where the government is an opposing party. Thus, just as the absence of freedom of action by judicial officers could erode the successful workings of democracy, so too can the dishonourable conduct and unacceptable attitudes of judicial officers undermine and sap the confidence of our people in the judiciary. If that happens, one of the most important bastions of democracy is in danger of destroying itself.

Complementary to an independent judiciary is the requirement of a well-organised and independent private legal profession, ready and willing to represent individuals in pursuit of their rights – even where the other party is the government. In other words, in a true democracy, there has to be an independent and proactive legal profession, which, without fear of reprisal from any office or authority, is allowed to serve justice as officers of court; to represent their clients' interests to the fullest extent permitted by law; to vindicate the rights of minorities and the disadvantaged; to initiate social programmes to inform members of the public about their rights and duties; and to make the law more accessible to them – to mention but a few.

As the late Chief Justice Ismail Mahomed of South Africa and Namibia so lucidly and succinctly stated in an address at a conference on “The Rule of Law and its Constitutional Organs” held in Windhoek on 2 October 1994, –

[t]o survive meaningfully, the values of the constitution and the rule of law must be emotionally internalised within the psyche of citizens. The active participation of the organs of civil society outside of the constitution in the articulation and dissemination of these values is a logistical necessity for the survival and perpetuation of the rule of law. Without it, the law and the ruler become alienated from the ruled. In a dangerously sterile sense the law itself becomes a series of mechanical commands to the citizen, resting its ultimate authority on the physical might of the state and its capacity to impose

its will on the citizenry. There can be no security in such a legal system either for the governor or the governed. A maturing society premised on the rule of law therefore urgently requires the support of national ethos of human rights conscientiously and methodically propagated, legitimised and activated [sic] by all organs of civil society.

To all these domestic aspects of the rule of law should be added the need for states to comply with their obligations under international law – whether the particular rule of international law derives from treaty or international custom and practice. Nowadays, it is important that respect for the rule of law ought not to be restricted to municipal laws only, for obvious reasons. It is not uncommon to find that a state which has no respect for the rule of law at home in most cases does not comply with its obligations under international law – with dire consequences.

Doubtless, a national constitution – as the supreme law – represents the extent to which all laws and enforcement of those laws must conform. International human rights instruments, on the other hand, are common-denominator yardsticks against which states' respect for the rule of law, human rights and democracy must be measured at home and at the international level. And for Africa, the African Charter for Human and Peoples' Rights is relevant in this regard.

Nearly all African countries (except one, which is presently grappling with internal strife) have written constitutions, whose provisions conform – to a lesser or greater degree – to international standards.

The state of the rule of law in sub-Saharan Africa

In Africa today, there is the political will at the levels of state and its subjects to work hard towards the attainment of respect for the rule of law. Of course, some African countries face stupendous challenges than others in this regard. Concomitantly, levels of respect for the rule of law vary across sub-Saharan Africa: some countries have done more than others to attain this noble goal. But all in all, the move towards respect for the rule of law is gaining root throughout most of sub-Saharan Africa.

Respect for the rule of law ultimately requires a respect for international legal standards, especially the respect for human rights standards. The two main international human rights instruments that are most relevant to the rule of

law are the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). By June 2004, at the last of the four yearly counts, only one out of the total of 46 sub-Saharan African countries was not a member of those two instruments. It is submitted that this means almost all sub-Saharan African countries are alive to their international obligation to promote the rule of law at home and abroad, and are prepared to work with international organisations and other countries towards attaining that goal. Of course, as mentioned above, some have done more than others to reach that goal.

In addition, international cooperation through regional and sub-regional institutions and/or organisations is important in providing a platform for the exchange and sharing of resources and ideas between member states. A prime example of such an initiative is the African Peer Review Mechanism (APRM) under the New Economic Partnership for Africa's Development (NEPAD), which is aimed at encouraging and assisting African states to institutionalise a culture of respect for democracy, human rights, the rule of law, social justice and economic development.

Admittedly, there are also many negative forces impinging adversely on national efforts to attain the rule of law. Many sub-Saharan African countries are trapped in disease – particularly malaria and HIV/AIDS, poverty, and illiteracy. But there are more destructive, insurmountable agencies and conditions. More specifically, there are centrifugal forces that tend to eat away at nation states, particularly civil wars and armed conflicts, reversing any political, social and economic gains that have been made. In such situations, it is idle to talk about the attainment of the rule of law, which, as it has been shown, is a multifaceted concept that cuts across varied but interlinked practical issues.

However, only a negligible percentage of sub-Saharan African countries are presently in that unpleasant and unfortunate situation. The only problem is that the ripples of civil unrest and armed conflicts in a country or sub-region can create real problems for neighbours.

The other equally destructive agency that can infect a state and militate against respect for the rule of law is the scourge of corruption. This cancer in a nation state desecrates the principle of the rule of law and systematically destroys the fabric of society and good governance in any country.

In a poll jointly conducted by *The New York Times* and the Pew Global Attitudes Project in April and May 2006, a majority of Africans polled in ten sub-Saharan African countries in West, East and southern Africa indicated that they had been better off five years prior to the survey; but a greater majority of those interviewed thought corrupt political leaders in their countries were a real problem.

It is heartening to note that many sub-Saharan African countries have set up independent anti-corruption agencies to fight this social evil. The work of the ombudsman in various countries should also be noted here. This office provides a valuable service to the people, and in some countries it has proved itself to be quite capable of taking wrongdoers to task, including in instances of alleged corruption. The fact that sub-Saharan African countries have admitted that the evil of corruption exists and must be rooted out and efforts – genuine and meaningful efforts – are being made to fight it is an achievement in itself.

In this vein, it is important to recognise the role that civil society and non-governmental actors play in the realisation of the rule of law in many sub-Saharan African states. These organisations play a crucial role as they take on the responsibility of being watchdogs, tasked with ensuring that governments live up to their obligations. It goes without saying that critical voices are a necessary component to any democratic state. Indeed, the media serves as a prime example in this regard: it is important that the media are free to report to the people, without fear of government or other intimidation. Needless to say, journalists are bound to observe the basic tenets of journalism in their work. It is also to be noted that, in the area of media freedom, some sub-Saharan African countries are performing better than others.

Although many African countries have excellent constitutions providing for the protection of fundamental rights and freedoms, it is disheartening to note that these rights are in some instances not respected in reality. Wanton disregard of the rights of the citizenry, principally by the executive, is a phenomenon which can be noted amongst some African states. This situation ultimately stems from skewed implementation of the separation of powers doctrine, characterised by timid judiciaries and legislatures run by the executive.

The lack of decentralised government services in some African states is a phenomenon which harshly affects those persons who live below the poverty line, especially in rural areas. The lack of formal government institutions in rural

areas makes it difficult for these persons to have access to the law, and formal law enforcement and protection agencies. Closely connected to and as a result of this lack of decentralisation in rural areas is the proliferation of the practice of traditional law. The fact that the formal judicial systems may not reach those citizens in rural areas has meant that inhabitants there have to resort to or sustain their traditional or cultural means of solving disputes. It may be argued that resolving disputes through customary law could be advantageous in that it may alleviate some of the burden on the 'formal' justice systems; however, the reality is that some of these traditional practices do not conform with a number of human rights standards. It is recognised, nonetheless, that customary law is an important source of law and is instrumental in the attainment of a state where the rule of law prevails. It should be given the recognition it deserves, and mechanisms should be put in place to ensure that its practice accords with human rights standards.

Conclusion

All is not lost in our quest to institutionalise a culture of respect for the rule of law – although of course a lot needs to be done in that regard. In doing so, it is necessary to take cognisance of the fact that the rule of law is a situation which can only be fostered through a concerted effort, and can only be maintained through the realisation that the rule of law operates in a dynamic society. Therefore, it needs constant attention in order to flourish.

Appendix

The Constitution of the Republic of Namibia

Table of Contents of the Constitution

PREAMBLE	228
CHAPTER 1 THE REPUBLIC	
Article 1 Establishment of the Republic of Namibia and Identification of its Territory	229
Article 2 National Symbols	229
Article 3 Language	229
CHAPTER 2 CITIZENSHIP	
Article 4 Acquisition and Loss of Citizenship	230
CHAPTER 3 FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS	
Article 5 Protection of Fundamental Rights and Freedoms	232
Article 6 Protection of Life	232
Article 7 Protection of Liberty	233
Article 8 Respect for Human Dignity	233
Article 9 Slavery and Forced Labour	233
Article 10 Equality and Freedom from Discrimination	233
Article 11 Arrest and Detention	234
Article 12 Fair Trial	234
Article 13 Privacy	235
Article 14 Family	235
Article 15 Children's Rights	235
Article 16 Property	236
Article 17 Political Activity	236
Article 18 Administrative Justice	237
Article 19 Culture	237
Article 20 Education	237
Article 21 Fundamental Freedoms	237
Article 22 Limitation upon Fundamental Rights and Freedoms	238
Article 23 Apartheid and Affirmative Action	238
Article 24 Derogation	239
Article 25 Enforcement of Fundamental Rights and Freedoms	240
CHAPTER 4 PUBLIC EMERGENCY, STATE OF NATIONAL DEFENCE AND MARTIAL LAW	
Article 26 State of Emergency, State of National Defence and Martial Law	241
CHAPTER 5 THE PRESIDENT	
Article 27 Head of State and Government	242
Article 28 Election	242
Article 29 Term of Office	243
Article 30 Oath or Affirmation	244

The Constitution of the Republic of Namibia

Article 31	Immunity from Civil and Criminal Proceedings	244
Article 32	Functions, Powers and Duties	245
Article 33	Remuneration	247
Article 34	Succession.....	248

CHAPTER 6 THE CABINET

Article 35	Composition	248
Article 36	Functions of the Prime Minister	248
Article 37	Deputy-Ministers	249
Article 38	Oath or Affirmation	249
Article 39	Vote of No Confidence	249
Article 40	Duties and Functions	249
Article 41	Ministerial Accountability	250
Article 42	Outside Employment.....	250
Article 43	Secretary to the Cabinet	250

CHAPTER 7 THE NATIONAL ASSEMBLY

Article 44	Legislative Power	251
Article 45	Representative Nature	251
Article 46	Composition	251
Article 47	Disqualification of Members	251
Article 48	Vacation of Seats	252
Article 49	Elections	253
Article 50	Duration	253
Article 51	Speaker.....	253
Article 52	Secretary and other Officers	253
Article 53	Quorum	254
Article 54	Casting Vote.....	254
Article 55	Oath or Affirmation	254
Article 56	Assent to Bills	254
Article 57	Dissolution	254
Article 58	Conduct of Business after Dissolution	255
Article 59	Rules of Procedure, Committees and Standing Orders	255
Article 60	Duties, Privileges and Immunities of Members.....	255
Article 61	Public Access to Sitzings	256
Article 62	Sessions	256
Article 63	Functions and Powers	256
Article 64	Withholding of Presidential Assent.....	257
Article 65	Signature and Enrolment of Acts	258
Article 66	Customary and Common Law	258
Article 67	Requisite Majorities.....	258

CHAPTER 8 THE NATIONAL COUNCIL

Article 68	Establishment	258
Article 69	Composition	258
Article 70	Term of Office of Members.....	259

The Constitution of the Republic of Namibia

Article 71	Oath or Affirmation	259
Article 72	Qualifications of Members	259
Article 73	Chairperson and Vice-Chairperson	259
Article 74	Powers and Functions	259
Article 75	Review of Legislation	260
Article 76	Quorum	262
Article 77	Voting	262

CHAPTER 9 THE ADMINISTRATION OF JUSTICE

Article 78	The Judiciary	262
Article 79	The Supreme Court	262
Article 80	The High Court	263
Article 81	Binding Nature of Decisions of the Supreme Court	263
Article 82	Appointment of Judges	263
Article 83	Lower Courts	264
Article 84	Removal of Judges from Office	264
Article 85	The Judicial Service Commission	264
Article 86	The Attorney-General	265
Article 87	Powers and Functions of the Attorney-General	265
Article 88	The Prosecutor-General	265

CHAPTER 10 THE OMBUDSMAN

Article 89	Establishment and Independence	266
Article 90	Appointment and Term of Office	266
Article 91	Functions	266
Article 92	Powers of Investigation	267
Article 93	Meaning of "Official"	268
Article 94	Removal from Office	268

CHAPTER 11 PRINCIPLES OF STATE POLICY

Article 95	Promotion of the Welfare of the People	268
Article 96	Foreign Relations	270
Article 97	Asylum	270
Article 98	Principles of Economic Order	270
Article 99	Foreign Investments	270
Article 100	Sovereign Ownership of Natural Resources	271
Article 101	Application of the Principles contained in this Chapter	271

CHAPTER 12 REGIONAL AND LOCAL GOVERNMENT

Article 102	Structures of Regional and Local Government	271
Article 103	Establishment of Regional Councils	272
Article 104	The Delimitation Commission	272
Article 105	Composition of Regional Councils	272
Article 106	Regional Council Elections	272
Article 107	Remuneration of Members of Regional Councils	273
Article 108	Powers of Regional Councils	273

The Constitution of the Republic of Namibia

Article 109	Management Committees.....	273
Article 110	Administration and Functioning of Regional Councils.....	273
Article 111	Local Authorities	273
CHAPTER 13 THE PUBLIC SERVICE COMMISSION		
Article 112	Establishment	274
Article 113	Functions.	274
CHAPTER 14 THE SECURITY COMMISSION		
Article 114	Establishment and Functions.....	275
CHAPTER 15 THE POLICE AND DEFENCE FORCES AND THE PRISON SERVICE		
Article 115	Establishment of the Police Force	275
Article 116	The Inspector-General of Police	275
Article 117	Removal of the Inspector-General of Police	276
Article 118	Establishment of the Defence Force.....	276
Article 119	Chief of the Defence Force.....	276
Article 120	Removal of the Chief of the Defence Force.....	276
Article 121	Establishment of the Prison Service	276
Article 122	Commissioner of Prisons	276
Article 123	Removal of the Commissioner of Prisons.....	277
CHAPTER 16 FINANCE		
Article 124	Transfer of Government Assets	277
Article 125	The State Revenue Fund.....	277
Article 126	Appropriations.....	278
Article 127	The Auditor-General.....	278
CHAPTER 17 CENTRAL BANK AND NATIONAL PLANNING COMMISSION		
Article 128	The Central Bank	278
Article 129	The National Planning Commission.....	279
CHAPTER 18 COMING INTO FORCE OF THE CONSTITUTION		
Article 130	Coming into Force of the Constitution	27
CHAPTER 19 AMENDMENT OF THE CONSTITUTION		
Article 131	Entrenchment of Fundamental Rights and Freedoms	279
Article 132	Repeal and Amendment of the Constitution	279
CHAPTER 20 THE LAW IN FORCE AND TRANSITIONAL PROVISIONS		
Article 133	The First National Assembly	280
Article 134	Election of the First President	281
Article 135	Implementation of this Constitution.....	281
Article 136	Powers of the National Assembly prior to the Election of a National Council	281

The Constitution of the Republic of Namibia

Article 137	Elections of the First Regional Councils and the First National Council.....	281
Article 138	Courts and Pending Actions.....	282
Article 139	The Judicial Service Commission	283
Article 140	The Law in Force at the Date of Independence	284
Article 141	Existing Appointments.....	284
Article 142	Appointment of the First Chief of the Defence Force, the First Inspector-General of Police and the First Commissioner of Prisons	285
Article 143	Existing International Agreements	285
CHAPTER 21 FINAL PROVISIONS		
Article 144	International Law.....	285
Article 145	Saving	285
Article 146	Definitions	286
Article 147	Repeal of Laws	286
Article 148	Short Title.....	286
SCHEDULE 1	OATH/AFFIRMATION OF JUDGES.....	287
SCHEDULE 2	OATH/AFFIRMATION OF MINISTERS AND DEPUTY-MINISTERS	288
SCHEDULE 3	OATH/AFFIRMATION OF MEMBERS OF THE NATIONAL ASSEMBLY AND THE NATIONAL COUNCIL.....	289
SCHEDULE 4	ELECTION OF MEMBERS OF THE NATIONAL ASSEMBLY	290
SCHEDULE 5	PROPERTY VESTING IN THE GOVERNMENT OF NAMIBIA.....	291
SCHEDULE 6	THE NATIONAL FLAG OF THE REPUBLIC OF NAMIBIA	292
SCHEDULE 7	IMPLEMENTATION OF THIS CONSTITUTION	293
SCHEDULE 8	REPEALS OF LAWS.....	294

Preamble

Whereas 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;

Whereas 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;

Whereas the said rights are most effectively maintained and protected in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary;

Whereas these rights have for so long been denied to the people of Namibia by colonialism, racism and apartheid;

Whereas we the people of Namibia -

have finally emerged victorious in our struggle against colonialism, racism and apartheid;

are determined to adopt a Constitution which expresses for ourselves and our children our resolve to cherish and to protect the gains of our long struggle;

desire to promote amongst all of us the dignity of the individual and the unity and integrity of the Namibian nation among and in association with the nations of the world;

will strive to achieve national reconciliation and to foster peace, unity and a common loyalty to a single state;

committed to these principles, have resolved to constitute the Republic of Namibia as a sovereign, secular, democratic and unitary State securing to all our citizens justice, liberty, equality and fraternity,

Now therefore, we the people of Namibia accept and adopt this Constitution as the fundamental law of our Sovereign and Independent Republic.

