

# NAMIBIA LAW JOURNAL

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a fair administrative procedure:  
A comparative study of Namibian, South African  
and German law  
*Cornelia Glinz*

Jurisprudential aspects of proclaiming towns  
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# NAMIBIA LAW JOURNAL

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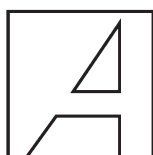
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# GUIDE TO CONTRIBUTORS

The *Namibia Law Journal* (NLJ) is a joint project of the Supreme Court of Namibia, the Law Society of Namibia and the University of Namibia.

The Editorial Board will accept articles and notes dealing with or relevant to Namibian law. The discussion of Namibian legislation and case law are dealt with as priorities.

Submissions can be made by E-mail to [namibialawjournal@gmail.com](mailto:namibialawjournal@gmail.com) in the form of a file attachment in MS Word. Although not preferred, the editors will also accept typed copies mailed to PO Box 27146, Windhoek, Namibia.

All submissions will be reviewed by one of the Advisory Board members or an expert in the field of the paper.

Submissions for the January 2010 edition need to reach the editors by 15 September 2009. Contributions with a constitutional theme are encouraged for the next edition.

All submissions need to comply with the following requirements:

- Submissions are to be in English.
- Only original, unpublished articles and notes are usually accepted by the Editorial Board. If a contributor wishes to submit an article that has been published elsewhere, s/he should acknowledge such prior publication in the submission. The article should be accompanied by a letter stating that the author has copyright of the article.
- By submitting an article for publication, the author transfers copyright of the submission to the Namibia Law Journal Trust.
- Articles should be between 4,000 and 10,000 words, including footnotes.
- “Judgment Notes” contain discussions of recent cases, not merely summaries of them. Submissions in this category should not exceed 10,000 words.
- Shorter notes, i.e. not longer than 4,000 words, can be submitted for publication in the “Other Notes and Comments” section.
- Summaries of recent cases (not longer than 4,000 words) are published in the relevant section.
- Reviews of Namibian or southern African legal books should not exceed 3,000 words.

The *NLJ* style sheet can be obtained from the Editor-in-Chief at [namibialawjournal@gmail.com](mailto:namibialawjournal@gmail.com) or on the website <http://www.namibialawjournal.org/>.



# INTRODUCTION

Nico Horn\*

This second edition of the *Namibia Law Journal* is loaded with interesting and relevant articles and notes.

For example, **Cornelia Glinz**, a doctoral student of one of our editors, Prof. Manfred Hinz, takes the issue of administrative law dealt with in the previous issue a step further with her comparison between administrative law in Namibia, South Africa and Germany. Ms Glinz is no stranger to Namibia. She spent the major part of 2008 in Windhoek as an intern with the Konrad Adenauer Foundation. She is presently attached to the Max Planck Institute in Heidelberg, one of Namibia's partners in developing a home-grown Namibian administrative law.

**Clever Mapaure**, a University of Namibia LLM student and LLB graduate (cum laude), writes on the controversial issue of town proclamations in areas subject to traditional law, while **Prof. Chris Peter** and **Juliana Masabo** of the University of Dar es Salaam warn against policies that hide government actions from public scrutiny. In Tanzania, such practices have led to corruption and decay. While the operations of the Anti-corruption Commission in Namibia are constantly under public scrutiny, the Tanzanian experience has important lessons for Namibia.

A new addition is the section entitled "Judgment Notes", which contains a critical discussion of recent judgments. In this edition, **Kaijata Kanguuehi**, a legal practitioner and law lecturer, asks if the successful appeal against the section 174 discharge by the High Court in the *Teek* case constitutes double jeopardy. **Fritz Nghishililwa**, Deputy Dean of the UNAM Law Faculty, in discussing the *African Personnel Services* case, suggests that labour hire should be seen within the context of a modern liberal economy rather than from a common law perspective. **Adv. Reinhard Töttemeyer** of the Society of Advocates looks at the importance of the *Hepute* judgment. He points out that, for the first time, the court has established that a party initiating litigation as a 'man of straw' can be ordered to give security for the respondent/defendant's costs.

The Namibian legal fraternity is slowly becoming aware of the *Namibia Law Journal*. But the Editorial Board would welcome more contributions for the January 2010 edition, whose closing date for submissions is 28 August 2009. The *NLJ* is too young to have reserve articles in its drawers!

In the light of the 20th anniversary of the Constitution of the Republic of Namibia, we encourage the legal fraternity to concentrate on constitutional issues, although we will also look at contributions on other subjects.

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# ARTICLES

## The right to be given reasons as part of a fair administrative procedure: A comparative study of Namibian, South African and German law

Cornelia Glinz\*

### Abstract

The right to be given reasons for an administrative decision is an essential component of a fair administrative procedure in a democratic state. In Article 18 of its Constitution, Namibia has an administrative justice provision that is part of the Bill of Rights, and which states the requirement of a fair procedure. The superior courts interpreted this provision in the context of common law principles, notably the *audi alteram partem* rule, but referred to the right to be given reasons only in a general way and in a small number of cases. So far, Article 18 is the only statutory basis for the right to a fair procedure; but in 2008, the Law Reform and Development Commission, under the auspices of the Ministry of Justice, introduced and initiated the preparation of an enactment in the field of administrative law. The first step they undertook was to open a discussion amongst legal experts and politicians on the possibilities of such an Act. This paper argues that, in order to efficiently prepare draft legislation, the Commission will need to look at similar provisions in other countries and learn from their experiences. To this end, the German Law on Administrative Procedure of 25 May 1976 sets an interesting example, as does the South African Promotion of Administrative Justice Act, 2000.<sup>1</sup> Before that is done, however, Namibian legal materials – mainly Court decisions – should be analysed to lay a well-grounded foundation for the discussion. The aim of this article is to provide a contribution to the law reform process, highlighting the right to be given reasons.

### Introduction

#### *Meaning*

It is a common opinion that, in a democratic state, the right to be given reasons for an administrative decision is an essential component of a fair administrative procedure. To begin with, a general meaning of the right is as

\* Research Fellow at the Max Planck Institute for Comparative Public Law and International Law (Heidelberg, Germany). Special thanks to my colleague Freya Baetens for her great help in finalising the manuscript.

1 No. 3 of 2000.

follows: if an administrator issues an administrative action to a citizen, the latter has the right to be given reasons for why this action was taken. Article 18 of the Constitution of the Republic of Namibia includes an administrative justice provision that is part of the Bill of Rights laid down in Chapter 3. It prescribes a fair procedure as a condition of administrative justice. Thus, fair procedure is every Namibian citizen's fundamental right, and has to be defended and effectively carried out.

To understand the importance of this right, the underlying arguments for granting it will be outlined. The right envisages three aspects:<sup>2</sup>

- As already mentioned, the right focuses on helping the citizen to defend his/her rights. When the affected person knows the reasons for the decision, s/he can properly consider the prospects of success in a legal action against such decision, and can defend his/her right against the arguments of the administration before a court or tribunal in a review process.
- The right is directed towards the administration itself because furnishing reasons is one of the fundamentals of good administration. It encourages rational and structured decision-making, whilst minimising arbitrary and biased outcomes – thereby facilitating accountability and openness on the part of the administration, and
- The reasons given assist courts and tribunals to render a judgment on the validity of an administrative action in a review process.<sup>3</sup>

### ***The discussion about law reform***

So far, the constitutional provision on administrative justice – as interpreted by the Namibian superior courts – is the only statutory basis for a fair procedure. However, the question arises whether this is sufficient to give effect to this fundamental right, or whether Namibia should follow the lead of other countries in enacting legal rules for the promotion of administrative justice in which a provision on the right to be given reasons would be an essential part. As reported in the last issue of the *Namibian Law Journal (NLJ)*, a recent initiative of the Law Reform and Development Commission, under the auspices of the Ministry of Justice, opened this debate via a conference entitled “Promoting Administrative Justice in Namibia” (hereafter referred to as the *PAJN Conference*), held in Windhoek from 18 to 21 August 2008.<sup>4</sup> The

2 Ziekow, J. 2006. *Verwaltungsverfahrensgesetz*. Stuttgart: Kohlhammer, section 39, para. 1.

3 Burns, Y & M Beukes. 2006. *Administrative law under the 1996 Constitution* (Third Edition). Durban: LexisNexis Butterworths, p 251.

4 Hinz, MO. 2009. “More administrative justice in Namibia? A comment on the initiative to reform administrative law by statutory enactment”. *Namibia Law Journal*, 1(1):81. The initiative as well as the Conference were supported by the Rule of Law Programme for Sub-Saharan Africa, run by Germany's Konrad Adenauer Foundation.

legal experts from Namibia and abroad who attended the Conference reached the joint conclusion that an enactment was advisable since it would provide for legal certainty and, therefore, would overcome many of the problems identified in the practice of administration.<sup>5</sup>

As one part of the discussion, this paper will highlight the necessity of creating a provision in the envisaged Act on the important right to be given reasons for an administrative decision, and will demonstrate where law reform would be fruitful in this respect. To this end, a summary of Namibian case law will first be presented to create a comprehensive basis for further development. Secondly, a comparison will be made between the statutory administrative provisions of two countries, namely South Africa and Germany, whose legislation expressly provides for the right to be given reasons for an administrative decision.<sup>6</sup>

### Namibia: Cases involving the right to be given reasons

#### ***Article 18 of the Constitution***

The starting point for an analysis of administrative law in Namibia is Article 18 of its Constitution, entitled “Administrative Justice”. It reads as follows:

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.