CHAPTER 1

The Republic

Article 1 Establishment of the Republic of Namibia and Identification of its Territory

- (1) The Republic of Namibia is hereby established as a sovereign, secular, democratic and unitary State founded upon the principles of democracy, the rule of law and justice for all.
- (2) All power shall vest in the people of Namibia who shall exercise their sovereignty through the democratic institutions of the State.
- (3) The main organs of the State shall be the Executive, the Legislature and the Judiciary.
- (4) The national territory of Namibia shall consist of the whole of the territory recognised by the international community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis Bay, as well as the off-shore islands of Namibia, and its southern boundary shall extend to the middle of the Orange River.
- (5) Windhoek shall be the seat of central Government.
- (6) This Constitution shall be the Supreme Law of Namibia.

Article 2 National Symbols

- (1) Namibia shall have a National Flag, the description of which is set out in Schedule 6 hereof.
- (2) Namibia shall have a National Coat of Arms, a National Anthem and a National Seal to be determined by Act of Parliament, which shall require a two-thirds majority of all the members of the National Assembly for adoption and amendment.
- (3)
 - (a) The National Seal of the Republic of Namibia shall show the Coat of Arms circumscribed with the word "NAMIBIA" and the motto of the country, which shall be determined by Act of Parliament as aforesaid.
 - (b) The National Seal shall be in the custody of the President or such person whom the President may designate for such purpose and shall be used on such official documents as the President may determine.

Article 3 Language

- (1) The official language of Namibia shall be English.

- (2) Nothing contained in this Constitution shall prohibit the use of any other language as a medium of instruction in private schools or in schools financed or subsidised by the State, subject to compliance with such requirements as may be imposed by law, to ensure proficiency in the official language, or for pedagogic reasons.
- (3) Nothing contained in Sub-Article (1) hereof shall preclude legislation by Parliament which permits the use of a language other than English for legislative, administrative and judicial purposes in regions or areas where such other language or languages are spoken by a substantial component of the population.

CHAPTER 2

Citizenship

Article 4 Acquisition and Loss of Citizenship

- (1) The following persons shall be citizens of Namibia by birth:
 - (a) those born in Namibia before the date of Independence whose fathers or mothers would have been Namibian citizens at the time of the birth of such persons, if this Constitution had been in force at that time; and
 - (b) those born in Namibia before the date of Independence, who are not Namibian citizens under Sub-Article (a) hereof, and whose fathers or mothers were ordinarily resident in Namibia at the time of the birth of such persons: provided that their fathers or mothers were not then persons:
 - (aa) who were enjoying diplomatic immunity in Namibia under any law relating to diplomatic privileges; or
 - (bb) who were career representatives of another country; or
 - (cc) who were members of any police, military or security unit seconded for service within Namibia by the Government of another country: provided further that this Sub-Article shall not apply to persons claiming citizenship of Namibia by birth if such persons were ordinarily resident in Namibia at the date of Independence and had been so resident for a continuous period of not less than five (5) years prior to such date, or if the fathers or mothers of such persons claiming citizenship were ordinarily resident in Namibia at the date of the birth of such persons and had been so resident for a continuous period of not less than five (5) years prior to such date;
 - (c) those born in Namibia after the date of Independence whose fathers or mothers are Namibian citizens at the time of the birth of such persons;
 - (d) those born in Namibia after the date of Independence who do not qualify for citizenship under Sub-Article (c) hereof, and whose fathers or mothers are ordinarily resident in Namibia at the time of the birth of such persons: provided that their fathers or mothers are not then persons:

The Constitution of the Republic of Namibia

- (aa) enjoying diplomatic immunity in Namibia under any law relating to diplomatic privileges; or
- (bb) who are career representatives of another country; or
- (cc) who are members of any police, military or security unit seconded for service within Namibia by the Government of another country; or
- (dd) who are illegal immigrants:

provided further that Sub-Articles (aa), (bb), (cc) and (dd) hereof will not apply to children who would otherwise be stateless.

- (2) The following persons shall be citizens of Namibia by descent:
 - (a) those who are not Namibian citizens under Sub-Article (1) hereof and whose fathers or mothers at the time of the birth of such persons are citizens of Namibia or whose fathers or mothers would have qualified for Namibian citizenship by birth under Sub-Article (1) hereof, if this Constitution had been in force at that time; and
 - (b) who comply with such requirements as to registration of citizenship as may be required by Act of Parliament: provided that nothing in this Constitution shall preclude Parliament from enacting legislation which requires the birth of such persons born after the date of Independence to be registered within a specific time either in Namibia or at an embassy, consulate or office of a trade representative of the Government of Namibia.
- (3) The following persons shall be citizens of Namibia by marriage:
 - (a) those who are not Namibian citizens under Sub-Article (1) or (2) hereof and who:
 - (aa) in good faith marry a Namibian citizen or, prior to the coming into force of this Constitution, in good faith married a person who would have qualified for Namibian citizenship if this Constitution had been in force; and
 - (bb) subsequent to such marriage have ordinarily resided in Namibia as the spouse of such person for a period of not less than two (2) years; and
 - (cc) apply to become citizens of Namibia;
 - (b) for the purposes of this Sub-Article (and without derogating from any effect that it may have for any other purposes) a marriage by customary law shall be deemed to be a marriage: provided that nothing in this Constitution shall preclude Parliament from enacting legislation which defines the requirements which need to be satisfied for a marriage by customary law to be recognised as such for the purposes of this Sub-Article.
- (4) Citizenship by registration may be claimed by persons who are not Namibian citizens under Sub-Articles (1), (2) or (3) hereof and who were ordinarily resident in Namibia at the date of Independence, and had been so resident for a continuous period of not less than five (5) years prior to such date: provided that application for Namibian citizenship under this Sub-Article is made within a period of twelve (12) months from the date of Independence, and prior to making such application, such persons renounce the citizenship of any other country of which they are citizens.
- (5) Citizenship by naturalisation may be applied for by persons who are not Namibian citizens under Sub-Articles (1), (2), (3) or (4) hereof and who:
 - (a) are ordinarily resident in Namibia at the time when the application for naturalisation is made; and

- (b) have been so resident in Namibia for a continuous period of not less than five (5) years (whether before or after the date of Independence); and
 - (c) satisfy any other criteria pertaining to health, morality, security or legality of residence as may be prescribed by law.
- (6) Nothing contained herein shall preclude Parliament from authorizing by law the conferment of Namibian citizenship upon any fit and proper person by virtue of any special skill or experience or commitment to or services rendered to the Namibian nation either before or at any time after the date of Independence.
- (7) Namibian citizenship shall be lost by persons who renounce their Namibian citizenship by voluntarily signing a formal declaration to that effect.
- (8) Nothing in this Constitution shall preclude Parliament from enacting legislation providing for the loss of Namibian citizenship by persons who, after the date of Independence
- (a) have acquired the citizenship of any other country by any voluntary act; or
 - (b) have served or volunteered to serve in the armed or security forces of any other country without the written permission of the Namibian Government; or
 - (c) have taken up permanent residence in any other country and have absented themselves thereafter from Namibia for a period in excess of two (2) years without the written permission of the Namibian Government:

provided that no person who is a citizen of Namibia by birth or descent may be deprived of Namibian citizenship by such legislation.

- (9) Parliament shall be entitled to make further laws not inconsistent with this Constitution regulating the acquisition or loss of Namibian citizenship.

CHAPTER 3

Fundamental Human Rights and Freedoms

Article 5 Protection of Fundamental Rights and Freedoms

The fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

Article 6 Protection of Life

The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.

Article 7 Protection of Liberty

No persons shall be deprived of personal liberty except according to procedures established by law.

Article 8 Respect for Human Dignity

- (1) The dignity of all persons shall be inviolable.
- (2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
- (b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

Article 9 Slavery and Forced Labour

- (1) No persons shall be held in slavery or servitude.
- (2) No persons shall be required to perform forced labour.
- (3) For the purposes of this Article, the expression "forced labour" shall not include:
 - (a) any labour required in consequence of a sentence or order of a Court;
 - (b) any labour required of persons while lawfully detained which, though not required in consequence of a sentence or order of a Court, is reasonably necessary in the interests of hygiene;
 - (c) any labour required of members of the defence force, the police force and the prison service in pursuance of their duties as such or, in the case of persons who have conscientious objections to serving as members of the defence force, any labour which they are required by law to perform in place of such service;
 - (d) any labour required during any period of public emergency or in the event of any other emergency or calamity which threatens the life and well-being of the community, to the extent that requiring such labour is reasonably justifiable in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with that situation;
- (e) any labour reasonably required as part of reasonable and normal communal or other civic obligations.

Article 10 Equality and Freedom from Discrimination

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

Article 11 Arrest and Detention

- (1) No persons shall be subject to arbitrary arrest or detention.
- (2) No persons who are arrested shall be detained in custody without being informed promptly in a language they understand of the grounds for such arrest.
- (3) All persons who are arrested and detained in custody shall be brought before the nearest Magistrate or other judicial officer within a period of forty-eight (48) hours of their arrest or, if this is not reasonably possible, as soon as possible thereafter, and no such persons shall be detained in custody beyond such period without the authority of a Magistrate or other judicial officer.
- (4) Nothing contained in Sub-Article (3) hereof shall apply to illegal immigrants held in custody under any law dealing with illegal immigration: provided that such persons shall not be deported from Namibia unless deportation is authorised by a Tribunal empowered by law to give such authority.
- (5) No persons who have been arrested and held in custody as illegal immigrants shall be denied the right to consult confidentially legal practitioners of their choice, and there shall be no interference with this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security or for public safety.

Article 12 Fair Trial

- (1)
 - (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal 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, as is necessary in a democratic society.
 - (b) A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.
 - (c) Judgments in criminal cases shall be given in public, except where the interests of juvenile persons or morals otherwise require.
 - (d) All persons charged with an offence shall be presumed innocent until proven guilty according to law, after having had the opportunity of calling witnesses and cross-examining those called against them.
 - (e) All persons shall be afforded adequate time and facilities for the preparation and presentation of their defence, before the commencement of and during their trial, and shall be entitled to be defended by a legal practitioner of their choice.
 - (f) No persons shall be compelled to give testimony against themselves or their spouses, who shall include partners in a marriage by customary law, and no Court shall admit in evidence against

The Constitution of the Republic of Namibia

such person's testimony which has been obtained from such persons in violation of Article 8(2)(b) hereof.

- (2) No persons shall be liable to be tried, convicted or punished again for any criminal offence for which they have already been convicted or acquitted according to law: provided that nothing in this Sub-Article shall be construed as changing the provisions of the common law defences of "previous acquittal" and "previous conviction".
- (3) No persons shall be tried or convicted for any criminal offence or on account of any act or omission which did not constitute a criminal offence at the time when it was committed, nor shall a penalty be imposed exceeding that which was applicable at the time when the offence was committed.

Article 13 Privacy

- (1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others.
- (2) Searches of the person or the homes of individuals shall only be justified:
 - (a) where these are authorised by a competent judicial officer;
 - (b) in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied.

Article 14 Family

- (1) Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family. They shall be entitled to equal rights as to marriage, during marriage and at its dissolution.
- (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 15 Children's Rights

- (1) Children shall have the right from birth to a name, the right to acquire a 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 Constitution of the Republic of Namibia

- (2) 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, 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.
- (3) No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament. Nothing in this Sub-Article shall be construed as derogating in any way from Sub-Article (2) hereof.
- (4) Any arrangement or scheme employed on any farm or other undertaking, the object or effect of which is to compel the minor children of an employee to work for or in the interest of the employer of such employee, shall for the purposes of Article 9 hereof be deemed to constitute an arrangement or scheme to compel the performance of forced labour.
- (5) No law authorising preventive detention shall permit children under the age of sixteen (16) years to be detained.

Article 16 Property

- (1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.
- (2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.

Article 17 Political Activity

- (1) All citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of Government. All citizens shall have the right to form and join political parties and, subject to such qualifications prescribed by law as are necessary in a democratic society, to participate in the conduct of public affairs, whether directly or through freely chosen representatives.
- (2) Every citizen who has reached the age of eighteen (18) years shall have the right to vote and who has reached the age of twenty-one (21) years to be elected to public office, unless otherwise provided herein.
- (3) The rights guaranteed by Sub-Article (2) hereof may only be abrogated, suspended or be impinged upon by Parliament in respect of specified categories of persons on such grounds of infirmity or on such grounds of public interest or morality as are necessary in a democratic society.

Article 18 Administrative Justice

Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.

Article 19 Culture

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.

Article 20 Education

- (1) All persons shall have the right to education.
- (2) Primary 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.
- (3) Children shall not be allowed to leave school until they have completed their primary education or have attained the age of sixteen (16) years, whichever is the sooner, save in so far as this may be authorised by Act of Parliament on grounds of health or other considerations pertaining to the public interest.
- (4) All persons shall have the right, at their own expense, to establish and to maintain private schools, or colleges or other institutions of tertiary education: provided that:
 - (a) such schools, colleges or institutions of tertiary education are registered with a Government department in accordance with any law authorising and regulating such registration;
 - (b) the standards maintained by such schools, colleges or institutions of tertiary education are not inferior to the standards maintained in comparable schools, colleges or institutions of tertiary education funded by the State;
 - (c) no restrictions of whatever nature are imposed with respect to the admission of pupils based on race, colour or creed;
 - (d) no restrictions of whatever nature are imposed with respect to the recruitment of staff based on race or colour.

Article 21 Fundamental Freedoms

- (1) All persons shall have the right to:
 - (a) freedom of speech and expression, which shall include freedom of the press and other media;

The Constitution of the Republic of Namibia

- (b) freedom of thought, conscience and belief, which shall include academic freedom in institutions of higher learning;
 - (c) freedom to practise any religion and to manifest such practice;
 - (d) assemble peaceably and without arms;
 - (e) freedom of association, which shall include freedom to form and join associations or unions, including trade unions and political parties;
 - (f) withhold their labour without being exposed to criminal penalties;
 - (g) move freely throughout Namibia;
 - (h) reside and settle in any part of Namibia;
 - (i) leave and return to Namibia;
 - (j) practise any profession, or carry on any occupation, trade or business.
- (2) 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 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.

Article 22 Limitation upon Fundamental Rights and Freedoms

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:

- (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
- (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.

Article 23 Apartheid and Affirmative Action

- (1) The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices.

The Constitution of the Republic of Namibia

- (2) Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.
- (3) In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.

Article 24 Derogation

- (1) Nothing contained in or done under the authority of Article 26 hereof shall be held to be inconsistent with or in contravention of this Constitution to the extent that it authorises the taking of measures during any period when Namibia is in a state of national defence or any period when a declaration of emergency under this Constitution is in force.
- (2) Where any persons are detained by virtue of such authorisation as is referred to in Sub-Article (1) hereof, the following provisions shall apply:
 - (a) they shall, as soon as reasonably practicable and in any case not more than five (5) days after the commencement of their detention, be furnished with a statement in writing in a language that they understand specifying in detail the grounds upon which they are detained and, at their request, this statement shall be read to them;
 - (b) not more than fourteen (14) days after the commencement of their detention, a notification shall be published in the Gazette stating that they have been detained and giving particulars of the provision of law under which their detention is authorised;
 - (c) not more than one (1) month after the commencement of their detention and thereafter during their detention at intervals of not more than three (3) months; their cases shall be reviewed by the Advisory Board referred to in Article 26(5)(c) hereof, which shall order their release from detention if it is satisfied that it is not reasonably necessary for the purposes of the emergency to continue the detention of such persons;
 - (d) they shall be afforded such opportunity for the making of representations as may be desirable or expedient in the circumstances, having regard to the public interest and the interests of the detained persons.
- (3) Nothing contained in this Article shall permit a derogation from or suspension of the fundamental rights or freedoms referred to in Articles 5, 6, 8, 9, 10, 12, 14, 15, 18, 19 and 21 (1)(a), (b), (c) and (e) hereof, or the denial of access by any persons to legal practitioners or a Court of law.

Article 25 Enforcement of Fundamental Rights and Freedoms

- (1) Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:
 - (a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid;
 - (b) any law which was in force immediately before the date of Independence shall remain in force until amended, repealed or declared unconstitutional. If a competent Court is of the opinion that such law is unconstitutional, it may either set aside the law, or allow Parliament to correct any defect in such law, in which event the provisions of Sub-Article (a) hereof shall apply.
- (2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.
- (3) Subject to the provisions of this Constitution, the Court referred to in Sub-Article (2) hereof shall have the power to make all such orders as shall be necessary and appropriate to secure such applicants the enjoyment of the rights and freedoms conferred on them under the provisions of this Constitution, should the Court come to the conclusion that such rights or freedoms have been unlawfully denied or violated, or that grounds exist for the protection of such rights or freedoms by interdict.
- (4) The power of the Court shall include the power to award monetary compensation in respect of any damage suffered by the aggrieved persons in consequence of such unlawful denial or violation of their fundamental rights and freedoms, where it considers such an award to be appropriate in the circumstances of particular cases.

CHAPTER 4

*Public Emergency, State of
National Defence and Martial Law*

Article 26 State of Emergency, State of National Defence and Martial Law

- (1) At a time of national disaster or during a state of national defence or public emergency threatening the life of the nation or the constitutional order, the President may by Proclamation in the Gazette declare that a state of emergency exists in Namibia or any part thereof.
- (2) A declaration under Sub-Article (1) hereof, if not sooner revoked, shall cease to have effect:
 - (a) in the case of a declaration made when the National Assembly is sitting or has been summoned to meet, at the expiration of a period of seven (7) days after publication of the declaration; or
 - (b) in any other case; at the expiration of a period of thirty (30) days after publication of the declaration; or
 - (c) in any other case; at the expiration of a period of thirty (30) days after publication of the declaration unless before the expiration of that period, it is approved by a resolution passed by the National Assembly by a two-thirds majority of all its members.
- (3) Subject to the provisions of Sub-Article (4) hereof, a declaration approved by a resolution of the National Assembly under Sub-Article (2) hereof shall continue to be in force until the expiration of a period of six (6) months after being so approved or until such earlier date as may be specified in the resolution: provided that the National Assembly may, by resolution by a two-thirds majority of all its members, extend its approval of the declaration for periods of not more than six (6) months at a time.
- (4) The National Assembly may by resolution at any time revoke a declaration approved by it in terms of this Article.
- (5)
 - (a) During a state of emergency in terms of this Article or when a state of national defence prevails, the President shall have the power by Proclamation to make such regulations as in his or her opinion are necessary for the protection of national security, public safety and the maintenance of law and order.
 - (b) The powers of the President to make such regulations shall include the power to suspend the operation of any rule of the common law or statute or any fundamental right or freedom protected by this Constitution, for such period and subject to such conditions as are reasonably justifiable for the purpose of dealing with the situation which has given rise to the emergency: provided that

The Constitution of the Republic of Namibia

nothing in this Sub-Article shall enable the President to act contrary to the provisions of Article 24 hereof.

- (c) Where any regulation made under Sub-Article (b) hereof provides for detention without trial, provision shall also be made for an Advisory Board, to be appointed by the President on the recommendation of the Judicial Service Commission, and consisting of no more than five (5) persons, of whom no fewer than three (3) persons shall be Judges of the Supreme Court or the High Court or qualified to be such. The Advisory Board shall perform the function set out in Article 24(2)(c) hereof.
- (6) Any regulations made by the President pursuant to the provisions of Sub-Article (5) hereof shall cease to have legal force if they have not been approved by a resolution of the National Assembly within fourteen (14) days from the date when the National Assembly first sits in session after the date of the commencement of any such regulations.
- (7) The President shall have the power to proclaim or terminate martial law. Martial law may be proclaimed only when a state of national defence involving another country exists or when civil war prevails in Namibia: provided that any proclamation of martial law shall cease to be valid if it is not approved within a reasonable time by a resolution passed by a two-thirds majority of all the members of the National Assembly.

CHAPTER 5

The President

Article 27 Head of State and Government

- (1) The President shall be the Head of State and of the Government and the Commander-in-Chief of the Defence Force.
- (2) The executive power of the Republic of Namibia shall vest in the President and the Cabinet.
- (3) Except as may be otherwise provided in this Constitution or by law, the President shall in the exercise of his or her functions be obliged to act in consultation with the Cabinet.

Article 28 Election

- (1) The President shall be elected in accordance with the provisions of this Constitution and subject thereto.
- (2) Election of the President shall be:

The Constitution of the Republic of Namibia

- (a) by direct, universal and equal suffrage; and
 - (b) conducted in accordance with principles and procedures to be determined by Act of Parliament: provided that no person shall be elected as President unless he or she has received more than fifty (50) per cent of the votes cast and the necessary number of ballots shall be conducted until such result is reached.
- (3) Every citizen of Namibia by birth or descent, over the age of thirty-five (35) years, and who is eligible to be elected to office as a member of the National Assembly shall be eligible for election as President.
- (4) The procedures to be followed for the nomination of candidates for election as President, and for all matters necessary and incidental to ensure the free, fair and effective election of a President, shall be determined by Act of Parliament: provided that any registered political party shall be entitled to nominate a candidate, and any person supported by a minimum number of registered voters to be determined by Act of Parliament shall also be entitled to be nominated as a candidate.

Article 29 Term of Office

- (1) (a) The President's term of office shall be five (5) years unless he or she dies or resigns before the expiry of the said term or is removed from office.
- (b) In the event of the dissolution of the National Assembly in the circumstances provided for under Article 57(1) hereof, the President's term of office shall also expire.
- (2) A President shall be removed from office if a two-thirds majority of all the members of the National Assembly, confirmed by a two-thirds majority of all the members of the National Council, adopts a resolution impeaching the President on the ground that he or she has been guilty of a violation of the Constitution or guilty of a serious violation of the laws of the land or otherwise guilty of such gross misconduct or ineptitude as to render him or her unfit to hold with dignity and honour the office of President.
- (3) A person shall hold office as President for not more than two terms.
- (4) If a President dies, resigns or is removed from office in terms of this Constitution, the vacant office of President shall be filled for the unexpired period thereof as follows:
- (a) if the vacancy occurs not more than one (1) year before the date on which Presidential elections are required to be held, the vacancy shall be filled in accordance with the provisions of Article 34 hereof;
 - (b) if the vacancy occurs more than one (1) year before the date on which Presidential elections are required to be held, an election for the President shall be held in accordance with the provisions of Article 28 hereof within a period of ninety (90) days from the date on which the vacancy occurred, and pending such election the vacant office shall be filled in accordance with the provisions of Article 34 hereof.

The Constitution of the Republic of Namibia

- (5) If the President dissolves the National Assembly under Articles 32(3)(a) and 57(1) hereof, a new election for President shall be held in accordance with the provisions of Article 28 hereof within ninety (90) days, and pending such election the President shall remain in office, and the provisions of Article 58 hereof shall be applicable.
- (6) If a person becomes President under Sub-Article (4) hereof, the period of time during which he or she holds office consequent upon such election or succession shall not be regarded as a term for the purposes of Sub-Article (3) hereof.

Article 30 Oath or Affirmation

Before formally assuming office, a President-elect shall make the following oath or affirmation which shall be administered by the Chief Justice or a Judge designated by the Chief Justice for this purpose:

"I, do hereby swear/solemnly affirm,

That I will strive to the best of my ability to uphold, protect and defend as the Supreme Law the Constitution of the Republic of Namibia, and faithfully to obey, execute and administer the laws of the Republic of Namibia;

That I will protect the independence, sovereignty, territorial integrity and the material and spiritual resources of the Republic of Namibia; and

That I will endeavour to the best of my ability to ensure justice for all the inhabitants of the Republic of Namibia.

(in the case of an oath)

So help me God."

Article 31 Immunity from Civil and Criminal Proceedings

- (1) No person holding the office of President or performing the functions of President may be sued in any civil proceedings save where such proceedings concern an act done in his or her official capacity as President.
- (2) No person holding the office of President shall be charged with any criminal offence or be amenable to the criminal jurisdiction of any Court in respect of any act allegedly performed, or any omission to perform any act, during his or her tenure of office as President.
- (3) After a President has vacated that office:
 - (a) no Court may entertain any action against him or her in any civil proceedings in respect of any act done in his or her official capacity as President;

- (b) a civil or criminal Court shall only have jurisdiction to entertain proceedings against him or her, in respect of acts of commission or omission alleged to have been perpetrated in his or her personal capacity whilst holding office as President, if Parliament by resolution has removed the President on the grounds specified in this Constitution and if a resolution is adopted by Parliament resolving that any such proceedings are justified in the public interest notwithstanding any damage such proceedings might cause to the dignity of the office of President.

Article 32 Functions, Powers and Duties

- (1) As the Head of State, the President shall uphold, protect and defend the Constitution as the Supreme Law, and shall perform with dignity and leadership all acts necessary, expedient, reasonable and incidental to the discharge of the executive functions of the Government, subject to the overriding terms of this Constitution and the laws of Namibia, which he or she is constitutionally obliged to protect, to administer and to execute.
- (2) In accordance with the responsibility of the executive branch of Government to the legislative branch, the President and the Cabinet shall each year during the consideration of the official budget attend Parliament. During such session the President shall address Parliament on the state of the nation and on the future policies of the Government, shall report on the policies of the previous year and shall be available to respond to questions.
- (3) Without derogating from the generality of the functions and powers contemplated by Sub-Article (1) hereof, the President shall preside over meetings of the Cabinet and shall have the power, subject to this Constitution to:
 - (a) dissolve the National Assembly by Proclamation in the circumstances provided for in Article 57(1) hereof;
 - (b) determine the times for the holding of special sessions of the National Assembly, and to prorogue such sessions;
 - (c) accredit, receive and recognise ambassadors, and to appoint ambassadors, plenipotentiaries, diplomatic representatives and other diplomatic officers, consuls and consular officers;
 - (d) pardon or reprieve offenders, either unconditionally or subject to such conditions as the President may deem fit;
 - (e) negotiate and sign international agreements, and to delegate such power;
 - (f) declare martial law or, if it is necessary for the defence of the nation, declare that a state of national defence exists: provided that this power shall be exercised subject to the terms of Article 26(7) hereof;
 - (g) establish and dissolve such Government departments and ministries as the President may at any time consider to be necessary or expedient for the good government of Namibia;

The Constitution of the Republic of Namibia

- (h) confer such honours as the President considers appropriate on citizens, residents and friends of Namibia in consultation with interested and relevant persons and institutions;
- (i) appoint the following persons:
 - (aa) the Prime Minister;
 - (bb) Ministers and Deputy-Ministers;
 - (cc) the Attorney-General;
 - (dd) the Director-General of Planning;
 - (ee) any other person or persons who are required by any other provision of this Constitution or any other law to be appointed by the President.
- (4) The President shall also have the power, subject to this Constitution, to appoint:
 - (a) on the recommendation of the Judicial Service Commission:
 - (aa) the Chief Justice, the Judge-President of the High Court and other Judges of the Supreme Court and the High Court;
 - (bb) the Ombudsman;
 - (cc) the Prosecutor-General;
 - (b) on the recommendation of the Public Service Commission:
 - (aa) the Auditor-General;
 - (bb) the Governor and the Deputy-Governor of the Central Bank;
 - (c) on the recommendation of the Security Commission:
 - (aa) the Chief of the Defence Force;
 - (bb) the Inspector-General of Police;
 - (cc) the Commissioner of Prisons.
- (5) Subject to the provisions of this Constitution dealing with the signing of any laws passed by Parliament and the promulgation and publication of such laws in the Gazette, the President shall have the power to:

The Constitution of the Republic of Namibia

- (a) sign and promulgate any Proclamation which by law he or she is entitled to proclaim as President;
 - (b) initiate, in so far as he or she considers it necessary and expedient, laws for submission to and consideration by the National Assembly;
 - (c) appoint as members of the National Assembly but without any vote therein, not more than six (6) persons by virtue of their special expertise, status, skill or experience.
- (6) Subject to the provisions of this Constitution or any other law, any person appointed by the President pursuant to the powers vested in him or her by this Constitution or any other law may be removed by the President by the same process through which such person was appointed.
- (7) Subject to the provisions of this Constitution and of any other law of application in this matter; the President may, in consultation with the Cabinet and on the recommendation of the Public Service Commission:
- (a) constitute any office in the public service of Namibia not otherwise provided for by any other law;
 - (b) appoint any person to such office;
 - (c) determine the tenure of any person so appointed as well as the terms and conditions of his or her service.
- (8) All appointments made and actions taken under Sub-Articles (3), (4), (5), (6) and (7) hereof shall be announced by the President by Proclamation in the Gazette.
- (9) Subject to the provisions of this Constitution and save where this Constitution otherwise provides, any action taken by the President pursuant to any power vested in the President by the terms of this Article shall be capable of being reviewed, reversed or corrected on such terms as are deemed expedient and proper should there be a resolution proposed by at least one-third of all the members of the National Assembly and passed by a two-thirds majority of all the members of the National Assembly disapproving any such action and resolving to review, reverse or correct it.
- (10) Notwithstanding the review, reversal or correction of any action in terms of Sub-Article (9) hereof, all actions performed pursuant to any such action during the period preceding such review, reversal or correction shall be deemed to be valid and effective in law, until and unless Parliament otherwise enacts.