The Article expresses the main principles of administrative law, therefore, and provides a basis for interpretation that is realised by the superior courts in developing a plethora of jurisprudence. As Namibian administrative law has been greatly influenced by English common law,<sup>7</sup> the Article has to be seen and interpreted in the context of its principles, notably natural justice – including the *audi alteram partem* rule. Namibian jurisprudence has indeed applied these general rules in numerous cases, and has developed more concrete requirements.

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5 Law Reform and Development Commission. 2008. “Conference resolutions and recommendations”. Unpublished paper presented to the conference entitled “Promoting Administrative Justice in Namibia”, Windhoek, 18–21 August 2008.

6 These two countries presented their Administrative Justice Acts to the PAJN Conference.

7 Parker, C. 1991. “The ‘Administrative Justice’ provision of the constitution of the Republic of Namibia: A constitutional protection of judicial review and tribunal adjudication under administrative law”. *The Comparative and International Law Journal of Southern Africa*, XXIV:89.

However, there is no definite rule or principle in common law which compels the administrator to comply with a citizen's right to be given reasons.<sup>8</sup> Despite this fact, the superior courts have developed this right, on the basis of Article 18, as an essential component of a fair procedure. In the following section, the main cases forming part of this evolution will be outlined.

### ***The Katofa case***

A pre-Independence case that dealt with the right to be given reasons is *Katofa v Administrator-General for South West Africa & Another*, which is also quoted by the later *Frank* case.<sup>9</sup> The court had to consider whether the Administrator-General could be compelled to give reasons for the arrest and detention of Mr Katofa. In terms of the applicable proclamation, the Administrator-General was expressly obliged to give reasons to the detainee himself; however, –<sup>10</sup>

... the question is, whether or not the Administrator-General is obliged to divulge these reasons to the Court to justify the detention.

The court laid down the purpose for the applicable provision which –<sup>11</sup>

... is to enable the detainee to ascertain whether there are grounds for his detention ...

and concluded that –<sup>12</sup>

... the Court would not be able to judge therefrom whether legal grounds do exist.

Accordingly, the court held that there was an obligation to give reasons to the detainee as well as to the court. These formulated objects – to assist the aggrieved person as well as the court in its decision-making – can be seen as the initial basis for the further development of the right to be given reasons.

### ***The Frank case***

In the first case that dealt extensively with the administrative justice provision – the case of *Frank & Another v Chairperson of the Immigration Selection Board*<sup>13</sup> – Levy AJ stated in the first instance judgment of the High Court that –<sup>14</sup>

8 Burns & Beukes (2006:251).

9 *Katofa v Administrator-General for South West Africa & Another*, 1985 (4) SA 211 (SWA).

10 (ibid.:221 I–J).

11 (ibid.:222 B).

12 (ibid.:222 E).

13 *Frank & Another v Chairperson of the Immigration Selection Board*, 1999 NR 257 (HC); 2001 NR 107 (SC).

14 *Frank*, 1999 NR 257 (HC), 265 D–E.

## The right to be given reasons as part of a fair administrative procedure

[a]n unfair or unreasonable decision entitles an aggrieved person to redress by the Court[,] but the Court cannot judge what is reasonable or unreasonable unless the administrative body gives its reasons for arriving at its decision.

Therefore, he came to the conclusion that –<sup>15</sup>

... the respondent was obliged to give reasons where such exist.

In the case, Ms Frank, a German national, applied for a permanent residence permit from the Immigration Selection Board, which rejected her application. Ms Frank requested reasons for the decision, but these were withheld because the Board did not consider itself to be compelled to furnish reasons. The application before the High Court was granted and the Board was ordered to furnish the requested permanent residence permit within 30 days of the judgment.

Subsequently, the Board brought the case before the Supreme Court, which once again elaborated on Article 18 and the right to be given reasons. In his minority judgment, Strydom CJ dealt broadly with the administrative justice requirement; with his findings on this point, he had the support of the majority.<sup>16</sup> Firstly, he emphasised that, because Article 18 formed part of Chapter 3 of the Constitution, it was a fundamental human right – which, apart from expressly stating the requirements of reasonable and fair decisions, demanded transparency as an inherent condition of the prescribed fair procedure. Strydom CJ concluded as follows:<sup>17</sup>

[A]n administrative organ exercising a discretion is obliged to give reasons for its decision. There can be little hope for transparency if an administrative organ is allowed to keep the reasons for its decision secret. The Article requires administrative bodies and officials to act fairly and reasonably. Whether these requirements were complied with can, more often than not, only be determined once reasons have been provided.

Additionally, only with the obligation to give reasons can one give effect to the right stated in Article 18 that an aggrieved person can seek redress before a competent court or tribunal. According to the decision of *Government of the Republic of Namibia v Cultura 2000*, from its nature as a fundamental right this entails that the Article has to be –<sup>18</sup>

... interpreted broadly, liberally and purposively to give to the article a construction which is most beneficial to the widest possible amplitude.

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15 (ibid.:265 A).

16 *Frank*, 2001 NR 107 (SC), 158 C–178 B.

17 (ibid.:174 I–175 A).

18 *Government of the Republic of Namibia v Cultura 2000*, 1993 NR 328 (SC), 340 B–D.

## ARTICLES

Although Strydom CJ considered that there can be exceptions from the general obligation, —<sup>19</sup>

[w]here there is a legitimate reason for refusing, such as State security, that option would still be open.

The majority judgment in the *Frank* case before the Supreme Court delivered by O’Linn AJA agreed with these findings. In addition, O’Linn AJA emphasised that the reasons, —<sup>20</sup>

... if not given prior to an application to a Court for a review of the administrative decision, must at least be given in the course of a review application.

This was what happened in the *Frank* case: although the Board had initially refused to give reasons for its decision, such reasons were later brought before the High Court. Finally, the appeal was upheld by the Supreme Court because of other breaches of the natural justice rule by the Board in taking the decision to refuse.

Consequently, in the *Frank* case, the Supreme Court laid down the obligation to furnish reasons for an administrative action in order to comply with fair procedure, as required by Article 18 of the Constitution, but stated at the same time that there could be exceptions to this obligation; however, these were not defined in any way. The Court also stated that the reasons did not necessarily have to be delivered at the same time as the decision, but could still be furnished at a later stage in the course of the review procedure.

### **The Sikunda case**

In the case of *Government of the Republic of Namibia v Sikunda*, the judgment of the two court instances expanded on the findings of the *Frank* case concerning the constitutional provision on administrative justice and developed them further, implicitly in the judgment before the High Court and clearly in that of the Supreme Court.<sup>21</sup>

The facts of the case were as follows: Mr Sikunda’s father had been detained under section 49 of the Immigration Control Act.<sup>22</sup> It had been alleged that he was a UNITA<sup>23</sup> collaborator, so state security had been called in. The Minister of Home Affairs had carried out certain investigations and then recommended to the Security Commission, established in terms of Article 114

19 *Frank*, 2001 NR 107 (SC), 175 C.

20 *Frank*, 2001 NR 107 (SC), 110 A–C.

21 *Government of the Republic of Namibia v Sikunda*, 2001 NR 181 (HC); 2002 NR 203 (SC).

22 No. 7 of 1993.

23 *União Nacional de Independência Total de Angola*, a resistance movement whose stated aim was the total independence of Angola.

## The right to be given reasons as part of a fair administrative procedure

of the Constitution, that Mr Sikunda's father be declared a persona non grata. The Commission heeded the Minister's recommendation and the father was subsequently detained.

Mr Sikunda sought redress against this decision before the High Court and demanded his father's release. Among the questions that arose was whether or not a fair procedure had been granted, i.e. whether the Minister's decision to declare Sikunda a persona non grata without affording him the opportunity to make representations was valid. The respondent stated that –<sup>24</sup>

... in certain circumstances audi alteram partem may take place after a decision has been taken, for example, where a statute authorises it expressly or impliedly and where an urgent decision has to be taken.

An example of an urgent action would be the involvement of state security, which is relevant to the case. Mainga J agreed with this statement, but in consideration of the –<sup>25</sup>

... nature of the right to be heard as a fundamental right which should be observed at all times when the civil rights and responsibilities of an individual are determined[.]

he could not find any reasons for urgency in the matter. Therefore, the applicant's father should have been heard before the decision was taken.

Concerning the right to be given reasons, the judgment of the High Court failed to deal with it expressly; nonetheless, it mentioned this right in the context of the right to be heard, classifying it as part of the latter, and stated that –<sup>26</sup>

... the Security Commission and the Minister were bound to communicate the allegations to the applicant's father, so as to enable him to deal with the allegations or rebut them where possible.

Only through the quotation of the relevant part of the minority judgment of Strydom CJ in the *Frank* case was the requirement for reasons directly mentioned. As a result, the Minister's decision was set aside, and Mr Sikunda's father was ordered to be released.

In the Minister's appeal before the Supreme Court, the judgment referred openly to the right to be given reasons as a requirement of fair procedure, distinguishing it clearly from the right to be heard – unlike the judgment of the High Court – and again quoted Strydom CJ's pertinent statement in the *Frank* case. O'Linn AJA draws from this quotation two conditions for the case in which a decision affects both the fundamental rights of a person and state

24 *Sikunda*, 2001 NR 181 (HC), 187 G).

25 (ibid.:189 C).

26 (ibid.:191 D–E).



security. Firstly, the administrative body is required to state explicitly why it refuses to furnish reasons. Secondly, O'Linn concludes that —<sup>27</sup>

... the administrative tribunal cannot avoid to give reasons for its decision altogether ... Reasons for the decision must be given, not necessarily in great detail[,] but at least in substance.

Accordingly, where state security is involved, administrative bodies are still required to furnish *some* reasons for their decisions. The latest point at which these reasons are to be provided “in substance, is in the course of the judicial review”.<sup>28</sup> Taking into account the violation of this requirement amongst others in the case, notably the audi alterem partem rule, the Supreme Court dismissed the appeal.

In conclusion, in the *Sikunda* case, the Supreme Court referred broadly to the *Frank* case, but went a step further by stating that even the exceptions of the application of the right to be given reasons have to be interpreted narrowly in order to give the best effect to this fundamental right. As a result, the value of the right to hear the reasons for an administrative decision as part of a fair procedure increased.

### **Findings**

Deriving from the interpretation of Article 18 by the superior courts, mainly the Supreme Court, the right to be given reasons is a condition of a fair administrative procedure. However, there are only a small number of cases that deal explicitly with this right, most notably the *Frank* and *Sikunda* cases. On the other hand, far more cases refer to the audi alteram partem rule, which states that the citizen is required to be given information about the basis of an administrative decision so that s/he can make representation; however, no clear distinction is made between the audi alteram partem rule and the right to be given reasons.<sup>29</sup> Furthermore, because there is no legislation on the matter apart from the general declaration that this right exists and some vague statements about its meaning, there are no concrete guidelines as such. Clarification is required on the following aspects:

27 *Sikunda*, 2002 NR 203 (SC), 228 D–E.

28 (ibid.:228 F).

29 See e.g. *Kaulinge v Minister of Health and Social Services*, 2006 (1) NR 377 (HC) (administrative decisions to be based on facts and not mere suspicions); *Günther Kessl v Ministry of Lands and Resettlement & 2 Others*, Case No. 27/2006 and 266/2006 (expropriations of three German farmers did not comply with a fair administrative procedure). See also Wiechers, M. 1985. *Administrative law*. Durban: Butterworths, p 212. Wiechers (ibid.) classifies the right to be given reasons expressly as a part of the audi alteram partem rule. Also, Parker (1991), in his comprehensive overview on the administrative justice provision, does not mention the right clearly.

## The right to be given reasons as part of a fair administrative procedure

- The scope of application of the duty, i.e. is there a distinction between *discretionary* and *binding* decisions?<sup>30</sup> How does the right to be given reasons relate to the audi alteram partem rule?
- The exceptions to the obligation
- The required content and form of the reasoning, and
- The point at which such reasons are due, i.e. must they be furnished alongside the decision, or can they be furnished later? If the latter, at what point exactly do they have to be furnished?

A survey conducted amongst legal experts by the Law Reform and Development Commission with the assistance of the Konrad Adenauer Foundation in preparation for the PAJN Conference discovered that, despite the superior courts having defended this right, in the practice of administrative decision-making there was a culture of not giving reasons.<sup>31</sup> The lack of concrete rules mentioned earlier could be one reason for this. Thus, the enactment of a clear provision should give administrators better guidelines and raise awareness of this right amongst both administrators and citizens, and in so doing, help give effect to the fundamental right of administrative justice. This is, therefore, an important field to be targeted by law reform.

## Germany: The right to be given reasons

### ***Could a comparison to German administrative law be fruitful?***

The German Law on Administrative Procedure of 25 May 1976, i.e. the *Verwaltungsverfahrensgesetz* (VwVfG) provides a statutory basis for general rules that are applicable to all administrative proceedings. Before the law was implemented, a controversial discussion took place on its possible benefits.<sup>32</sup> The legislator had different aims when it finally came to the enactment, however. Firstly, the legislation was to contribute to simplifying and rationalising of the administration, since it provided for clear and authoritative rules. Secondly, the enactment intended to ease the legislator's burden, by providing these general rules to consult when enacting further laws on special fields of administrative law. Finally, the legislation was meant to serve citizens, whose rights were now to be expressly stated and guaranteed.<sup>33</sup>

30      Wiechers (1985).

31      Glinz, C. 2008. "Administrative law in Namibia: Its current state, challenge and proposals for law reform". Unpublished paper presented to the conference entitled "Promoting Administrative Justice in Namibia", Windhoek, 18–21 August 2008.

32      Maurer, H. 2009. *Allgemeines Verwaltungsrecht* (Seventeenth Edition). Munich: Beck, p 100.

33      (*ibid.*:104).

Since its enactment, the law has shown huge merit in practice and has indeed succeeded in realising its aims. A specialised branch – the administrative courts – interprets the Act and sees to its constant development.<sup>34</sup> Thus, today, the Act serves as a sound basis for administrative decision-making. In particular, it has a specific provision dealing with the right to be given reasons for an administrative decision. Therefore, the right stands on a firmer foundation in German law than it does in most other common law countries, including the United Kingdom and India<sup>35</sup> and, thus, can provide a good example how to give effect to the right in the law reform process.

### ***The constitutional basis***

Deriving from the rule of law as prescribed in subsection 3 of Article 20 in the *Grundgesetz*,<sup>36</sup> i.e. the Constitution of the Federal Republic of Germany, every citizen who is affected by an administrative act has a right to be informed of the grounds of the decision. Only then s/he can effectively defend his/her rights. Consequently, compliance with the right to be given reasons is considered to be an essential part of fair administrative procedure.<sup>37</sup>

### ***The provision under the VwVfG***

Part 3 of the VwVfG deals with the formation of an administrative act.<sup>38</sup> Section 39, which prescribes the requirement for reasons, is a component of this Part and reads as follows:<sup>39</sup>

Section 39 Grounds for an administrative act.

- (1) An administrative act issued in writing or electronically or confirmed in writing or electronically must be accompanied by a statement of grounds. This statement of grounds must contain the chief material and legal grounds which have caused the authority to take its decision. The grounds given in connection with discretionary decisions shall also contain the point of view which led the authority to exercise its powers of discretion.

34 With financial assistance from the Konrad Adenauer Foundation, a group of Namibian legal experts recently went to Germany on a study visit to learn about the German administrative court system.

35 This statement was made by an Indian legal academic (Singh) and thus, from a common law perspective; see Singh, MP. 2001. "German administrative law in common law perspective". In Frowein, AbrJ & R Wolfrum (Eds). *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht* (Second Edition). Berlin/Heidelberg/etc.: Springer, p 73.

36 "Basic Law".

37 Stelkens, P, HJ Bonk & M Sachs (Eds). 2008. *Verwaltungsverfahrensgesetz* (Seventeenth Edition). Munich: Beck, section 39, para. 2.

38 German law uses administrative act, while Namibian law uses administrative action. I use the applicable term in the context concerned.

39 Translation of the provisions of the VwVfG in Singh (2001:286–314, 294), updated by this author.

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- (2) No statement of grounds is required:
1. when the authority is granting an application or is acting subsequent to a statement and the administrative act does not infringe upon the rights of another,
  2. when the person for whom the administrative act is intended or who is affected thereby is already acquainted with the opinion of the authority as to the material and legal positions or able to grasp it without argumentation,
  3. when the authority issued identical administrative acts in considerable numbers or issued administrative acts with the help of automatic equipment and individual cases do not merit a statement of grounds,
  4. when this derives from legal provisions, [or]
  5. when a general order is publicly promulgated.

### *The scope of application*

Every administrative act issued or confirmed in writing is legally required to contain written reasons. Thus, the scope of application is broad: it covers not only administrative acts that adversely affect the rights of the addressee, but all administrative acts.<sup>40</sup> However, concerning the acts in favour of the addressee, subsection (2)1 will apply as an exception in many of the cases.

The duty to furnish reasons is not relevant in the case of a verbal administrative act.

As to the required form of an administrative act, it may be issued in written, verbal or any other form.<sup>41</sup> However, a verbal administrative act has to be confirmed in writing if there is justified interest that this should be done, and the person affected immediately requests it. Again, written reasons for the decision have to be furnished.