Article 33 Remuneration

Provision shall be made by Act of Parliament for the payment out of the State Revenue Fund of remuneration and allowances for the President, as well as for the payment of pensions to former Presidents and, in the case of their deaths, to their surviving spouses.

Article 34 Succession

- (1) If the office of President becomes vacant or if the President is otherwise unable to fulfil the duties of the office, the following persons shall in the order provided for in this Sub-Article act as President for the unexpired portion of the President's term of office or until the President is able to resume office whichever is the earlier:
 - (a) the Prime Minister;
 - (b) the Deputy-Prime Minister;
 - (c) a person appointed by the Cabinet.
- (2) Where it is regarded as necessary or expedient that a person deputise for the President because of a temporary absence from the country or because of pressure of work, the President shall be entitled to nominate any person enumerated in Sub-Article (1) hereof to deputise for him or her in respect of such specific occasions or such specific matters and for such specific periods as in his or her discretion may be considered wise and expedient, subject to consultation with the Cabinet.

CHAPTER 6

The Cabinet

Article 35 Composition

- (1) The Cabinet shall consist of the President, the Prime Minister and such other Ministers as the President may appoint from the members of the National Assembly, including members nominated under Article 46(1)(b) hereof, for the purposes of administering and executing the functions of the Government.
- (2) The President may also appoint a Deputy-Prime Minister to perform such functions as may be assigned to him or her by the President or the Prime Minister.
- (3) The President or, in his or her absence, the Prime Minister or other Minister designated for this purpose by the President, shall preside at meetings of the Cabinet,

Article 36 Functions of the Prime Minister

The Prime Minister shall be the leader of Government business in Parliament, shall co-ordinate the work of the Cabinet and shall advise and assist the President in the execution of the functions of Government.

Article 37 Deputy-Ministers

The President may appoint from the members of the National Assembly, including members nominated under Article 46(1)(b) hereof, and the National Council such Deputy-Ministers as he or she may consider expedient, to exercise or perform on behalf of Ministers any of the powers, functions and duties which may have been assigned to such Ministers.

Article 38 Oath or Affirmation

Before assuming office, a Minister or Deputy-Minister shall make and subscribe to an oath or solemn affirmation before the President or a person designated by the President for this purpose, in the terms set out in Schedule 2 hereof.

Article 39 Vote of No Confidence

The President shall be obliged to terminate the appointment of any member of the Cabinet, if the National Assembly by a majority of all its members resolves that it has no confidence in that member.

Article 40 Duties and Functions

The members of the Cabinet shall have the following functions:

- (a) to direct, co-ordinate and supervise the activities of Ministries and Government departments including para-statal enterprises, and to review and advise the President and the National Assembly on the desirability and wisdom of any prevailing subordinate legislation, regulations or orders pertaining to such para-statal enterprises, regard being had to the public interest;
- (b) to initiate bills for submission to the National Assembly;
- (c) to formulate, explain and assess for the National Assembly the budget of the State and its economic development plans and to report to the National Assembly thereon;
- (d) to carry out such other functions as are assigned to them by law or are incidental to such assignment;
- (e) to attend meetings of the National Assembly and to be available for the purposes of any queries and debates pertaining to the legitimacy, wisdom, effectiveness and direction of Government policies;
- (f) to take such steps as are authorised by law to establish such economic organisations, institutions and para-statal enterprises on behalf of the State as are directed or authorised by law;
- (g) to formulate, explain and analyse for the members of the National Assembly the goals of Namibian foreign policy and its relations with other States and to report to the National Assembly thereon;
- (h) to formulate, explain and analyse for the members of the National Assembly the directions and content of foreign trade policy and to report to the National Assembly thereon;

The Constitution of the Republic of Namibia

- (i) to assist the President in determining what international agreements are to be concluded, acceded to or succeeded to and to report to the National Assembly thereon;
- (j) to advise the President on the state of national defence and the maintenance of law and order and to inform the National Assembly thereon;
- (k) to issue notices, instructions and directives to facilitate the implementation and administration of laws administered by the Executive, subject to the terms of this Constitution or any other law;
- (l) to remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies.

Article 41 Ministerial Accountability

All Ministers shall be accountable individually for the administration of their own Ministries and collectively for the administration of the work of the Cabinet, both to the President and to Parliament.

Article 42 Outside Employment

- (1) During their tenure of office as members of the Cabinet, Ministers may not take up any other paid employment, engage in activities inconsistent with their positions as Ministers, or expose themselves to any situation which carries with it the risk of a conflict developing between their interests as Ministers and their private interests.
- (2) No members of the Cabinet shall use their positions as such or use information entrusted to them confidentially as such members of the Cabinet, directly or indirectly to enrich themselves.

Article 43 Secretary to the Cabinet

- (1) There shall be a Secretary to the Cabinet who shall be appointed by the President and who shall perform such functions as may be determined by law and such functions as are from time to time assigned to the Secretary by the President or the Prime Minister. Upon appointment by the President, the Secretary shall be deemed to have been appointed to such office on the recommendation of the Public Service Commission.
- (2) The Secretary to the Cabinet shall also serve as a depository of the records, minutes and related documents of the Cabinet.

CHAPTER 7

The National Assembly

Article 44 Legislative Power

The legislative power of Namibia shall be vested in the National Assembly with the power to pass laws with the assent of the President as provided in this Constitution subject, where applicable, to the powers and functions of the National Council as set out in this Constitution.

Article 45 Representative Nature

The members of the National Assembly shall be representative of all the people and shall in the performance of their duties be guided by the objectives of this Constitution, by the public interest and by their conscience.

Article 46 Composition

(1) The composition of the National Assembly shall be as follows:

- (a) seventy-two (72) members to be elected by the registered voters by general, direct and secret ballot. Every Namibian citizen who has the qualifications described in Article 17 hereof shall be entitled to vote in the elections for members of the National Assembly and, subject to Article 47 hereof, shall be eligible for candidature as a member of the National Assembly;
 - (b) not more than six (6) persons appointed by the President under Article 32(5)(c) hereof, by virtue of their special expertise, status, skill or experience: provided that such members shall have no vote in the National Assembly, and shall not be taken into account for the purpose of determining any specific majorities that are required under this Constitution or any other law.
- (2) Subject to the principles referred to in Article 49 hereof, the members of the National Assembly referred to in Sub-Article (1)(a) hereof shall be elected in accordance with procedures to be determined by Act of Parliament.

Article 47 Disqualification of Members

(1) No persons may become members of the National Assembly if they:

- (a) have at any time after Independence been convicted of any offence in Namibia, or outside Namibia if such conduct would have constituted an offence within Namibia, and for which they have been sentenced to death or to imprisonment of more than twelve (12) months without the option of a fine, unless they have received a free pardon or unless such imprisonment has expired at least ten (10) years before the date of their election; or
- (b) have at any time prior to Independence been convicted of an offence, if such conduct would have constituted an offence within Namibia after Independence, and for which they

The Constitution of the Republic of Namibia

have been sentenced to death or to imprisonment of more than twelve (12) months without the option of a fine, unless they have received a free pardon or unless such imprisonment has expired at least ten(10) years before the date of their election: provided that no person sentenced to death or imprisonment for acts committed in connection with the struggle for the independence of Namibia shall be disqualified under this Sub-Article from being elected as a member of the National Assembly; or

- (c) are unrehabilitated insolvents; or
- (d) are of unsound mind and have been so declared by a competent Court; or
- (e) are remunerated members of the public service of Namibia; or
- (f) are members of the National Council, Regional Councils or Local Authorities.

(2) For the purposes of Sub-Article (1) hereof:

- (a) no person shall be considered as having been convicted by any Court until any appeal which might have been noted against the conviction or sentence has been determined, or the time for noting an appeal against such conviction has expired;
- (b) the public service shall be deemed to include the defence force, the police force, the prison service, para-statal enterprises, Regional Councils and Local Authorities.

Article 48 Vacation of Seats

(1) Members of the National Assembly shall vacate their seats:

- (a) if they cease to have the qualifications which rendered them eligible to be members of the National Assembly;
- (b) if the political party which nominated them to sit in the National Assembly informs the Speaker that such members are no longer members of such political party;
- (c) if they resign their seats in writing addressed to the Speaker;
- (d) if they are removed by the National Assembly pursuant to its rules and standing orders permitting or requiring such removal for good and sufficient reasons;
- (e) if they are absent during sittings of the National Assembly for ten (10) consecutive sitting days, without having obtained the special leave of the National Assembly on grounds specified in its rules and standing orders.

(2) If the seat of member of the National Assembly is vacated in terms of Sub-Article (1) hereof, the political party which nominated such member to sit in the National Assembly shall be entitled to fill the vacancy

The Constitution of the Republic of Namibia

by nominating any person on the party's election list compiled for the previous general election, or if there be no such person, by nominating any member of the party.

Article 49 Elections

The election of members in terms of Article 46(1)(a) hereof shall be on party lists and in accordance with the principles of proportional representation as set out in Schedule 4 hereof.

Article 50 Duration

Every National Assembly shall continue for a maximum period of five (5) years, but it may before the expiry of its term be dissolved by the President by Proclamation as provided for in Articles 32(3)(a) and 57(1) hereof.

Article 51 Speaker

- (1) At the first sitting of a newly elected National Assembly, the National Assembly, with the Secretary acting as Chairperson, shall elect a member as Speaker. The National Assembly shall then elect another member as Deputy-Speaker. The Deputy-Speaker shall act as Speaker whenever the Speaker is not available.
- (2) The Speaker or Deputy-Speaker shall cease to hold office if he or she ceases to be a member of the National Assembly. The Speaker or Deputy-Speaker may be removed from office by resolution of the National Assembly, and may resign from office or from the National Assembly in writing addressed to the Secretary of the National Assembly.
- (3) When the office of Speaker or Deputy-Speaker becomes vacant the National Assembly shall elect a member to fill the vacancy.
- (4) When neither the Speaker nor the Deputy-Speaker is available for duty, the National Assembly, with the Secretary acting as Chairperson, shall elect a member to act as Speaker.

Article 52 Secretary and other Officers

- (1) Subject to the provisions of the laws pertaining to the public service and the directives of the National Assembly, the Speaker shall appoint a person (or designate a person in the public service made available for that purpose); as the Secretary of the National Assembly, who shall perform the functions and duties assigned to such Secretary by this Constitution or by the Speaker.
- (2) Subject to the laws governing the control of public monies, the Secretary shall perform his or her functions and duties under the control of the Speaker.
- (3) The Secretary shall be assisted by officers of the National Assembly who shall be persons in the public service made available for that purpose.

Article 53 Quorum

The presence of at least thirty-seven (37) members of the National Assembly entitled to vote, other than the Speaker or the presiding member, shall be necessary to constitute a meeting of the National Assembly for the exercise of its powers and the performance of its functions.

Article 54 Casting Vote

In the case of an equality of votes in the National Assembly, the Speaker or the Deputy-Speaker or the presiding member shall have and may exercise a casting vote.

Article 55 Oath or Affirmation

Every member of the National Assembly shall make and subscribe to an oath or solemn affirmation before the Chief Justice or a Judge designated by the Chief Justice for this purpose, in the terms set out in Schedule 3 hereof.

Article 56 Assent to Bills

- (1) Every bill passed by Parliament in terms of this Constitution in order to acquire the status of an Act of Parliament shall require the assent of the President to be signified by the signing of the bill and the publication of the Act in the Gazette.
- (2) Where a bill is passed by a majority of two-thirds of all the members of the National Assembly and has been confirmed by the National Council the President shall be obliged to give his or her assent thereto.
- (3) Where a bill is passed by a majority of the members of the National Assembly but such majority consists of less than two-thirds of all the members of the National Assembly and has been confirmed by the National Council, but the President declines to assent to such bill, the President shall communicate such dissent to the Speaker.
- (4) If the President has declined to assent to a bill under Sub-Article (3) hereof, the National Assembly may reconsider the bill and, if it so decides, pass the bill in the form in which it was referred back to it, or in an amended form or it may decline to pass the bill. Should the bill then be passed by a majority of the National Assembly it will not require further confirmation by the National Council but, if the majority consists of less than two-thirds of all the members of the National Assembly, the President shall retain his or her power to withhold assent to the bill. If the President elects not to assent to the bill, it shall then lapse.

Article 57 Dissolution

- (1) The National Assembly may be dissolved by the President on the advice of the Cabinet if the Government is unable to govern effectively.

- (2) Should the National Assembly be dissolved a national election for a new National Assembly and a new President shall take place within a period of ninety (90) days from the date of such dissolution.

Article 58 Conduct of Business after Dissolution

Notwithstanding the provisions of Article 57 hereof:

- (a) every person who at the date of its dissolution was a member of the National Assembly shall remain a member of the National Assembly and remain competent to perform the functions of a member until the day immediately preceding the first polling day for the election held in pursuance of such dissolution;
- (b) the President shall have power to summon Parliament for the conduct of business during the period following such dissolution, up to and including the day immediately preceding the first polling day for the election held in pursuance of such dissolution, in the same manner and in all respects as if the dissolution had not occurred.

Article 59 Rules of Procedure, Committees and Standing Orders

- (1) The National Assembly may make such rules of procedure for the conduct of its business and proceedings and may also make such rules for the establishing, functioning and procedures of committees, and formulate such standing orders as may appear to it to be expedient or necessary.
- (2) The National Assembly shall in its rules of procedure make provision for such disclosure as may be considered to be appropriate in regard to the financial or business affairs of its members.
- (3) For the purposes of exercising its powers and performing its functions any committee of the National Assembly established in terms of Sub-Article (1) hereof shall have the power to subpoena persons to appear before it to give evidence on oath and to produce any documents required by it.

Article 60 Duties, Privileges and Immunities of Members

- (1) The duties of the members of the National Assembly shall include the following:
- (a) all members of the National Assembly shall maintain the dignity and image of the National Assembly both during the sittings of the National Assembly as well as in their acts and activities outside the National Assembly;
- (b) all members of the National Assembly shall regard themselves as servants of the people of Namibia and desist from any conduct by which they seek improperly to enrich themselves or alienate themselves from the people.
- (2) A private members' bill may be introduced in the National Assembly if supported by one-third of all the members of the National Assembly.

The Constitution of the Republic of Namibia

- (3) Rules providing for the privileges and immunities of members of the National Assembly shall be made by Act of Parliament and all members shall be entitled to the protection of such privileges and immunities.

Article 61 Public Access to Sittings

- (1) Save as provided in Sub-Article (2) hereof, all meetings of the National Assembly shall be held in public and members of the public shall have access to such meetings.
- (2) Access by members of the public in terms of Sub-Article (1) hereof may be denied if the National Assembly adopts a motion supported by two-thirds of all its members excluding such access to members of the public for specified periods or in respect of specified matters. Such a motion shall only be considered if it is supported by at least one-tenth of all the members of the National Assembly and the debate on such motion shall not be open to members of the public.