### *Form and content*

The requested form of the reasoning follows the main part of the administrative act and, thus, it is in writing or electronically. This consequence is the result of the assumption that the reasons are an essential part of the administrative act and, therefore, have to comply with the same formal standards as the decision itself.<sup>42</sup> The statement of reasons needs to give the principal material and legal grounds on which the administrative body based its decision. The degree of detail given as regards such grounds depends on the circumstances of the concrete case. On the one hand, a certain standardisation of the formulation is allowed if the *relation to the individual case* is still obvious. On the other hand, it would not be sufficient to deliver only a formulaic sequence

40 Ule, CH & H Laubinger. 1995. *Verwaltungsverfahrenrecht* (Fourth Edition). Cologne: Heymann, p 522.

41 VwVfG, section 37(2).

42 BVerwG NVwZ, 1993, 67.

of set phrases or the blanket reference to compulsory grounds.<sup>43</sup> In the case of a discretionary decision, the reasons also need to indicate clearly the administrator's knowledge of the need to exercise discretion, and, in so doing, s/he considered and balanced the interests of the persons involved. The primary aspects that were considered have to be mentioned.<sup>44</sup> The use of "shall" in sentence 3 of section 37(1) has to be understood in the sense that the basis for the discretion has to be furnished as a rule and can only be omitted in an exceptional case.<sup>45</sup>

Looking at the requirements of section 39(1) of the VwVfG, it is important to note that this provision only lays down a formal requirement to give reasons. As a general rule, an administrative act under German law is not unlawful just because the reasons given are inaccurate. If a court concludes that the law was properly applied to the facts of the case, the inadequacy of the reasons given does not matter. However, if the authority exercises its discretion and its reasons prove inadequate, this generally indicates that the discretion was not used properly.<sup>46</sup>

### *Exceptions of the application*

Section 39(2) of the VwVfG delivers five exceptions to the broad scope of application of section 39 (1) outlined above. This list of exceptions is a conclusive enumeration and each one is only open to narrow interpretation. Only in the case of extreme urgency, where the reasoning would lead to prejudices, is there the possibility for the administrator to deliver shorter grounds than usually required.

However, detailed reasoning must be furnished later.<sup>47</sup> Unlike this German rule, urgency was mentioned in the *Sikunda* case before the High Court as a possible ground *not* to furnish reasons.<sup>48</sup>

Two of the exceptions in section 39(2) of the VwVfG deserve to be highlighted:

- The exception in subsection (2)1 had to be established because of section 39(1)'s broad scope of application. As the general requirement to furnish reasons is applicable to all administrative acts, including those in favour of the addressee, the grounds do not have to be provided if the administrative act approves the application of the party concerned and does not infringe on the rights of a third party. In the latter case, nobody has an interest in a review process and, therefore,

43 Ziekow (2006:section 39, para. 4–5).

44 Kopp, FO & U Ramsauer. 2003. *Verwaltungsverfahrensgesetz* (Eighth Edition). Munich: Beck, section 39, para. 26.

45 Ziekow (2006:section 39, para. 6).

46 Kopp & Ramsauer (2003:section 39, para. 2).

47 (ibid.:section 39, para. 33).

48 *Sikunda*, 2001 NR 181 (HC), 189 F.

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the objectives of the duty to provide reasons for a decision are not affected.<sup>49</sup>

- Subsection (2)4 prescribes that no statement of reasons is required if a law so allows. Notably, this specifically covers provisions that protect an interest in secrecy, notably in the name of the state.<sup>50</sup>

Thus, as in Namibian law, state security under German law can result in a waiver of the duty to provide a motivated decision.

### *The audi alteram partem rule*

To complete the picture, it should be mentioned that, in addition to section 39 on the right to be given reasons, the VwVfG contains a provision that deals particularly with the right to have a hearing:<sup>51</sup>

Section 28. Hearing of participants.

- (1) Before an administrative act affecting the rights of a participant may be executed, the latter must be given the opportunity of commenting on the facts relevant to the decision.
- (2) This hearing may be omitted when not required by the circumstances of an individual case and in particular when:
  1. an immediate decision appears necessary because of the risk involved in delay or in the public interest,
  2. the hearing would jeopardise the observance of a period vital to the decision,
  3. it is intended not to diverge, to his disadvantage, from the factual statements made by a participant in an application or statement,
  4. the authority wishes to issue a general order or similar administrative acts in considerable numbers or administrative acts using automatic equipment, [or]
  5. measures of enforcement are to be taken.
- (3) A hearing shall not be granted when this is grossly against the public interest.

In the final analysis, one could say that section 39 VwVfG is a short legal provision that, with the interpretation of the German administrative courts, delivers a detailed and comprehensive regulation and, therefore, concrete guidelines for administrative decision-makers, citizens and courts in review procedures.

## ***Summary of the main differences between the German and Namibian systems***

One initial difference between the German and Namibian rule is the broad scope of application of the former. The provision sets a general rule to furnish

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49 Ziekow (2006:section 39, para. 8).

50 See VwVfG, section 29(2).

51 Translation of the provisions of the VwVfG in Singh (2001:286–314, 291), updated by this author.

reasons upon the delivery of an administrative act, even if it is in favour of the addressee. In contrast, under Namibian administrative law, the right to be given reasons is only applicable if a person is affected by an administrative action since the right is deduced from the *audi alteram partem* rule, which is likewise only applicable in the latter case.<sup>52</sup> Therefore, from a comparative perspective, the scope of application is rather narrow in the Namibian case.

The German rule also defines exactly the required extent of the content of the reasons to be furnished, with an additional condition concerning discretionary decisions. Moreover, the mandatory content is broadly concretised by the courts, and the provision determines the form of the reasoning. In contrast, superior courts in Namibia state that the obligation to furnish reasons exists in general, but the exact content and required form are not specified. In the decisions mentioned above, no express distinction was made between a *discretionary* or *bound* decision, so clarification in this field would be helpful.

Another difference between the German and Namibian systems is that, in section 37(2) of the *VwVfG*, the German law enumerates an exclusive list of exceptions to the provision. These exceptions have to be interpreted in narrowly in order to prevent the right from being undermined. Consequently, urgency in the matter does not constitute an exceptional case. In the Namibian law, the possible exceptions are not defined, although state security and urgency were mentioned as likely reasons for an exception.

Finally, two different rules exist under German law: one for the right to be given reasons, and one for the right to be heard, which provides for a clear distinction the two rules. In contrast, this differentiation is not made in all Namibian court decisions. For example, only cursory reference was made to the right to be given reasons in the first instance judgment of the *Sikunda* case. This situation is not satisfactory, and a clear statement for a right to be given reasons would help to ensure a fair procedure.

### ***Conclusions for law reform in Namibia***

What could be derived from this analysis for the benefit of the Namibian law reform process? To create a provision on the protection of the right to be given reasons would signal a serious commitment to its recognition as an autonomous requirement in addition to the *audi alteram partem* rule. It could give an answer to the above revealed need for clarification and thus provide for legal certainty in the field. What should be considered when it comes to legal drafting is that in Namibia the background of concretisation as it exists under German law by its court decisions is missing. Therefore it would be advisable to have some more detailed sentences to provide for a better understanding from the legal text itself.

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52      Baxter, L. 1984. *Administrative law*. Cape Town: Juta, p 536.

## South Africa: German legal concepts adopted in a foreign law system

### *The constitutional basis*

In the Bill of Rights enshrined in Chapter 2 of the 1996 Constitution of the Republic of South Africa, the individual's right to just administrative action is entrenched.<sup>53</sup> Section 33 reads as follows:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must [-]
  - (a) provide for the review of administrative action by a Court or, where appropriate, an independent and impartial tribunal;
  - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
  - (c) promote an efficient administration.

### *Essential differences between the South African and Namibian systems*

There are two main differences between the South African and Namibian systems when it comes to the constitutional provision on administrative justice. The first is apparent from Section 33(2), which states the right to be given reasons expressly as part of administrative justice, and therewith gives the right a special emphasis. This is clearly different under Namibian law, as discussed earlier. Secondly, section (33)3 of the South African Constitution cited above contains the imperative to enact legislation in this field, whereas no similar provision exists under Namibian law.

### *Administrative law reform in South Africa*

The South African Parliament gave effect to the constitutional imperative by adopting and promulgating the Promotion of Administrative Justice Act (PAJA),<sup>54</sup> which came into operation on 3 February 2000. The Act spells out the ambit, content and application of the rights and duties contained in the constitutional declaration.<sup>55</sup>

Apart from the fact that Article 18 of the Namibian Constitution does not provide for such a constitutional imperative, the starting point for law reform in

53 See section 33.

54 No. 3 of 2000.

55 Burns & Beukes (2006:6).



South Africa and Namibia was quite similar; indeed, the aims of an enactment were essentially the same. Besides the purpose to correspond with the constitutional imperative, the intention of the South African law reform process was to promote just administrative action by regulating the administration – and thereby create a culture of accountability, openness and transparency.<sup>56</sup> The outcome of the implementation of the PAJA was a *major innovation* in South African administrative law: for the first time, basic rules and principles of administrative procedure and of the corresponding court procedure were defined in a statute.<sup>57</sup>

An interesting fact about the law reform process – following from the fact that it was broadly assisted by Germany's *Gesellschaft für Technische Zusammenarbeit*<sup>58</sup> (GTZ) – was that the PAJA incorporated specific concepts from German law.<sup>59</sup> Consequently, the question arises as to whether or not this was a successful strategy. This will be analysed in the discussions to follow with particular reference to the section on the requirement to furnish reasons for an administrative action.

### ***The right to be given reasons under the PAJA***

Section 5 of the PAJA, which gives effect to section 33(2) of the Constitution, reads as follows:

- (1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.
- (2) The administrator to whom the request is made must, within 90 days after receiving the request, give that person adequate reasons in writing for the administrative action.
- (3) If an administrator fails to furnish adequate reasons for an administrative action, it must, subject to subsection (4) and in the absence of proof to the contrary, be presumed in any proceedings for judicial review that the administrative action was taken without good reason.
- (4) (a) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and must forthwith inform the person making the request of such departure.

56 (ibid.:7).

57 Pfaff, R & H Schneider. 2001. "The Promotion of Administrative Justice Act from a German perspective". *South African Journal of Human Rights*, 17(1):59.

58 Literally, "Association for Technical Cooperation". The GTZ is an international cooperation enterprise for sustainable development with worldwide operations. It is federally owned and supports the German Government in achieving its development policy objectives; see also <<http://www.gtz.de/en/index.htm>>.

59 Pfaff & Schneider (2001:60).

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- (b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including –
  - (i) the objects of the empowering provision;
  - (ii) the nature, purpose and likely effect of the administrative action concerned;
  - (iii) the nature and the extent of the departure;
  - (iv) the relation between the departure and its purpose;
  - (v) the importance of the purpose of the departure; and
  - (vi) the need to promote an efficient administration and good governance.
- (5) Where an administrator is empowered by any empowering provision to follow a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure.
- (6) (a) In order to promote an efficient administration, the Minister may, at the request of an administrator, by notice in the *Gazette* publish a list specifying any administrative action or a group or class of administrative actions in respect of which the administrator concerned will automatically furnish reasons to a person whose rights are adversely affected by such actions, without such person having to request reasons in terms of this section.
  - (b) The Minister must, within 14 days after the receipt of a request referred to in paragraph (a) and at the cost of the relevant administrator, publish such list, as contemplated in that paragraph.

Section 5 should be read with Chapter 4 of the Regulations on Fair Administrative Procedure, which set out the formal requirements with regard to the format of any request for reasons. Additionally, the Rules of Procedure of Judicial Review of Administrative Action provide for forms with regard to the request for reasons and for the response of the administrator, and give further guidelines on the grounds for a refusal of the requested reasons (Part B 3).

From a first reading of section 5(1), it is notable that the right was not furnished with the same strong emphasis as in the German model: the provision does not state a right to be *given* reasons – only the right to *request* them. Consequently, the affected person is responsible for obtaining written reasons if they were not provided by the administrator.<sup>60</sup> In terms of section 3(2)(e) of the PAJA, all the administrator needs to do is give adequate notice of the right to request reasons. In the law reform process, this final provision was not the same as the one discussed initially. In its first draft, the South African Law Reform Commission's Project Committee proposed that, as a general rule, administrators should give adequate reasons for their actions, incorporating the essential facts and the legal basis for the action in question, or a reference

<sup>60</sup> Burns & Beukes (2006:256).

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to the right to request reasons.<sup>61</sup> In amending this draft, the legislature clearly watered down this right.<sup>62</sup>

Section 5(6) provides for a way to overcome this problem: the Minister can define in a list those circumstances under which reasons will automatically be furnished, without a person needing to formally request them. However, it must be noted that, to date, no such list has been published.<sup>63</sup>

Another remarkable point concerns section 5(4), which establishes the conditions under which the administrator can depart from the requirement to furnish written reasons. The departure has to be reasonable and justifiable in the circumstances, while subsection (4)(b) prescribes factors to consider when it comes to whether or not the conditions have been met. As a result, section 5(4) provides for a broad scope of exceptions which can be problematic to determine in individual cases. Also, the Rules of Procedure of Judicial Review of Administrative Action, which, in section 3(5) of Part B, deal with the refusal of a request, do not deliver much further concretisation of possible exceptions of the duty to furnish reasons. Only two comprehensive cases are prescribed: firstly, if written reasons have already been furnished to the person requesting them; and secondly, if the reasons are publicly available and the person requesting them has been informed of where and how they have been made available.

In conclusion, the broad scope of section 5(4) of the PAJA does not help to add legal certainty on the one hand, and to give the administrator concrete guidelines on the conditions for a rejection on the other. Therefore, it does not effectively support the aim to protect the constitutional right to obtaining reasons for a decision.

### ***Evaluation***

Although it is a notable improvement that the right to be given reasons is explicitly set out in a statutory provision, the decision to provide only for a right to *request* reasons is not in accord with the purpose of the PAJA to give effect to the citizen's constitutional right to such reasons. Considering the relatively low levels of literacy and the lack of awareness of rights in South Africa, a huge number of citizens do not use their right to request reasons for an administrative action.<sup>64</sup> The small number of cases that have so far been brought before the courts to enforce this right proves that the majority of the population is not aware of the right to be given reasons for a decision under the PAJA. Thus, although a right to *request* reasons exists on paper, it does

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61 South African Law Reform Commission. 1999. *Project 115 Administrative Justice Report (August 1999)*. Pretoria: SALRC, p 26.

62 Pfaff & Schneider (2001:81).

63 Burns & Beukes (2006:260).

64 Pfaff & Schneider (2001:81).

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not have the expected implication in effect. Similarly, the provision does not adequately enhance the aim to ensure rational decision-making on the part of the administrator; likewise, it adds little to ensure the administration's openness and accountability. The administrative official has to base his/her decision on sound grounds before taking a decision. Therefore, it is more effective to write down the grounds at the same time and to furnish them with the decision to the person affected by it. If done at a later stage, it will probably become complicated and annoying to reconstruct the circumstances.<sup>65</sup> Furthermore, the system is very complicated and bureaucratic – which is borne out by the length of section 5 in combination with the load of additional provisions and forms that are made in aforementioned regulations to the PAJA.

## Conclusion and recommendation

The German concept of the right to be given reasons for an administrative action, as set out in section 39 of that country's VwVfG, offers an example of a precise provision with a strong emphasis on the protection of the right. This model sheds light on how such a right could possibly be incorporated into Namibian legislation. Of course, not all the aspects of the German provision should be implemented in the same way as was done in German law: a rule has to be created which fulfils the specific needs of the Namibian context.

However, one should learn from the South African experience as well, and avoid devolving the responsibility to the citizen to obtain the reasons for an administrative act. More advisable would be to formulate a comprehensive provision that sets a firm basis for the administrator to furnish reasons for an administrative action at the same time as such action is delivered.

Considering the importance of the right to fair procedure enshrined in the Namibian Constitution, and in a bid to prevent bureaucratic inefficiency, the best solution would be to develop a statutory provision containing a procedure that is effective in protecting the constitutional right of the citizen as well as being uncomplicated for administrators to comply with in their daily work.

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65 (ibid.:82); Burns & Beukes (2006:257).

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# Jurisprudential aspects of proclaiming towns in communal areas in Namibia

Clever Mapaire\*

## Abstract

The proclamation or declaration of local authority areas in communal areas in Namibia has recently raised jurisprudential questions regarding the powers of both the central and traditional government structures. All communal lands in Namibia are under the jurisdiction of Traditional Authorities. This means that the declaration of local authority areas in communal land amount to a withdrawal of land from communal land, making such withdrawn land a local authority area. Thus, the declaration impacts directly on the powers and jurisdictions of Traditional Authorities. This paper considers the jurisprudential aspects of such declarations. From a legal-philosophical and anthropological perspective, the question whether traditional authorities have the jurisdiction over land that has been declared local authority area lies in the plurality of legal regimes and the concept of *tradition* versus *modernity*. The paper considers the power relationship between traditional and central government authorities through a network of statutes which regulate the declaration of areas as local authorities, and argues that the current position is a perpetuation of plurality-blind apartheid laws. Taking a philosophical and anthropological perspective, the paper considers in detail the controversy surrounding the ownership of communal land in Namibia. The paper also explores the plurality of legal codes in Namibian land law, and argues that although modernity is an inevitable reality, tradition cannot be ignored. Thus, the law regarding the proclamation of local authority areas has to be weighed up against community values and customary laws in general. Statutory law, as it stands in Namibia, cannot be applied in a way that negates traditional norms; however, although the prescribed procedures seek to strike a balance between the two legal systems, this equilibrium has not been adequately achieved. The conflict between laws will persist in an uneasy pluralism, therefore.