Article 62 Sessions

- (1) The National Assembly shall sit:
 - (a) at its usual place of sitting determined by the National Assembly, unless the Speaker directs otherwise on the grounds of public interest, security or convenience;
 - (b) for at least two (2) sessions during each year, to commence and terminate on such dates as the National Assembly from time to time determines;
 - (c) for such special sessions as directed by Proclamation by the President from time to time.
- (2) During such sessions the National Assembly shall sit on such days and during such times of the day or night as the National Assembly by its rules and standing orders may provide.
- (3) The day of commencement of any session of the National Assembly may be altered by Proclamation by the President, if the President is requested to do so by the Speaker on grounds of public interest or convenience.

Article 63 Functions and Powers

- (1) The National Assembly, as the principal legislative authority in and over Namibia, shall have the power, subject to this Constitution, to make and repeal laws for the peace, order and good government of the country in the best interest of the people of Namibia.
- (2) The National Assembly shall further have the power and function, subject to this Constitution:
 - (a) to approve budgets for the effective government and administration of the country;
 - (b) to provide for revenue and taxation;

The Constitution of the Republic of Namibia

- (c) take such steps as it considers expedient to uphold and defend this Constitution and the laws of Namibia and to advance the objectives of Namibian independence;
- (d) to consider and decide whether or not to succeed to such international agreements as may have been entered into prior to Independence by administrations within Namibia in which the majority of the Namibian people have historically not enjoyed democratic representation and participation;
- (e) to agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e) hereof;
- (f) to receive reports on the activities of the Executive, including para-statal enterprises, and from time to time to require any senior official thereof to appear before any of the committees of the National Assembly to account for and explain his or her acts and programmes;
- (g) to initiate, approve or decide to hold a referendum on matters of national concern
- (h) to debate and to advise the President in regard to any matters which by this Constitution the President is authorised to deal with;
- (i) to remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies;
- (j) generally to exercise any other functions and powers assigned to it by this Constitution or any other law and any other functions incidental thereto.

Article 64 Withholding of Presidential Assent

- (1) Subject to the provisions of this Constitution, the President shall be entitled to withhold his or her assent to a bill approved by the National Assembly if in the President's opinion such bill would upon adoption conflict with the provisions of this Constitution.
- (2) Should the President withhold assent on the grounds of such opinion, he or she shall so inform the Speaker who shall inform the National Assembly thereof, and the Attorney-General, who may then take appropriate steps to have the matter decided by a competent Court.
- (3) Should such Court thereafter conclude that such bill is not in conflict with the provisions of this Constitution, the President shall assent to the said bill if it was passed by the National Assembly by a two-thirds majority of all its members. If the bill was not passed with such majority, the President may withhold his or her assent to the bill, in which event the provisions of Article 56(3) and (4) hereof shall apply.

The Constitution of the Republic of Namibia

- (4) Should such Court conclude that the disputed bill would be in conflict with any provisions of this Constitution, the said bill shall be deemed to have lapsed and the President shall not be entitled to assent thereto.

Article 65 Signature and Enrolment of Acts

- (1) When any bill has become an Act of Parliament as a result of its having been passed by Parliament, signed by the President and published in the Gazette, the Secretary of the National Assembly shall promptly cause two (2) fair copies of such Act in the English language to be enrolled in the office of the Registrar of the Supreme Court and such copies shall be conclusive evidence of the provisions of the Act.
- (2) The public shall have the right of access to such copies subject to such regulations as may be prescribed by Parliament to protect the durability of the said copies and the convenience of the Registrar's staff.

Article 66 Customary and Common Law

- (1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.
- (2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.

Article 67 Requisite Majorities

Save as provided in this Constitution, a simple majority of votes cast in the National Assembly shall be sufficient for the passage of any bill or resolution of the National Assembly.

CHAPTER 8

The National Council

Article 68 Establishment

There shall be a National Council which shall have the powers and functions set out in this Constitution.

Article 69 Composition

- (1) The National Council shall consist of two (2) members from each region referred to in Article 102 hereof, to be elected from amongst their members by the Regional Council for such region.

- (2) The elections of members of the National Council shall be conducted according to procedures to be prescribed by Act of Parliament.

Article 70 Term of Office of Members

- (1) Members of the National Council shall hold their seats for six (6) years from the date of their election and shall be eligible for re-election.
- (2) When a seat of a member of the National Council becomes vacant through death, resignation or disqualification, an election for a successor to occupy the vacant seat until the expiry of the predecessor's term of office shall be held, except in the instance where such vacancy arises less than six (6) months before the expiry of the term of the National Council, in which instance such vacancy need not be filled. Such election shall be held in accordance with the procedures prescribed by the Act of Parliament referred to in Article 69 (2) hereof.

Article 71 Oath or Affirmation

Every member of the National Council shall make and subscribe to an oath or solemn affirmation before the Chief Justice, or a Judge designated by the Chief Justice for this purpose, in the terms set out in Schedule 3 hereof.

Article 72 Qualifications of Members

No person shall be qualified to be a member of the National Council if he or she is an elected member of a Local Authority, and unless he or she is qualified under Article 47(1))(a) to (e) hereof to be a member of the National Assembly.

Article 73 Chairperson and Vice-Chairperson

The National Council shall, before proceeding to the dispatch of any other business, elect from its members a Chairperson and a Vice-Chairperson. The Chairperson, or in his or her absence the Vice-Chairperson, shall preside over sessions of the National Council. Should neither the Chairperson nor the Vice-Chairperson be present at any session, the National Council shall elect from amongst its members a person to act as Chairperson in their absence during that session.

Article 74 Powers and Functions

- (1) The National Council shall have the power to:
- (a) consider in terms of Article 75 hereof all bills passed by the National Assembly;
 - (b) investigate and report to the National Assembly on any subordinate legislation, reports and documents which under law must be tabled in the National Assembly and which are referred to it by the National Assembly for advice;

The Constitution of the Republic of Namibia

- (c) recommend legislation on matters of regional concern for submission to and consideration by the National Assembly;
 - (d) perform any other functions assigned to it by the National Assembly or by an Act of Parliament.
- (2) The National Council shall have the power to establish committees and to adopt its own rules and procedures for the exercise of its powers and the performance of its functions. A committee of the National Council shall be entitled to conduct all such hearings and collect such evidence as it considers necessary for the exercise of the National Council's powers of review and investigations, and for such purposes shall have the powers referred to in Article 59(3) hereof.
- (3) The National Council shall in its rules of procedure make provision for such disclosure as may be considered to be appropriate in regard to the financial or business affairs of its members.
- (4) The duties of the members of the National Council shall include the following:
- (a) all members of the National Council shall maintain the dignity and image of the National Council both during the sittings of the National Council as well as in their acts and activities outside the National Council;
 - (b) all members of the National Council shall regard themselves as servants of the people of Namibia and desist from any conduct by which they seek improperly to enrich themselves or alienate themselves from the people.
- (5) Rules providing for the privileges and immunities of members of the National Council shall be made by Act of Parliament and all members shall be entitled to the protection of such privileges and immunities.

Article 75 Review of Legislation

- (1) All bills passed by the National Assembly shall be referred by the Speaker to the National Council.
- (2) The National Council shall consider bills referred to it under Sub-Article (1) hereof and shall submit reports thereon with its recommendations to the Speaker.
- (3) If in its report to the Speaker the National Council confirms a bill, the Speaker shall refer it to the President to enable the President to deal with it under Articles 56 and 64 hereof.
- (4) (a) If the National Council in its report to the Speaker recommends that the bill be passed subject to amendments proposed by it, such bill shall be referred by the Speaker back to the National Assembly.
- (b) If a bill is referred back to the National Assembly under Sub-Article (a) hereof, the National Assembly may reconsider the bill and may make any amendments thereto, whether proposed by the National Council or not. If the bill is again passed by the National Assembly, whether in the form in which it was originally passed, or in an amended form, the bill shall not again be referred

The Constitution of the Republic of Namibia

to the National Council, but shall be referred by the Speaker to the President to enable it to be dealt with under Articles 56 and 64 hereof.

- (5) (a) If a majority of two-thirds of all the members of the National Council objects to the principle of a bill, this shall be mentioned in its report to the Speaker. In that event, the report shall also indicate whether or not the National Council proposes that amendments be made to the bill, if the principle of the bill is confirmed by the National Assembly under Sub-Article (b) hereof, and if amendments are proposed, details thereof shall be set out in the report.
- (b) If the National Council in its report objects to the principle of the bill, the National Assembly shall be required to reconsider the principle. If upon such reconsideration the National Assembly reaffirms the principle of the bill by a majority of two-thirds of all its members, the principle of the bill shall no longer be an issue. If such two-thirds majority is not obtained in the National Assembly, the bill shall lapse.
- (6) (a) If the National Assembly reaffirms the principle of the bill under Sub-Article 5(b) hereof by a majority of two-thirds of all its members, and the report of the National Council proposed that in such event amendments be made to the bill, the National Assembly shall then deal with the amendments proposed by the National Council, and in that event the provisions of Sub-Article 4(b) shall apply mutatis mutandis.
- (b) If the National Assembly reaffirms the principle of the bill under Sub-Article 5(b) hereof by a majority of two-thirds of all its members, and the report of the National Council did not propose that in such event amendments be made to the bill, the National Council shall be deemed to have confirmed the bill, and the Speaker shall refer the bill to the President to be dealt with under Articles 56 and 64 hereof.
- (7) Sub-Articles (5) and (6) hereof shall not apply to bills dealing with the levying of taxes or the appropriation of public monies.
- (8) The National Council shall report to the Speaker on all bills dealing with the levying of taxes or appropriations of public monies within thirty (30) days of the date on which such bills were referred to it by the Speaker, and on all other bills within three (3) months of the date of referral by the Speaker, failing which the National Council will be deemed to have confirmed such bills and the Speaker shall then refer them promptly to the President to enable the President to deal with the bills under Articles 56 and 64 hereof.
- (9) If the President withholds his or her assent to any bill under Article 56 hereof and the bill is then dealt with in terms of that Article, and is again passed by the National Assembly in the form in which it was originally passed or in an amended form, such bill shall not again be referred to the National Council, but shall be referred by the Speaker directly to the President to enable the bill to be dealt with in terms of Articles 56 and 64 hereof.

Article 76 Quorum

The presence of a majority of the members of the National Council shall be necessary to constitute a meeting of the National Council for the exercise of its powers and the performance of its functions.

Article 77 Voting

Save as is otherwise provided in this Constitution, all questions in the National Council shall be determined by a majority of the votes cast by members present other than the Chairperson, or in his or her absence the Vice-Chairperson or the member presiding at that session, who shall, however, have and may exercise a casting vote in the case of an equality of votes.

CHAPTER 9

The Administration of Justice

Article 78 The Judiciary

- (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.
- (4) The Supreme Court and the High Court shall have 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 their own procedures and to make court rules for that purpose.

Article 79 The Supreme Court

- (1) The Supreme Court shall consist of a Chief Justice and such additional Judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.
- (2) The Supreme Court shall be presided over by the Chief Justice and shall hear and adjudicate upon appeals emanating from the High Court, including appeals which involve the interpretation, implementation and

The Constitution of the Republic of Namibia

upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The Supreme Court shall also deal with matters referred to it for decision by the Attorney-General under this Constitution, and with such other matters as may be authorised by Act of Parliament.

- (3) Three (3) Judges shall constitute a quorum of the Supreme Court when it hears appeals or deals with matters referred to it by the Attorney-General under this Constitution: provided that provision may be made by Act of Parliament for a lesser quorum in circumstances in which a Judge seized of an appeal dies or becomes unable to act at any time prior to judgment.
- (4) The jurisdiction of the Supreme Court with regard to appeals shall be determined by Act of Parliament.

Article 80 The High Court

- (1) The High Court shall consist of a Judge-President and such additional Judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.
- (2) The High Court shall have original jurisdiction to hear and adjudicate upon all civil disputes and criminal prosecutions, including cases which involve the interpretation, implementation and upholding of this Constitution and the fundamental rights and freedoms guaranteed thereunder. The High Court shall also have jurisdiction to hear and adjudicate upon appeals from Lower Courts.
- (3) The jurisdiction of the High Court with regard to appeals shall be determined by Act of Parliament.

Article 81 Binding Nature of Decisions of the Supreme Court

A decision of the Supreme Court shall be 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.

Article 82 Appointment of Judges

- (1) All appointments of Judges to the Supreme Court and the High Court shall be made by the President on the recommendation of the Judicial Service Commission and upon appointment Judges shall make an oath or affirmation of office in the terms set out in Schedule 1 hereof.
- (2) At the request of the Chief Justice the President may appoint Acting Judges of the Supreme Court to fill casual vacancies in the Court from time to time, or as adhoc appointments to sit in cases involving constitutional issues or the guarantee of fundamental rights and freedoms, if in the opinion of the Chief Justice it is desirable that such persons should be appointed to hear such cases by reason of their special knowledge of or expertise in such matters.
- (3) At the request of the Judge-President, the President may appoint Acting Judges of the High Court from time to time to fill casual vacancies in the Court, or to enable the Court to deal expeditiously with its work.

The Constitution of the Republic of Namibia

- (4) All Judges, except Acting Judges, appointed under this Constitution shall hold office until the age of sixty-five (65) but the President shall be entitled to extend the retiring age of any Judge to seventy (70). It shall also be possible by Act of Parliament to make provision for retirement at ages higher than those specified in this Article.

Article 83 Lower Courts

- (1) Lower Courts shall be established by Act of Parliament and shall have the jurisdiction and adopt the procedures prescribed by such Act and regulations made thereunder.
- (2) Lower Courts shall be presided over by Magistrates or other judicial officers appointed in accordance with procedures prescribed by Act of Parliament.

Article 84 Removal of Judges from Office

- (1) A Judge may be removed from office before the expiry of his or her tenure only by the President acting on the recommendation of the Judicial Service Commission.
- (2) Judges may only be removed from office on the ground of mental incapacity or for gross misconduct, and in accordance with the provisions of Sub-Article (3) hereof.
- (3) The Judicial Service Commission shall investigate whether or not a Judge should be removed from office on such grounds, and if it decides that the Judge should be removed, it shall inform the President of its recommendation.
- (4) If the deliberations of the Judicial Service Commission pursuant to this Article involve the conduct of a member of the Judicial Service Commission, such Judge shall not participate in the deliberations and the President shall appoint another Judge to fill such vacancy.
- (5) While investigations are being carried out into the necessity of the removal of a Judge in terms of this Article, the President may, on the recommendation of the Judicial Service Commission and, pending the outcome of such investigations and recommendation, suspend the Judge from office.

Article 85 The Judicial Service Commission

- (1) There shall be a Judicial Service Commission consisting of the Chief Justice, a Judge appointed by the President, the Attorney-General and two members of the legal profession nominated in accordance with the provisions of an Act of Parliament by the professional organisation or organisations representing the interests of the legal profession in Namibia.
- (2) The Judicial Service Commission shall perform such functions as are prescribed for it by this Constitution or any other law.
- (3) The Judicial Service Commission shall be entitled to make such rules and regulations for the purposes of regulating its procedures and functions as are not inconsistent with this Constitution or any other law.

- (4) Any casual vacancy in the Judicial Service Commission may be filled by the Chief Justice or in his or her absence by the Judge appointed by the President.

Article 86 The Attorney-General

There shall be an Attorney-General appointed by the President in accordance with the provisions of Article 32(3)(1)(cc) hereof.

Article 87 Powers and Functions of the Attorney-General

The powers and functions of the Attorney-General shall be:

- (a) to exercise the final responsibility for the office of the Prosecutor-General;
- (b) to be the principal legal adviser to the President and Government;
- (c) to take all action necessary for the protection and upholding of the Constitution;
- (d) to perform all such functions and duties as may be assigned to the Attorney-General by Act of Parliament.

Article 88 The Prosecutor-General

- (1) There shall be a Prosecutor-General appointed by the President on the recommendation of the Judicial Service Commission. No person shall be eligible for appointment as Prosecutor-General unless such person:

- (a) possesses legal qualifications that would entitle him or her to practise in all the Courts of Namibia;
- (b) is, by virtue of his or her experience, conscientiousness and integrity a fit and proper person to be entrusted with the responsibilities of the office of Prosecutor-General.

- (2) The powers and functions of the Prosecutor-General shall be:

- (a) to prosecute, subject to the provisions of this Constitution, in the name of the Republic of Namibia in criminal proceedings;
- (b) to prosecute and defend appeals in criminal proceedings in the High Court and the Supreme Court;
- (c) to perform all functions relating to the exercise of such powers;
- (d) to delegate to other officials, subject to his or her control and direction, authority to conduct criminal proceedings in any Court;

- (e) to perform all such other functions as may be assigned to him or her in terms of any other law.

CHAPTER 10

The Ombudsman

Article 89 Establishment and Independence

- (1) There shall be an Ombudsman, who shall have the powers and functions set out in this Constitution.
- (2) The Ombudsman 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 the Ombudsman in the exercise of his or her functions and all organs of the State shall accord such assistance as may be needed for the protection of the independence, dignity and effectiveness of the Ombudsman.
- (4) The Ombudsman shall either be a Judge of Namibia, or a person possessing the legal qualifications which would entitle him or her to practise in all the Courts of Namibia.

Article 90 Appointment and Term of Office

- (1) The Ombudsman shall be appointed by Proclamation by the President on the recommendation of the Judicial Service Commission.
- (2) The Ombudsman shall hold office until the age of sixty-five (65) but the President may extend the retiring age of any Ombudsman to seventy (70).

Article 91 Functions

The functions of the Ombudsman shall be defined and prescribed by an Act of Parliament and shall include the following:

- (a) the duty to investigate complaints concerning alleged or apparent instances of violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment of an inhabitant of Namibia by an official in the employ of any organ of Government (whether central or local), manifest injustice, or corruption or conduct by such official which would properly be regarded as unlawful, oppressive or unfair in a democratic society;
- (b) the duty to investigate complaints concerning the functioning of the Public Service Commission, administrative organs of the State, the defence force, the police force and the prison service in so far as such complaints relate to the failure to achieve a balanced structuring of such services or equal access by all to the recruitment of such services or fair administration in relation to such services;

The Constitution of the Republic of Namibia

- (c) the duty to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia;
- (d) the duty to investigate complaints concerning practices and actions by persons, enterprises and other private institutions where such complaints allege that violations of fundamental rights and freedoms under this Constitution have taken place;
- (e) the duty and power to take appropriate action to call for the remedying, correction and reversal of instances specified in the preceding Sub-Articles through such means as are fair, proper and effective, including:
 - (aa) negotiation and compromise between the parties concerned;
 - (bb) causing the complaint and his or her finding thereon to be reported to the superior of an offending person;
 - (cc) referring the matter to the Prosecutor-General;
 - (dd) bringing proceedings in a competent Court for an interdict or some other suitable remedy to secure the termination of the offending action or conduct, or the abandonment or alterations of the offending procedures;
 - (ee) bringing proceedings to interdict the enforcement of such legislation or regulation by challenging its validity if the offending action or conduct is sought to be justified by subordinate legislation or regulation which is grossly unreasonable or otherwise ultra virus’;
 - (ff) reviewing such laws as were in operation before the date of Independence in order to ascertain whether they violate the letter or the spirit of this Constitution and to make consequential recommendations to the President, the Cabinet or the Attorney-General for appropriate action following thereupon;
- (f) the duty to investigate vigorously all instances of alleged or suspected corruption and the misappropriation of public monies by officials and to take appropriate steps, including reports to the Prosecutor-General and the Auditor-General pursuant thereto;
- (g) the duty to report annually to the National Assembly on the exercise of his or her powers and functions.

Article 92 Powers of Investigation

The powers of the Ombudsman shall be defined by Act of Parliament and shall include the power:

- (a) to issue subpoenas requiring the attendance of any person before the Ombudsman and the production of any document or record relevant to any investigation by the Ombudsman;

- (b) to cause any person contemptuous of any such subpoena to be prosecuted before a competent Court;
- (c) to question any person;
- (d) to require any person to co-operate with the Ombudsman and to disclose truthfully and frankly any information within his or her knowledge relevant to any investigation of the Ombudsman.

Article 93 Meaning of “Official”

For the purposes of this Chapter the word “official” shall, unless the context otherwise indicates, include any elected or appointed official or employee of any organ of the central or local Government, any official of a para-statal enterprise owned or managed or controlled by the State, or in which the State or the Government has substantial interest, or any officer of the defence force, the police force or the prison service, but shall not include a Judge of the Supreme Court or the High Court or, in so far as a complaint concerns the performance of a judicial function, any other judicial officer.

Article 94 Removal from Office

- (1) The Ombudsman may be removed from office before the expiry of his or her term of office by the President acting on the recommendation of the Judicial Service Commission.
- (2) The Ombudsman may only be removed from office on the ground of incapacity or for gross misconduct, and in accordance with the provisions of Sub-Article (3) hereof.
- (3) The Judicial Service Commission shall investigate whether or not the Ombudsman shall be removed from office on the grounds referred to in Sub-Article (2) hereof and, if it decides that the Ombudsman shall be removed, it shall inform the President of its recommendation.
- (4) While investigations are being carried out into the necessity of the removal of the Ombudsman in terms of this Article, the President may, on the recommendation of the Judicial Service Commission and, pending the outcome of such investigations and recommendation, suspend the Ombudsman from office.

CHAPTER 11

Principles of State Policy

Article 95 Promotion of the Welfare of the People

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

The Constitution of the Republic of Namibia

- (a) enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society; in particular, the Government shall ensure the implementation of the principle of non-discrimination in remuneration of men and women; further, the Government shall seek, through appropriate legislation, to provide maternity and related benefits for women;
- (b) enactment of 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;
- (c) active encouragement of the formation of independent trade unions to protect workers' rights and interests, and to promote sound labour relations and fair employment practices;
- (d) membership of the International Labour Organisation (ILO) and, where possible, adherence to and action in accordance with the international Conventions and Recommendations of the ILO;
- (e) ensurance that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law;
- (f) ensurance that senior citizens are entitled to and do receive a regular pension adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities;
- (g) enactment of legislation to ensure that the unemployed, the incapacitated, the indigent and the disadvantaged are accorded such social benefits and amenities as are determined by Parliament to be just and affordable with due regard to the resources of the State;
- (h) a legal system seeking to promote justice on the basis of equal opportunity by providing free legal aid in defined cases with due regard to the resources of the State;
- (i) ensurance that workers are paid a living wage adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities;
- (j) consistent planning to raise and maintain an acceptable level of nutrition and standard of living of the Namibian people and to improve public health;
- (k) encouragement of the mass of the population through education and other activities and through their organisations to influence Government policy by debating its decisions;
- (l) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.

Article 96 Foreign Relations

The State shall endeavour to ensure that in its international relations it:

- (a) adopts and maintains a policy of non-alignment;
- (b) promotes international co-operation, peace and security;
- (c) creates and maintains just and mutually beneficial relations among nations;
- (d) fosters respect for international law and treaty obligations;
- (e) encourages the settlement of international disputes by peaceful means.

Article 97 Asylum

The State shall, where it is reasonable to do so, grant asylum to persons who reasonably fear persecution on the ground of their political beliefs, race, religion or membership of a particular social group.

Article 98 Principles of Economic Order

- (1) The economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians.
- (2) The Namibian economy shall be based, inter alia, on the following forms of ownership:
 - (a) public;
 - (b) private;
 - (c) joint public-private;
 - (d) co-operative;
 - (e) co-ownership;
 - (f) small-scale family.

Article 99 Foreign Investments

Foreign investments shall be encouraged within Namibia subject to the provisions of an Investment Code to be adopted by Parliament.

Article 100 Sovereign Ownership of Natural Resources

Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.

Article 101 Application of the Principles contained in this Chapter

The principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.

CHAPTER 12

Regional and Local Government

Article 102 Structures of Regional and Local Government

- (1) For purposes of regional and local government, Namibia shall be divided into regional and local units, which shall consist of such region and Local Authorities as may be determined and defined by Act of Parliament.
- (2) The delineation of the boundaries of the regions and Local Authorities referred to in Sub-Article (1) hereof shall be geographical only, without any reference to the race, colour or ethnic origin of the inhabitants of such areas.
- (3) Every organ of regional and local government shall have a Council as the principal governing body, freely elected in accordance with this Constitution and the Act of Parliament referred to in Sub-Article (1) hereof, with an executive and administration which shall carry out all lawful resolutions and policies of such Council, subject to this Constitution and any other relevant laws.
- (4) For the purposes of this Chapter, a Local Authority shall include all municipalities, communities, village councils and other organs of local government defined and constituted by Act of Parliament.
- (5) There shall be a Council of Traditional Leaders to be established in terms of an Act of Parliament in order to advise the President on the control and utilization of communal land and on all such other matters as may be referred to it by the President for advice.

Article 103 Establishment of Regional Councils

- (1) The boundaries of regions shall be determined by a Delimitation Commission in accordance with the principles set out in Article 102 (2) hereof.
- (2) The boundaries of regions may be changed from time to time and new regions may be created from time to time, but only in accordance with the recommendations of the Delimitation Commission.
- (3) A Regional Council shall be established for every region the boundaries of which have been determined in accordance with Sub-Articles (1) and (2) hereof.

Article 104 The Delimitation Commission

- (1) The Delimitation Commission shall consist of a Chairperson who shall be a Judge of the Supreme Court or the High Court, and two other persons to be appointed by the President with the approval of Parliament.
- (2) The Delimitation Commission shall discharge its duties in accordance with the provisions of an Act of Parliament and this Constitution, and shall report thereon to the President.

Article 105 Composition of Regional Councils

Every Regional Council shall consist of a number of persons determined by the Delimitation Commission for the particular region for which that Regional Council has been established, and who are qualified to be elected to the National Council.

Article 106 Regional Council Elections

- (1) Each region shall be divided into constituencies the boundaries of which shall be fixed by the Delimitation Commission in accordance with the provisions of an Act of Parliament and this Constitution: provided that there shall be no fewer than six (6) and no more than twelve (12) constituencies in each region.
- (2) Each constituency shall elect one member to the Regional Council for the region in which it is situated.
- (3) The elections shall be by secret ballot to be conducted in accordance with the provisions of an Act of Parliament, and the candidate receiving the most votes in any constituency shall be the elected member of the Regional Council for that constituency.
- (4) All Regional Council elections for the various regions of Namibia shall be held on the same day.
- (5) The date for Regional Council elections shall be determined by the President by Proclamation in the Gazette.

Article 107 Remuneration of Members of Regional Councils

The remuneration and allowances to be paid to members of Regional Councils shall be determined by Act of Parliament.

Article 108 Powers of Regional Councils

Regional Councils shall have the following powers:

- (a) to elect members to the National Council;
- (b) to exercise within the region for which they have been constituted such executive powers and to perform such duties in connection therewith as may be assigned to them by Act of Parliament and as may be delegated to them by the President;
- (c) to raise revenue, or share in the revenue raised by the central Government within the regions for which they have been established, as may be determined by Act of Parliament;
- (d) to exercise powers, perform any other functions and make such by-laws or regulations as may be determined by Act of Parliament.

Article 109 Management Committees

- (1) Each Regional Council shall elect from amongst its members a Management Committee, which shall be vested with executive powers in accordance with the provisions of an Act of Parliament.
- (2) The Management Committee shall have a Chairperson to be elected by the members of the Regional Council at the time that they elect the Management Committee, and such Chairperson shall preside at meetings of his or her Regional Council.
- (3) The Chairperson and the members of the Management Committee shall hold office for three (3) years and shall be eligible for re-election.

Article 110 Administration and Functioning of Regional Councils

The holding and conducting of meetings of Regional Councils, the filling of casual vacancies on Regional Councils and the employment of officials by the Regional Councils, as well as all other matters dealing with or incidental to the administration and functioning of Regional Councils, shall be determined by Act of Parliament.

Article 111 Local Authorities

- (1) Local Authorities shall be established in accordance with the provisions of Article 102 hereof.
- (2) The boundaries of Local Authorities, the election of Councils to administer the affairs of Local Authorities, the method of electing persons to Local Authority Councils, the methods of raising revenue for Local Authorities, the remuneration of Local Authority Councillors and all other matters dealing with or incidental to the administration and functioning of Local Authorities, shall be determined by Act of Parliament.
- (3) Persons shall be qualified to vote in elections for Local Authority Councils if such persons have been resident within the jurisdiction of a Local Authority for not less than one (1) year immediately prior to such election and if such persons are qualified to vote in elections for the National Assembly.

- (4) Different provisions may be made by the Act of Parliament referred to in Sub-Article (2) hereof in regard to different types of Local Authorities.
- (5) All by-laws or regulations made by Local Authorities pursuant to powers vested in them by Act of Parliament shall be tabled in the National Assembly and shall cease to be of force if a resolution to that effect is passed by the National Assembly.

CHAPTER 13

The Public Service Commission

Article 112 Establishment

- (1) There shall be established a Public Service Commission which shall have the function of advising the President on the matters referred to in Article 113 hereof and of reporting to the National Assembly thereon.
- (2) The Public Service Commission shall be independent and act impartially.
- (3) The Public Service Commission shall consist of a Chairperson and no fewer than three (3) and no more than six (6) other persons nominated by the President and appointed by the National Assembly by resolution.
- (4) Every member of the Public Service Commission shall be entitled to serve on such Commission for a period of five (5) years unless lawfully removed before the expiry of that period for good and sufficient reasons in terms of this Constitution and procedures to be prescribed by Act of Parliament. Every member of the Public Service Commission shall be eligible for reappointment.

Article 113 Functions

The functions of the Public Service Commission shall be defined by Act of Parliament and shall include the power:

- (a) to advise the President and the Government on:
 - (aa) the appointment of suitable persons to specified categories of employment in the public service, with special regard to the balanced structuring thereof;
 - (bb) the exercise of adequate disciplinary control over such persons in order to assure the fair administration of personnel policy;
 - (cc) the remuneration and the retirement benefits of any such persons;
 - (dd) all other matters which by law pertain to the public service;

- (b) to perform all functions assigned to it by Act of Parliament;
- (c) to advise the President on the identity, availability and suitability of persons to be appointed by the President to offices in terms of this Constitution or any other law.

CHAPTER 14

The Security Commission

Article 114 Establishment and Functions

- (1) There shall be a Security Commission which shall have the function of making recommendations to the President on the appointment of the Chief of the Defence Force, the Inspector-General of Police and the Commissioner of Prisons and such other functions as may be assigned to it by Act of Parliament.
- (2) The Security Commission shall consist of the Chairperson of the Public Service Commission, the Chief of the Defence Force, the Inspector-General of Police, the Commissioner of Prisons and two (2) members of the National Assembly, appointed by the President on the recommendation of the National Assembly.

CHAPTER 15

The Police and Defence Forces and The Prison Service

Article 115 Establishment of the Police Force

There shall be established by Act of Parliament a Namibian police force with prescribed powers, duties and procedures in order to secure the internal security of Namibia and to maintain law and order.