## Introduction

Over the past few years, events in northern Namibia – particularly the official proclamation of Helao Nafidi as a town – have provoked questions regarding the powers of Traditional Authorities in parts of communal areas that have been proclaimed as towns or cities. The complexity of the matter is not necessarily in the political twists in the clashes between investors in the

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town of Helao Nafidi and the Ndonga Traditional Authority; rather, it lies in a complex network of legislation and the internal conflict of laws which will be discussed below. From a legal-philosophical and anthropological perspective, the question whether traditional authorities have the jurisdiction over land that has been declared a local authority area lies in the duality or plurality of legal regimes, and the clash between tradition and modernity. The problem at hand arises as we consider that the powers, rights and obligations of Traditional Authorities on the one hand and town councils on the other are regulated by statute. Of equal note is that the powers of Traditional Authorities go beyond mere statute: they extend into the traditional norms and values that form part of the communities' chthonic and autochthonous laws.

*Town councils* are local authorities under the Local Authorities Act.<sup>1</sup> Traditional Authorities are also local authorities, however, insofar as the Traditional Authorities Act<sup>2</sup> limits their jurisdiction to certain localities in communal areas. Events in northern Namibia require consideration of the jurisdiction and ambit of the powers of these two types of local authorities. The critical question here is whether the declaration of an area as a city or town has any effect on the powers and/or jurisdiction of the relevant Traditional Authority when it comes to land allocation. One would normally answer in the affirmative, but the same question takes us into apartheid laws. As will be explained in detail below, it is shocking to note that the new statutes have not made changes to the old practice under apartheid. Instead, these statutes confirm the status quo, albeit in different and more polite language. This in turn offends the traditional norms which predated the statutes, and which have since taken precedence. This situation has caused conflict between Traditional Authorities on the one hand, and the Helao Nafidi Town Council (or the Government in general) and private investors in the town on the other hand – a clear issue of tradition clashing with modernity. In terms of this analysis, could one declare that Traditional Authorities have a legitimate say in the allocation of land in towns? Are town councils bound to consult Traditional Authorities whenever they deal with land allocations in local authority areas, since such areas are surrounded by communal lands under the jurisdiction of Traditional Authorities? What is the law to be applied in these processes? These are the legal questions which befuddle an issue that many would like to politicise.

### Powers and laws in place

Traditional Authorities in Namibia are not part of central government structures. The Namibian Government did not follow South Africa's wall-to-wall system, whereby traditional authorities are made part and parcel of the central governance structures through legislation which makes them part of provincial governmental bureaucracy. The amount of administrative power

1 No. 23 of 1992.

2 No. 25 of 2000.

that Traditional Authorities have in Namibia does not necessarily correspond with what one would expect after having noted the institutional guarantee of such powers in the Namibian Constitution.<sup>3</sup> According to Hinz, the wall-to-wall system of local government substantially limits the executive scope of Traditional Authorities,<sup>4</sup> since the system subjects the latter's authority to that of the communities' elected representatives. Thus, the Government forces Traditional Authorities to operate within the framework of local government structures.<sup>5</sup> Indeed, from what is happening in Helao Nafidi, it seems the Namibian system does not make any significant practical difference between the two types of local government structure, especially considering that the exclusion of Traditional Authorities from the central government bureaucracy simultaneously excludes them from participating in the daily decision-making processes of government. This seems to be the genesis of the reactionary stance that Traditional Authorities have taken as regards the fate already decided for them by central government.

According to Hinz, –<sup>6</sup>

[w]ith the exception of declared local authority areas (municipalities, towns or villages) Namibia is free of local authorities.

The fact that territory once under the control of Traditional Authorities can be withdrawn from their jurisdiction puts them in a subservient position where they are obliged to give way to the imperative of a proclamation or notice declaring certain territory a local authority area. Traditional Authorities are primary when it comes to allocating land in communal areas in terms of the Communal Land Reform Act.<sup>7</sup> This power is not absolute, however, since there are several statutes which affect it.

For instance, the Local Authorities Act provides for the jurisdiction of town councils and their powers over certain land, but does not mention Traditional Authorities. It is regrettable that such an omission allows the powers of

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- 3 Hinz, MO. 2008. "Traditional governance and African customary law: Comparative observations from a Namibian perspective". In Horn, N & A Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Educational Namibia, pp 59–87
  - 4 See the submissions in Hinz, MO. 2000. "Traditional authorities: Sub-central government agents". In Hinz, MO, SK Amoo & D van Wyk (Eds). *The Constitution at work: 10 years of Namibian nationhood*. Pretoria: University of South Africa, pp 81–93.
  - 5 See arguments in Buthelezi, Mangosuthu P. "Media statement by the Inkatha Freedom Party: Mangosuthu Buthelezi's weekly newsletter to the nation", 6 July 2007; available at <<http://ifp.org.za/Newsletters/070706wn.htm>>; last accessed 28 January 2009.
  - 6 Hinz, MO. 2006. "The project of 'tradition': Constitutionalism in Africa". In Hinz, MO & T Gutter (Eds). *Global responsibility – Local agenda: The legitimacy of modern self-determination and African traditional authority*. Berlin: Lit Verlag, p 21.
  - 7 No. 5 of 2002, section 20(a).



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Traditional Authorities to be eroded when a town has been declared in their area. On the other hand, the Communal Land Reform Act provides for the powers of Traditional Authorities over communal land; the Act also prescribes the powers of the President to withdraw such communal land, but it does not mention town councils and their power to do so. In terms of the Traditional Authorities Act, a Traditional Authority is that traditional body which has authority over a traditional community, and which comprises the traditional leaders of that community who have been designated and recognised as such in accordance with the provisions of the Act.<sup>8</sup>

Under customary governance, the Chief, King or Queen<sup>9</sup> is the supreme ruler who has the primary and ultimate power to allocate land. This power can, however, be delegated to members of the council of the Traditional Authority concerned. This same power finds confirmation in section 20 of the Communal Land Reform Act, which grants Traditional Authorities the power to allocate land rights as follows:

20. Subject to the provisions of this Act, the primary power to allocate or cancel any customary land right in respect of any portion of land in the communal area of a traditional community vests –
  - (a) in the Chief of that traditional community; or
  - (b) where the Chief so determines, in the Traditional Authority of that traditional community.

It is gratifying to see that the original powers to allocate land are retained in the Communal Land Reform Act because, to a traditional community, land means life and identity, whether cultural, religious or spiritual; thus, land produces a sense of patriotism and belonging. This explains why the boundaries created by the European settlers and formalised through the Berlin Conference in 1884 are meaningless among Traditional Authorities. To note but a few examples, the Wambo community extends into Angola, as does the Kavango community in north-eastern Namibia; the Shona community of Zimbabwe extends into Mozambique, while the Venda of South Africa extend into Zimbabwe.

Members of these 'divided' communities remain united, even though they may need passports to visit each other. However, because the borders drawn by the Europeans are not real to these communities from a traditional perspective, their members often cross without passports or the like. This illustrates how land is a symbol of traditional community unity, power and sovereignty. This customary principle of identifying people with their land is even found in Article 1 of the Namibian Constitution, and it is one of the most important considerations of statehood under international law. Therefore, land is community in as much as the community is land and its people. Does the declaration of a town change this, either on paper or in people's minds?

<sup>8</sup> (ibid.:section 1).

<sup>9</sup> In those traditional authorities under the authority of a female ruler, like the Kwanyama.

## Jurisprudential aspects of proclaiming towns in communal areas

The contrast between the powers of Traditional Authorities and those of town councils becomes apparent when we consider the provisions in other statutes that create the so-called local authorities. In terms of the Local Authorities Act, *local authority council* means any municipal council, town council or village council, and *local authority area* means the area declared under section 3 of the Act to be such municipality, town or village, as the case may be, or deemed to be so declared.<sup>10</sup> Section 3 of the Local Authorities Act provides for the declaration of areas as local authority areas. The section in the Act reads as follows:

3. (1) Subject to the provisions of this section, the President may from time to time by proclamation in the Gazette establish any area specified in such proclamation as the area of a local authority, and declare such area to be a municipality, town or village under the name specified in such proclamation.

The above subsection was amended by the Local Authorities Amendment Act<sup>11</sup> and the powers of the President to declare communal land a local authority area was effectively shifted to the Minister responsible for regional and local government and housing. This change was inserted by another change to the Ordinance which was passed in 2002 in an amendment.<sup>12</sup> The current section 3, which empowers the Minister of Lands and Resettlement to declare communal land, not only shifts power to the Minister of Regional and Local Government, Housing and Rural Development, but also substitutes “notice” for “proclamation”. The section reads as follows:

3. (1) Subject to the provisions of this section, the **Minister** may from time to time by **notice** in the Gazette establish any area specified in such **notice** as the area of a local authority, and declare such area to be a municipality, town or village under the name specified in such **notice**. [Emphases added]

Section 3(b) is decisive concerning the powers of the Chief in regard to control over such proclaimed land. The section shifts the ownership and management powers regarding land to the local authority so created. This implies that the declaration of an area as a local authority shifts the balance of power regarding the assets and liabilities in the area so proclaimed in favour of the town council or local authority so created. Thus, the section stipulates as follows:

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10 Section 1, Act No. 23 of 1992, as amended by the Registration of Deeds in the Rehoboth Amendment Act, 1994 (No. 35 of 1994); the Local Authorities Amendment Act, 1997 (No. 3 of 1997); the Local Authorities Second Amendment Act, 1997 (No. 14 of 1997); the Local Authorities Amendment Act, 2000 (No. 24 of 2000); the Local Authorities Amendment Act, 2002 (No. 17 of 2002); and the Local Authorities Amendment Act, 2003 (No. 27 of 2003).

11 Section 3, Act No. 24 of 2000.

12 The definition was amended by section 1, Act No. 24 of 2000.

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- 3 (3) (a) If the area of any township or village management area established or purporting to have been established by or under any law on the establishment of townships or village management boards on communal land is, in terms of subsection (1), declared to be, or, in terms of subsection (5), deemed to have been declared to be, a municipality, town or village, the assets used in relation to such township or village management area and all rights, liabilities and obligations connected with such assets shall vest in the municipal council, town council or village council of such municipality, town or village, as the case may be, to such extent and as from such date as may be determined by the Minister.

The principle in this provision is duplicated in section 15(2) of the Communal Land Reform Act, which provides that communal land does not extend to the area declared a town or municipal area. The land declared a municipal area or town ceases to be communal area; hence, the Chief of the area ceases to have jurisdiction over that area. Section 15(2) provides the following:

- 15 (2) Where a local authority area is situated or established within the boundaries of any communal land area[,] the land comprising such local authority area shall not form part of that communal land area and shall not be communal land.

If a local authority area is situated within the boundaries of a communal area, therefore, Traditional Authorities will not have any say regarding land allocations in that proclaimed or declared local authority area. This stipulation answers the question as to what the powers of a Traditional Authority are in relation to communal land declared a local authority area: the Chief's powers to allocate land in that area no longer exist. The powers of the Traditional Authority, as provided for in section 3 of the Traditional Authorities Act, do not extend to the control of urban land issues, and, thus, cannot be invoked. This position is legally sustainable since section 2 of the Traditional Authorities Act limits the jurisdiction of Traditional Authorities to traditional communities.<sup>13</sup> To repeat: in terms of the Traditional Authorities Act, a *Traditional Authority* is a traditional body that has authority over a traditional community established in terms of the Act.<sup>14</sup> Also in terms of section 1 of the Traditional Authorities Act, a *traditional community* is –<sup>15</sup>

... an indigenous homogeneous, endogamous social grouping of persons comprising families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, who recognise a common traditional authority and inhabit a common communal area and

13 In terms of section 2(2), "a traditional authority shall in the exercise of its powers and the execution of its duties and functions have jurisdiction over members of the traditional community in respect of which it has been established".

14 Section 1, Traditional Authorities Act.

15 (ibid.).

may include the members of that traditional community residing outside the common communal area.

This definition of *traditional community* has its own controversial interpretation, but, aside from that, it is clear that *urban community* cannot fall under it. This means, in turn, that Traditional Authorities do not have jurisdiction over urban areas or areas declared or deemed to be under a municipal, town or village council.

## Perpetuation of apartheid laws or a two-track system of political authority?

If an area has been declared a municipal, town or village council area, then Traditional Authorities no longer have jurisdiction over that area. It follows, therefore, that the municipal, town or village council takes charge of all land allocations and the Chief's powers are terminated once the relevant notice declaring a certain area as a local authority area in terms of the Local Authorities Act is gazetted. This finding finds further support in a piece of legislation hailing from the apartheid era in Namibia, namely Ordinance 11 of 1963. Of importance here is section 14, which reads as follows:

- 14 (1) When a township has been proclaimed an approved township, under the provisions of this Ordinance or any other Ordinance, the dominium of the land therein comprising all public places shall *ipso facto* vest in the local authority within whose area of jurisdiction such land is situated, or if such land is not situated within the area of jurisdiction of a local authority, in the Executive Committee in trust for any local authority which may thereafter be constituted in respect of the area within which such land is situated.

After Independence in 1990, the Namibian legislature did not change the law in any way on this; instead, they came up with an amendment to the Ordinance, which effectively reinforced the old principle.<sup>16</sup> The amended section 14 of the Ordinance now reads as follows:<sup>17</sup>

When a township has been proclaimed an approved township, under the provisions of this Ordinance or any other **law**, the dominium of the land therein comprising all public places shall *ipso facto* vest in the local authority within whose area of jurisdiction such land is situated, or if such land is not situated within the area of jurisdiction of a local authority, in the **State** in trust for any local authority which may thereafter be constituted in respect of the area within which such land is situated. [Emphases added]

16 Section 14 of the Ordinance was amended by section 4 of the Townships and Division of Land Amendment Act, 1992 (No. 28 of 1992).

17 (ibid.).

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Basically, the independence legislature substituted “any other Ordinance” with “any other law”. Also of great interest is the change regarding ownership of communal land. The Ordinance vested declared or proclaimed land which is not part of local authority area in an Executive Committee “in trust for any local authority which may thereafter be constituted in respect of the area within which such land is situated”.<sup>18</sup> As the law stands now, declared or proclaimed land which is not part of a local authority area is vested “in the State in trust for any local authority which may thereafter be constituted in respect of the area within which such land is situated”.<sup>19</sup>

Thus, if the Minister declares certain territory a local authority area under the Local Authorities Act, as amended, then such land is no longer under the relevant Traditional Authority’s jurisdiction – even if the local authority area has not yet been established. The land is vested in the state in trust for the local authority to be established. This is an interesting change in that the ownership of such land does not actually change: the section in essence only makes sure that the land is no longer vested in the state for the benefit of the community as per section 17 of the Communal Land Reform Act. This change is what sums up the change as regards the vesting of land, and it establishes the setting in which traditional powers over declared or proclaimed land are dislocated. If the land is no longer vested in trust for the communities concerned, it means that communities have no claim whatsoever against the government over such land. This finds support in sections 16(1)(c) and 29(1)(c) of the Communal Land Reform Act, which – subject to stipulated procedural imperatives (discussed below) – recognise the withdrawal of land from communal land.

There is no law granting Traditional Authorities the power to allocate land which is not communal land. The Independence Government did not change the law in this regard. In terms of section 15 of the Ordinance as amended by section 4 of the Townships and Division of Land Amendment Act, the Minister may authorise any land which is held by the state under the provisions of section 15, which land is held in trust for a future local authority to be constituted, to be used by any public body established for the township or for the portion of the township in which that land is situated,<sup>20</sup> or to be devoted to the use and benefit of the inhabitants of the township in such manner and subject to such conditions as the Minister deems fit. This gives the local council concerned the power to allocate the land over which such council has thus assumed authority.

In light of the above web of statutory provisions, it can be seen that the power of traditional leaders to control all means of production in former communal

18 Section 14, Ordinance 11 of 1963.

19 Section 14 of the Ordinance was amended by section 4 of the Townships and Division of Land Amendment Act, 1992 (No. 28 of 1992).

20 Section 14 of the Ordinance, as amended by section 4 of the Townships and Division of Land Amendment Act.

land which is now a local authority area has been seriously eroded. The power to control communal land use and/or the means of production on communal land is one of the props of traditional authority. These props, which reinforced the leadership of Kings, Queens and Chiefs, have slipped away and given in to modern statutes. To be more sympathetic to traditional leadership, the old traditional and religious beliefs faded as rural and urban Namibia became largely Christian – or at least Judeo-Christian. However, with statutory recognition of traditional structures, chiefdoms and kingdoms will never die in Namibia and cannot be regarded as an endangered social structure. Although such traditional leaders have lost much of the economic clout they had in former times, they are still legally recognised and respected. On the other hand, they remain outside the community of those who are voted to serve on local councils, but their voices are heard parallel to the elected by way of the Council of Traditional Authorities.

However, because their voice is not the final say on any matter whatever, it seems that Traditional Authorities will remain only informally influential in the politics and legal discourse of the nation. Of important note here is that, under section 16 of the Traditional Authorities Act, traditional leaders are expected to submit to modern political authorities in the arena of modern governance and national planning.<sup>21</sup> It seems, however, that this is not always the case in practice – especially if we consider the planned Epupa Dam project. The project was derailed after the Himba traditional community objected to the national government's plan to develop a dam in the Himba heartland.<sup>22</sup> It appeared that customary law had trumped national developmental plans in this instance. Thus, section 16 of the Traditional Authorities Act cannot be interpreted to mean that Traditional Authorities always have to submit to the authority of elected leaders or central government authorities.

The fact that a local authority area is deemed to be held in trust by the state for the benefit of the inhabitants of an officially proclaimed local authority area and that the relevant Minister does with such land as s/he deems fit means that traditional leaders have no say in what a local authority does with former communal land. This is further supported by section 10 of Ordinance 11, which provides that the land declared a local authority area vests in such local authority. The section reads thus:

- (10) If, by any subdivision in terms of this section, new public places are created, the dominium of the land comprising such public places shall *ipso facto* vest in the local authority within whose area of jurisdiction

21 Section 16 of the Traditional Authorities Act requires Traditional Authorities to cooperate with central government and its decentralised offices, and to refrain from actions that would undermine the central government.