Article 116 The Inspector-General of Police

- (1) There shall be an Inspector-General of Police who shall be appointed by the President in terms of Article 32(4)(c)(bb) hereof.
- (2) The Inspector-General of Police shall make provision for a balanced structuring of the police force and shall have the power to make suitable appointments to the police force, to cause charges of indiscipline among members of the police force to be investigated and prosecuted and to ensure the efficient administration of the police force.

Article 117 Removal of the Inspector-General of Police

The President may remove the Inspector-General of Police from office for good cause and in the public interest and in accordance with the provisions of any Act of Parliament which may prescribe procedures considered to be expedient for this purpose.

Article 118 Establishment of the Defence Force

- (1) There shall be established by Act of Parliament a Namibian Defence Force with prescribed composition, powers, duties and procedures, in order to defend the territory and national interests of Namibia.
- (2) The President shall be the Commander-in-Chief of the Defence Force and shall have all the powers and exercise all the functions necessary for that purpose.

Article 119 Chief of the Defence Force

- (1) There shall be a Chief of the Defence Force who shall be appointed by the President in terms of Article 32(4)(c)(aa) hereof.
- (2) The Chief of the Defence Force shall make provision for a balanced structuring of the defence force and shall have the power to make suitable appointments to the defence force, to cause charges of indiscipline among members of the defence force to be investigated and prosecuted and to ensure the efficient administration of the defence force.

Article 120 Removal of the Chief of the Defence Force

The President may remove the Chief of the Defence Force from office for good cause and in the public interest and in accordance with the provisions of any Act of Parliament which may prescribe procedures considered to be expedient for this purpose.

Article 121 Establishment of the Prison Service

There shall be established by Act of Parliament a Namibian prison service with prescribed powers, duties and procedures.

Article 122 Commissioner of Prisons

- (1) There shall be a Commissioner of Prisons who shall be appointed by the President in terms of Article 32(4)(c)(cc) hereof.
- (2) The Commissioner of Prisons shall make provision for a balanced structuring of the prison service and shall have the power to make suitable appointments to the prison service, to cause charges of indiscipline among members of the prison service to be investigated and prosecuted and to ensure the efficient administration of the prison service.

Article 123 Removal of the Commissioner of Prisons

The President may remove the Commissioner of Prisons from office for good cause and in the public interest and in accordance with the provisions of any Act of Parliament which may prescribe procedures considered to be expedient for this purpose.

CHAPTER 16

Finance

Article 124 Transfer of Government Assets

The assets mentioned in Schedule 5 hereof shall vest in the Government of Namibia on the date of Independence.

Article 125 The State Revenue Fund

- (1) The Central Revenue Fund of the mandated territory of South West Africa instituted in terms of Section 3 of the Exchequer and Audit Proclamation, 1979 (Proclamation 85 of 1979) and Section 31(1) of Proclamation R 101 of 1985 shall continue as the State Revenue Fund of the Republic of Namibia.
- (2) All income accruing to the central Government shall be deposited in the State Revenue Fund and the authority to dispose thereof shall vest in the Government of Namibia.
- (3) Nothing contained in Sub-Article (2) hereof shall preclude the enactment of any law or the application of any law which provides that:
 - (a) the Government shall pay any particular monies accruing to it into a fund designated for a special purpose; or
 - (b) any body or institution to which any monies accruing to the State have been paid, may retain such monies or portions thereof for the purpose of defraying the expenses of such body or institution; or
 - (c) where necessary, subsidies be allocated to regional and Local Authorities.
- (4) No money shall be withdrawn from the State Revenue Fund except in accordance with an Act of Parliament.
- (5) No body or person other than the Government shall have the power to withdraw monies from the State Revenue Fund.

Article 126 Appropriations

- (1) The Minister in charge of the Department of Finance shall, at least once every year and thereafter at such interim stages as may be necessary, present for the consideration of the National Assembly estimates of revenue, expenditure and income for the prospective financial year.
- (2) The National Assembly shall consider such estimates and pass pursuant thereto such Appropriation Acts as are in its opinion necessary to meet the financial requirements of the State from time to time.

Article 127 The Auditor-General

- (1) There shall be an Auditor-General appointed by the President on the recommendation of the Public Service Commission and with the approval of the National Assembly. The Auditor-General shall hold office for five (5) years unless removed earlier under Sub-Article (4) hereof or unless he or she resigns. The Auditor-General shall be eligible for reappointment.
- (2) The Auditor-General shall audit the State Revenue Fund and shall perform all other functions assigned to him or her by the Government or by Act of Parliament and shall report annually to the National Assembly thereon.
- (3) The Auditor-General shall not be a member of the public service.
- (4) The Auditor-General shall not be removed from office unless a two-thirds majority of all the members of the National Assembly vote for such removal on the ground of mental incapacity or gross misconduct.

CHAPTER 17

*Central Bank
and National Planning Commission*

Article 128 The Central Bank

- (1) There shall be established by Act of Parliament a Central Bank of the Republic of Namibia which shall serve as the State's principal instrument to control the money supply, the currency and the institutions of finance, and to perform all other functions ordinarily performed by a central bank.
- (2) The Governing Board of the Central Bank shall consist of a Governor, a Deputy-Governor and such other members of the Board as shall be prescribed by Act of Parliament, and all members of the Board shall be appointed by the President in accordance with procedures prescribed by such Act of Parliament.

Article 129 The National Planning Commission

- (1) There shall be established in the office of the President a National Planning Commission, whose task shall be to plan the priorities and direction of national development.
- (2) There shall be a Director-General of Planning appointed by the President in terms of Article 32(3)(i)(dd) hereof, who shall be the head of the National Planning Commission and the principal adviser to the President in regard to all matters pertaining to economic planning and who shall attend Cabinet meetings at the request of the President.
- (3) The membership, powers, functions and personnel of the National Planning Commission shall be regulated by Act of Parliament.

CHAPTER 18

Coming into force of the Constitution

Article 130 Coming into Force of the Constitution

This Constitution as adopted by the Constituent Assembly shall come into force on the date of Independence.

CHAPTER 19

Amendment of the Constitution

Article 131 Entrenchment of Fundamental Rights and Freedoms

No repeal or amendment of any of the provisions of Chapter 3 hereof, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.

Article 132 Repeal and Amendment of the Constitution

- (1) Any bill seeking to repeal or amend any provision of this Constitution shall indicate the proposed repeals and/or amendments with reference to the specific Articles sought to be repealed and/or amended and shall not deal with any matter other than the proposed repeals or amendments.

- (2) The majorities required in Parliament for the repeal and/or amendment of any of the provisions of this Constitution shall be:
- (a) two-thirds of all the members of the National Assembly;
 - and
 - (b) two-thirds of all the members of the National Council.
- (3) (a) Notwithstanding the provisions of Sub-Article (2) hereof, if a bill proposing a repeal and/or amendment of any of the provisions of this Constitution secures a majority of two-thirds of all the members of the National Assembly, but fails to secure a majority of two-thirds of all the members of the National Council, the President may by Proclamation make the bill containing the proposed repeals and/or amendments the subject of a national referendum.
- (b) The national referendum referred to in Sub-Article (a) hereof shall be conducted in accordance with procedures prescribed for the holding of referenda by Act of Parliament.
- (c) If upon the holding of such a referendum the bill containing the proposed repeals and/or amendments is approved by a two-thirds majority of all the votes cast in the referendum, the bill shall be deemed to have been passed in accordance with the provisions of this Constitution, and the President shall deal with it in terms of Article 56 hereof.
- (4) No repeal or amendment of this Sub-Article or Sub-Articles (2) or (3) hereof in so far as it seeks to diminish or detract from the majorities required in Parliament or in a referendum shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect.
- (5) Nothing contained in this Article:
- (a) shall detract in any way from the entrenchment provided for in Article 131 hereof of the fundamental rights and freedoms contained and defined in Chapter 3 hereof;
 - (b) shall prevent Parliament from changing its own composition or structures by amending or repealing any of the provisions of this Constitution: provided always that such repeals or amendments are effected in accordance with the provisions of this Constitution.

CHAPTER 20

The Law in Force and Transitional Provisions

Article 133 The First National Assembly

Notwithstanding the provisions of Article 46 hereof, the Constituent Assembly shall be deemed to have been elected under Articles 46 and 49 hereof, and shall constitute the first National Assembly of Namibia, and its term of office and that of the President shall be deemed to have begun from the date of Independence.

Article 134 Election of the First President

- (1) Notwithstanding the provisions of Article 28 hereof, the first President of Namibia shall be the person elected to that office by the Constituent Assembly by a simple majority of all its members.
- (2) The first President of Namibia shall be deemed to have been elected under Article 28 hereof and upon assuming office shall have all the powers, functions, duties and immunities of a President elected under that Article.

Article 135 Implementation of this Constitution

This Constitution shall be implemented in accordance with the provisions of Schedule 7 hereof.

Article 136 Powers of the National Assembly prior to the Election of a National Council

- (1) Until elections for a National Council have been held:
 - (a) all legislation shall be enacted by the National Assembly as if this Constitution had not made provision for a National Council, and Parliament had consisted exclusively of the National Assembly acting on its own without being subject to the review of the National Council;
 - (b) this Constitution shall be construed as if no functions had been vested by this Constitution in the National Council;
 - (c) any reference in Articles 29, 56, 75 and 132 hereof to the National Council shall be ignored: provided that nothing contained in this Sub-Article shall be construed as limiting in any way the generality of Sub-Articles (a) and (b) hereof.
- (2) Nothing contained in Sub-Article (1) hereof shall detract in any way from the provisions of Chapter 8 or any other provision of this Constitution in so far as they make provision for the establishment of a National Council, elections to the National Council and its functioning after such elections have been held.

Article 137 Elections of the First Regional Councils and the First National Council

- (1) The President shall by Proclamation establish the first Delimitation Commission which shall be constituted in accordance with the provisions of Article 104 (1) hereof, within six (6) months of the date of Independence.
- (2) Such Proclamation shall provide for those matters which are referred to in Articles 102 to 106 hereof, shall not be inconsistent with this Constitution and shall require the Delimitation Commission to determine boundaries of regions and Local Authorities for the purpose of holding Local Authority and Regional Council elections.
- (3) The Delimitation Commission appointed under such Proclamation shall forthwith commence its work, and shall report to the President within nine (9) months of its appointment: provided that the National

The Constitution of the Republic of Namibia

Assembly may by resolution and for good cause extend the period within which such report shall be made.

- (4) Upon receipt of the report of the Delimitation Commission the President shall as soon as reasonably possible thereafter establish by Proclamation the boundaries of regions and Local Authorities in accordance with the terms of the report.
- (5) Elections for Local Authorities in terms of Article 111 hereof shall be held on a date to be fixed by the President by Proclamation, which shall be a date within six (6) months of the Proclamation referred to in Sub-Article (4) hereof, or within six (6) months of the date on which the legislation referred to in Article 111 hereof has been enacted, whichever is the later: provided that the National Assembly may by resolution and for good cause extend the period within which such elections shall be held.
- (6) Elections for Regional Councils shall be held on a date to be fixed by the President by Proclamation, which shall be a date within one (1) month of the date of the elections referred to in Sub-Article (5) hereof, or within one (1) month of the date on which the legislation referred to in Article 106 (3) hereof has been enacted, whichever is the later: provided that the National Assembly may by resolution and for good cause extend the period within which such elections shall be held.
- (7) Elections for the first National Council shall be held on a date to be fixed by the President by Proclamation, which shall be a date within one (1) month of the date of the elections referred to in Sub-Article (6) hereof, or within one (1) month of the date on which the legislation referred to in Article 69(2) hereof has been enacted, whichever is the later: provided that the National Assembly may by resolution and for good cause extend the period within which such elections shall be held.

Article 138 Courts and Pending Actions

- (1) The Judge-President and other Judges of the Supreme Court of South West Africa holding office at the date on which this Constitution is adopted by the Constituent Assembly shall be deemed to have been appointed as the Judge-President and Judges of the High Court of Namibia under Article 82 hereof on the date of Independence, and upon making the oath or affirmation of office in the terms set out in Schedule 1 hereof, shall become the first Judge-President and Judges of the High Court of Namibia: provided that if the Judge-President or any such Judges are sixty-five (65) years of age or older on such date, it shall be deemed that their appointments have been extended until the age of seventy (70) in terms of Article 82(4) hereof.
- (2)
 - (a) The laws in force immediately prior to the date of Independence governing the jurisdiction of Courts within Namibia, the right of audience before such Courts, the manner in which procedure in such Courts shall be conducted and the power and authority of the Judges, Magistrates and other judicial officers, shall remain in force until repealed or amended by Act of Parliament, and all proceedings pending in such Courts at the date of Independence shall be continued as if such Courts had been duly constituted as Courts of the Republic of Namibia when the proceedings were instituted.
 - (b) Any appeal noted to the Appellate Division of the Supreme Court of South Africa against any judgment or order of the Supreme Court of South West Africa shall be deemed to have been

The Constitution of the Republic of Namibia

noted to the Supreme Court of Namibia and shall be prosecuted before such Court as if that judgment or order appealed against had been made by the High Court of Namibia and the appeal had been noted to the Supreme Court of Namibia.

- (c) All criminal prosecutions initiated in Courts within Namibia prior to the date of Independence shall be continued as if such prosecutions had been initiated after the date of Independence in Courts of the Republic of Namibia.
 - (d) All crimes committed in Namibia prior to the date of Independence which would be crimes according to the law of the Republic of Namibia if it had then existed, shall be deemed to constitute crimes according to the law of the Republic of Namibia, and to be punishable as such in and by the Courts of the Republic of Namibia.
- (3) Pending the enactment of the legislation contemplated by Article 79 hereof:
- (a) the Supreme Court shall have the same jurisdiction to hear and determine appeals from Courts in Namibia as was previously vested in the Appellate Division of the Supreme Court of South Africa;
 - (b) the Supreme Court shall have jurisdiction to hear and determine matters referred to it for a decision by the Attorney-General under this Constitution;
 - (c) all persons having the right of audience before the High Court shall have the right of audience before the Supreme Court;
 - (d) three (3) Judges shall constitute a quorum of the Supreme Court when it hears appeals or deals with matters under Sub-Articles (a) and (b) hereof: provided that if any such Judge dies or becomes unable to act after the hearing of the appeal or such matter has commenced, but prior to judgment, the law applicable in such circumstances to the death or inability of a Judge to the High Court shall apply *mutatis mutandis*;
 - (e) until rules of the Supreme Court are made by the Chief Justice for the noting and prosecution of appeals and all matters incidental thereto, the rules which regulated appeals from the Supreme Court of South West Africa to the Appellate Division of the Supreme Court of South Africa, and were in force immediately prior to the date of Independence, shall apply *mutatis mutandis*.

Article 139 The Judicial Service Commission

- (1) Pending the enactment of legislation as contemplated by Article 85 hereof and the appointment of a Judicial Service Commission thereunder, the Judicial Service Commission shall be appointed by the President by Proclamation and shall consist of the Chief Justice, a Judge appointed by the President, the Attorney-General, an advocate nominated by the Bar Council of Namibia and an attorney nominated by the Council of the Law Society of South West Africa: provided that until the first Chief Justice has been appointed, the President shall appoint a second Judge to be a member of the Judicial Service Commission who shall hold office thereon until the Chief Justice has been appointed. The Judicial Service Commission shall elect from amongst its members at its first meeting the person to

The Constitution of the Republic of Namibia

preside at its meetings until the Chief Justice has been appointed. The first task of the Judicial Service Commission shall be to make a recommendation to the President with regard to the appointment of the first Chief Justice.

- (2) Save as aforesaid the provisions of Article 85 hereof shall apply to the functioning of the Judicial Service Commission appointed under Sub-Article (1) hereof, which shall have all the powers vested in the Judicial Service Commission by this Constitution.

Article 140 The Law in Force at the Date of Independence

- (1) Subject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.
- (2) Any powers vested by such laws in the Government, or in a Minister or other official of the Republic of South Africa shall be deemed to vest in the Government of the Republic of Namibia or in a corresponding Minister or official of the Government of the Republic of Namibia, and all powers, duties and functions which so vested in the Government Service Commission, shall vest in the Public Service Commission referred to in Article 112 hereof.
- (3) Anything done under such laws prior to the date of Independence by the Government, or by a Minister or other official of the Republic of South Africa shall be deemed to have been done by the Government of the Republic of Namibia or by a corresponding Minister or official of the Government of the Republic of Namibia, unless such action is subsequently repudiated by an Act of Parliament, and anything so done by the Government Service Commission shall be deemed to have been done by the Public Service Commission referred to in Article 112 hereof, unless it is determined otherwise by an Act of Parliament.
- (4) Any reference in such laws to the President, the Government, a Minister or other official or institution in the Republic of South Africa shall be deemed to be a reference to the President of Namibia or to a corresponding Minister, official or institution in the Republic of Namibia and any reference to the Government Service Commission or the government service, shall be construed as a reference to the Public Service Commission referred to in Article 112 hereof or the public service of Namibia.
- (5) For the purposes of this Article the Government of the Republic of South Africa shall be deemed to include the Administration of the Administrator-General appointed by the Government of South Africa to administer Namibia, and any reference to the Administrator-General in legislation enacted by such Administration shall be deemed to be a reference to the President of Namibia, and any reference to a Minister or official of such Administration shall be deemed to be a reference to a corresponding Minister or official of the Government of the Republic of Namibia.

Article 141 Existing Appointments

- (1) Subject to the provisions of this Constitution, any person holding office under any law in force on the date of Independence shall continue to hold such office unless and until he or she resigns or is retired, transferred or removed from office in accordance with law.

- (2) Any reference to the Attorney-General in legislation in force immediately prior to the date of Independence shall be deemed to be a reference to the Prosecutor-General, who shall exercise his or her functions in accordance with this Constitution.

Article 142 Appointment of the First Chief of the Defence Force, the First Inspector-General of Police and the First Commissioner of Prisons

The President shall, in consultation with the leaders of all political parties represented in the National Assembly, appoint by Proclamation the first Chief of the Defence Force, the first Inspector-General of Police and the first Commissioner of Prisons.

Article 143 Existing International Agreements

All existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly acting under Article 63(2)(d) hereof otherwise decides.

CHAPTER 21

Final Provisions

Article 144 International Law

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Article 145 Saving

- (1) Nothing contained in this Constitution shall be construed as imposing upon the Government of Namibia:
- (a) any obligations to any other State which would not otherwise have existed under international law;
 - (b) any obligations to any person arising out of the acts or contracts of prior Administrations which would not otherwise have been recognised by international law as binding upon the Republic of Namibia.
- (2) Nothing contained in this Constitution shall be construed as recognising in any way the validity of the Administration of Namibia by the Government of the Republic of South Africa or by the Administrator-General appointed by the Government of the Republic of South Africa to administer Namibia.

Article 146 Definitions

- (1) Unless the context otherwise indicates, any word or expression in this Constitution shall bear the meaning given to such word or expression in any law which deals with the interpretation of statutes and which was in operation within the territory of Namibia prior to the date of Independence.
- (2)
 - (a) The word “Parliament” shall mean the National Assembly and, once the first National Council has been elected, shall mean the National Assembly acting, when so required by this Constitution, subject to the review of the National Council.
 - (b) Any reference to the plural shall include the singular and any reference to the singular shall include the plural.
 - (c) Any reference to the “date of Independence” or “Independence” shall be deemed to be a reference to the day as of which Namibia is declared to be independent by the Constituent Assembly.
 - (d) Any reference to the “Constituent Assembly” shall be deemed to be a reference to the Constituent Assembly elected for Namibia during November 1989 as contemplated by United Nations Security Council Resolution 435 of 1978.
 - (e) Any reference to “Gazette” shall be deemed to be a reference to the Government Gazette of the Republic of Namibia.

Article 147 Repeal of Laws

The laws set out in Schedule 8 hereof are hereby repealed.

Article 148 Short Title

This Constitution shall be called the Namibian Constitution.

SCHEDULE 1

Oath/Affirmation of Judges

"I,..... do hereby swear/solemnly affirm that as a Judge of the Republic of Namibia I will defend and uphold the Constitution of the Republic of Namibia as the Supreme Law and will fearlessly administer justice to all persons without favour or prejudice and in accordance with the laws of the Republic of Namibia.

(in the case of an oath)

So help me God."

SCHEDULE 2

*Oath/Affirmation of Ministers
And Deputy-Ministers*

"I, do hereby swear/solemnly affirm that I will be faithful to the Republic of Namibia, hold my office as Minister/Deputy-Minister with honour and dignity, uphold, protect and defend the Constitution and faithfully obey, execute and administer the laws of the Republic of Namibia, serve the people of Namibia to the best of my ability, not divulge directly or indirectly any matters brought before the Cabinet and entrusted to me under secrecy, and perform the duties of my office and the functions entrusted to me by the President conscientiously and to the best of my ability.

(in case of an oath)

So help me God."

SCHEDULE 3

*Oath/Affirmation of Members of
The National Assembly
And the National Council*

"I,....., do hereby swear/solemnly affirm that I will be faithful to the Republic of Namibia and its people and I solemnly promise to uphold and defend the Constitution and laws of the Republic of Namibia to the best of my ability.

(in the case of an oath)

So help me God."

SCHEDULE 4

*Election of Members of
The National Assembly*

- (1) For the purpose of filling the seventy-two (72) seats in the National Assembly pursuant to the provisions of Article 46(1)(a) hereof, the total number of votes cast in a general election for these seats shall be divided by seventy-two (72) and the result shall constitute the quota of votes per seat.
- (2) The total number of votes cast in favour of a registered political party which offers itself for this purpose shall be divided by the quota of votes per seat and the result shall, subject to paragraph (3), constitute the number of seats to which that political party shall be entitled in the National Assembly.
- (3) Where the formula set out in paragraph (2) yields a surplus fraction not absorbed by the number of seats allocated to the political party concerned, such surplus shall compete with other similar surpluses accruing to any other political party or parties participating in the election, and any undistributed seat or seats (in terms of the formula set out in paragraph (2)) shall be awarded to the party or parties concerned in sequence of the highest surplus.
- (4) Subject to the requirements pertaining to the qualification of members of the National Assembly, a political party which qualifies for seats in terms of paragraphs (2) and (3) shall be free to choose in its own discretion which persons to nominate as members of the National Assembly to fill the said seats.
- (5) Provision shall be made by Act of Parliament for all parties participating in an election of members of the National Assembly to be represented at all material stages of the election process and to be afforded a reasonable opportunity for scrutinising the counting of the votes cast in such election.

SCHEDULE 5

*Property Vesting In
The Government Of Namibia*

- 1) All property of which the ownership or control immediately prior to the date of Independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.
- 2) For the purpose of this Schedule, "property" shall, without detracting from the generality of that term as generally accepted and understood, mean and include movable and immovable property, whether corporeal or incorporeal and wheresoever situate, and shall include any right or interest therein.
- 3) All such immovable property shall be transferred to the Government of Namibia without payment of transfer duty, stamp duty or any other fee or charge, but subject to any existing right, charge, obligation or trust on or over such property and subject also to the provisions of this Constitution.
- 4) The Registrar of Deeds concerned shall upon production to him or her of the title deed to any immovable property mentioned in paragraph (1) endorse such title deed to the effect that the immovable property therein described is vested in the Government of Namibia and shall make the necessary entries in his or her registers, and thereupon the said title deed shall serve and avail for all purposes as proof of the title of the Government of Namibia to the said property.

SCHEDULE 6

*The National Flag of
The Republic of Namibia*

The National Flag of Namibia shall be rectangular in the proportion of three in the length to two in the width, tierced per bend reversed, blue, white and green; the white bend reversed, which shall be one third of the width of the flag, is charged with another of red, one quarter of the width of the flag. In the upper hoist there shall be a gold sun with twelve straight rays, the diameter of which shall be one third of the width of the flag, with its vertical axis one fifth of the distance from the hoist, positioned equidistant from the top edge and from the reversed bend. The rays, which shall each be two fifths of the radius of the sun, issue from the outer edge of a blue ring, which shall be one tenth of the radius of the sun.

SCHEDULE 7

Implementation of This Constitution

1. On the day of Independence, the Secretary-General of the United Nations shall administer to the President, elected in terms of Article 134 hereof, the oath or affirmation prescribed by Article 30 hereof.
2. The President shall appoint the Prime Minister and administer to him or her the oath or affirmation set out in Schedule 2 hereof.
3. The President shall administer to the first Judges of Namibia, appointed under Article 138(1) hereof, the oath or affirmation set out in Schedule 1 hereof.
4. On the day determined by the Constituent Assembly the National Assembly shall first meet, at a time and at a place specified by the Prime Minister.
5. The members of the National Assembly, with the Prime Minister as Chairperson, shall:
 - (a) take the oath or affirmation prescribed by Article 55 hereof before the Judge-President or a Judge designated by the Judge-President for this purpose;
 - (b) elect the Speaker of the National Assembly.
6. The National Assembly, with the Speaker as Chairperson, shall:
 - (a) elect a Deputy-Speaker;
 - (b) conduct such business as it deems appropriate;
 - (c) adjourn to a date to be determined by the National Assembly.
7. The rules and procedures followed by the Constituent Assembly for the holding of its meetings shall, mutatis mutandis, be the rules and procedures to be followed by the National Assembly until such time as the National Assembly has adopted rules of procedure and standing orders under Article 59 hereof.

SCHEDULE 8

Repeals Of Laws

South West Africa Constitution Act, 1968 (Act No. 39 of 1968)

Rehoboth Self-Government Act, 1976 (Act No. 56 of 1976)

Establishment of Office of Administrator-General for the Territory of South West Africa Proclamation, 1977 (Proclamation No. 180 of 1977 of the State President)

Empowering of the Administrator-General for the Territory of South West Africa to make Laws Proclamation, 1977 (Proclamation No. 181 of 1977 of the State President)

Representative Authorities Proclamation, 1980 (Proclamation AG. 8 of 1980)

Representative Authority of the Whites Proclamation, 1980 (Proclamation AG. 12 of 1980)

Representative Authority of the Coloureds Proclamation, 1980 (Proclamation AG. 14 of 1980)

Representative Authority of the Ovambos Proclamation, 1980 (Proclamation AG. 23 of 1980)

Representative Authority of the Kavangos Proclamation, 1980 (Proclamation AG. 26 of 1980)

Representative Authority of the Caprivians Proclamation, 1980 (Proclamation AG. 29 of 1980)

Representative Authority of the Damaras Proclamation, 1980 (Proclamation AG. 32 of 1980)

Representative Authority of the Namas Proclamation, 1980 (Proclamation AG. 35 of 1980)



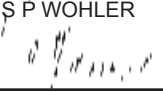
Representative Authority of the Tswanas Proclamation, 1980 (Proclamation AG. 47 of 1980)

Representative Authority of the Hereros Proclamation, 1980 (Proclamation AG. 50 of 1980)

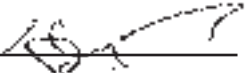
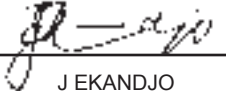
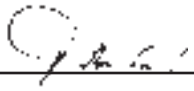
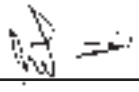

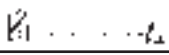

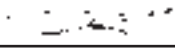
Representative Authority Powers Transfer Proclamation, 1989 (Proclamation AG. 8 of 1989)

Government of Rehoboth Powers Transfers Proclamation, 1989 (Proclamation AG. 32 of 1989)

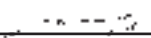
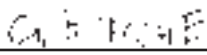
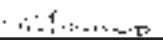

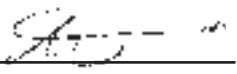
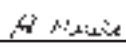
SWAPO OF NAMIBIA

 S NUJOMA	 REV H WITBOOI	 D MERORO
 A TOIVO YA TOIVO	 M GAROEB	 P MWESHIHANGE
 H G GEINGOB	 H POHAMBA	 T-B GURIRAB
 DR L AMATHILA	 H HAMUTENYA	 N BESSINGER
 DR Z KAMEETA	 DR E TJIRIANGE	 P ITHANA
 DR N IYAMBO	 DR M TJITENDERO	 DR K MBUENDE
 N ANGULA	 M M HAUSIKU	 S P WOHLER
 H RUPPEL	 A VON WIETERSHEIM	 DR P KATJAVIVI
 J W WENTWORTH	 D P BOTHA	 REV. M AMADHIA
 H T HISHONGWA	 B AMATHILA	 J YA OTTO
 R KAPELWA	 I G NATHANIEL	 M M E K H HUEBSCHLE

The Constitution of the Republic of Namibia

 B U UULENGA	 J EKANDJO	 J HOEBEB
 W BIWA	 H HAUSIKU	 P SHOOMBE
 REV W KONJORE	 A P TSHIRUMBU	

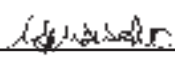
D.T.A. OF NAMIBIA

 M MUYONGO	 D F MUDGE	 F J KOZONGUIZI
 D LUIPERT	 J M HARASEB	 G DAN
 P M JUNIUS	 DR B J AFRICA	 L J BARNES
 C KGOSIMANG	 A MAJAVERO	 G KASHE
 N K KAURA	 M BARNES	 A MATJILA
 H E-STABY	 A GENDE	 U JAGER
 J GASEB	 A NUULE	 C A C VAN WYK

UNITD DEMOCRATIC FRONT OF NAMIBIA

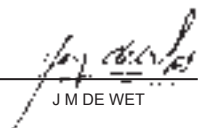

J GAROEB


R R DIERGAARDT

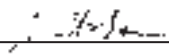

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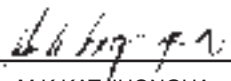
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J M DE WET

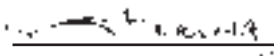

J W F PRETORIUS


W O ASTON

NATIONAL PATRIOTIC FRONT OF NAMIBIA


M K KATJUONGUA

FEDERAL CONVENTION OF NAMIBIA


M KERINA

NAMIBIA NATIONAL FRONT


V RUKORO

Namibian Constitution First Amendment Act, 1998
(Act 34 of 1998)

To amend the Namibian Constitution so as to provide that the first President of Namibia may hold office as President for three terms, and to provide for incidental matters.

(Signed by the President on 7 December 1998)

BE IT ENACTED by the Parliament of the Republic of Namibia, in accordance with the requirements of Article 132 of the Namibian Constitution, as follows:-

Amendment of Article 134 of the Namibian Constitution

1. Article 134 of the Namibian Constitution is amended by the addition of the following Sub-Article:

“(3) Notwithstanding Article 29(3), the first President of Namibia may hold office as President for three terms.”

Short title

2. This Act shall be called the Namibian Constitution First Amendment Act, 1998.

Published in the Government Gazette of the Republic of Namibia, Windhoek, December 24, 1998, No. 2014, Government Notice No. 304