22 For more detailed discussions on this case, see Haring, S. 2001. "God gave us this land": The OvaHimba, the proposed Epupa Dam, the independent Namibian state, and law and development in Africa". *The Georgetown International Environmental law Review*, XIV(1).

such land is situated, or if such land is not situated within the area of jurisdiction of a local authority, in the State in trust for any local authority which may thereafter be constituted in respect of the area within which such land is situated. The provisions of subsections (2) and (3) of section 14 and the provisions of section 25 shall, *mutatis mutandis*, apply to all such land.

## Ownership of communal land

### **General**

The above discussion takes us to section 17 of the Communal Land Reform Act, which provides that all communal land is vested in the state in trust for the benefit of the communities resident on such land:

- 17 (1) Subject to the provisions of this Act, all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities.
- (2) No right conferring freehold ownership is capable of being granted or acquired by any person in respect of any portion of communal land.

The declaration of local authority areas is one of the ways through which the state can promote social and economic development. Hence, a local authority area can be declared a town to encourage urban development and business investments in former communal areas. In this light, section 17 of the Communal Land Reform Act can be used by the state to claim ownership of all communal land. The contentious issue is the meaning of the word *vest*, which has been interpreted by the government and some academic authors to mean “ownership”.<sup>23</sup> However, some authors have questioned the concept of communal land *being held in trust*. For example, if the government holds the land in trust, does it own it? Considering that the concept of *trust* does not connote ownership, if the state holds the property in trust only, it implies there are owners – i.e. the communities – on whose behalf such a trust is formed.

### **The controversy of vest**

Section 17 of the Communal Land Reform Act does not use the word *ownership*. In fact, the term is used only once in the entire Act, i.e. in section

23 See, for example, the position of the Legal Assistance Centre in LAC & NNFU/ Legal Assistance Centre & Namibia National Farmers’ Union. 2003. *Guide to the Communal Land Reform Act, Act No. 5 of 2002*. Windhoek: Legal Assistance Centre, p xvii.

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17(2) (see previous citation), which translates as being that the ownership of land in Namibia only exists as freehold, and no such right of freehold can be granted on communal land.

Section 17(1) is now surrounded by some controversy regarding the actual meaning of the word *vest* in the context of the section. Starting from a number of definitions given for *vest* in the *Macquarie Dictionary*,<sup>24</sup> for example, none refers to ownership. The most relevant sense of *vest* is as follows:<sup>25</sup>

Settled or secured in the possession of a person or persons, as a complete or fixed right, an interest sometimes possessory, sometimes future, which has a substance because of its relative certainty.

The general meaning of *vest* from the *Macquarie* accords with the sense the term is given in the *Australian Legal Dictionary*, where it is said to refer to a "legal right or interest accruing".<sup>26</sup> A second sense of *vest* relates property law:<sup>27</sup>

To effectively transfer legal ownership, rights or powers to another or place property in the possession or control of another; when a legal right or interest accrues to a person on the happening of the contingency or condition precedent to its vesting such as lapse of time or determination of a prior interest.

At traditional governance level, communal land is a community resource that gives rise to community-based resource rights like the right to land. The fundamental characteristic of community-based property rights is that their primary legitimacy is drawn from the community in which they exist, and not from the nation state in which they are located. In other words, community property rights are derived from the customs of a community, which are a form of a constitution for that community. Lon Fuller contends that modern customary law should be seen as —<sup>28</sup>

... a branch of constitutional law, largely and properly developed outside the framework of our written constitutions. It is constitutional law in that it involves the allocation among various institutions of our society ... of legal power, that is, the authority to enact rules and to reach decisions that will be regarded as properly binding on those affected by them. That this body of constitutional law should have grown outside our written constitution should not be a source of concern.

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- 24 Delbridge, A, JRL Bernard, D Blair, S Butler, P Peters & C Yallop (Eds). 2005. *The Macquarie Dictionary* (Fourth Edition). Australia: Macquarie Library.
- 25 Nygh, P & P Butt (Eds). 2004. *Butterworths Concise Australian Legal Dictionary* (Third Edition). Sydney: Butterworths: Macquarie Library.
- 26 (ibid.).
- 27 (ibid.).
- 28 Fuller, LL. 1964. *The morality of law*. New Haven, CT: Yale University Press.



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Thus, custom stands as a constitution for the people who live according to it. This is a clear reflection of custom as a system of law. The power of custom is found in the fact that it is reflected in people's conduct toward each other. The further a society moves away from customary law systems and their internal control mechanisms, the greater is the perceived need for laws coercively enforced by the state.

In light of the above exposition about custom, it should be noted that, although the classification of legal rights as vested or otherwise is well known, it is not easy to provide a definitive statement of the meaning of the term. This is due in part to some difficulty inherent in what *vest* means, but the main source of trouble is that, in both popular and legal parlance, the terms *vested* and *contingent* bear different meanings in a legal rights context.<sup>29</sup>

According to Cowen,<sup>30</sup> a *legal right* is a consequence attached by law to a fact or combination of facts which the law defines, and is often referred to as the *title* of the right to, for example, ownership. The distinction between **vested** and other types of rights serves to indicate the holder of the right's title to it.<sup>31</sup> *Vested* rights are, for example, relevant for purposes of the law of succession, estate duty, transfer duty, insolvency, trusts, and income tax. *Jewish Colonial Trust Ltd v Estate Nathan*<sup>32</sup> is almost always quoted, as it is here too, when the meaning of the phrase *vested rights* is analysed:

Unfortunately the word "vest" bears different meanings according to its context. When it is said that a right is vested in a person, what is usually meant is that such person is the owner of that right – that he has all rights of ownership in such right including the right of enjoyment. ... But the word is also used in another sense, to draw a distinction between what is certain and what is conditional[:] a vested right as distinguished from a contingent or conditional right.

In this light, therefore, in the case of a conditional right or interest, no vested right is acquired prior to fulfilment of the condition.<sup>33</sup> Thus, in *Jewish Colonial Trust*, Watermeyer JA distinguishes between two uses of *vest*: one indicates ownership (including enjoyment) of a right; the other, an unconditional right. The answer to the question of where the right is vested can, thus, conveniently be –

... sought by establishing whether the ultimate beneficiaries had obtained a vested right in the trust assets ... That, in its turn, depends on the question whether the grant to the charities was conditional or contingent and not

29 Cowen, DV. 1949. "Vested and contingent rights". *South African Law Journal*, 66:404.

30 (ibid.:404–405).

31 *Durban City Council v Association of Building Societies*, 1942 AD 27.

32 1940 AD 163 at 175.

33 *De Leef Family Trust & Others v Commissioner for Inland Revenue*, 1993 (3) SA 345 (AD) at para. 13.

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certain.<sup>34</sup> It must be determined with reference to the language ... properly interpreted in the light of the admissible surrounding circumstances.

According to Van der Merwe,<sup>35</sup> the first use of *vest* refers to the ownership of a right and not to the ownership of the benefit or asset as such. Van der Merwe says that it may not be terminologically correct to use *ownership* in relation to a right.<sup>36</sup> When the term *ownership* is used to indicate the relationship between a person and a legal object, it usually contemplates the **right** to a physical object or thing.

As always, however, there are exceptions. For example, a usufructuary interest in a personal right or a bond in respect of a usufructuary right has been acknowledged under 69 of the Deeds Registries Act,<sup>37</sup> and is basically a right to a right.<sup>38</sup> *Ownership* usually connotes the most complete real right a person can have in relation to a legal object. Dogmatically, a person is **entitled** to a right, or is the **holder** of a right.

Incorrect use of the word *vest* can cause confusion, as the impression is created that the person who has a vested right to a benefit is also the owner of that benefit. A disposition in a will (or a contract, for that matter) does not transfer ownership of corporeal property to a beneficiary: it only disposes of rights in favour of beneficiaries.<sup>39</sup>

Rights may be vested or conditional. Van der Merwe, taking authority from various cases and from Cowen,<sup>40</sup> thus says that “[t]he vesting of a right does not mean that a right of ownership in the thing is obtained”.<sup>41</sup> An example is given of a legatee who does not acquire the dominium in the property immediately on the death of the testator, but acquires a vested right to claim from the testator’s executors at some future date the delivery of the legacy – after confirmation of the liquidation and distribution account – as was decided in *Greenberg & Others v Estate Greenberg*.<sup>42</sup>

This means that the state does not own communal land in the sense of absolute and exclusive dominion over the resources thereon. In communal areas which are not yet declared local authority areas, community-based property rights already exist among the community members; something is seriously wrong,

34 See *Jewish Colonial Trust Ltd v Estate Nathan*, 1940 AD 163 at 175–176.

35 Van der Merwe, BA. 2000. “Meaning and relevance of the phrase ‘vested right’ for Income Tax Law”. *South African Mercantile Law Journal*, 12(2):319.

36 (ibid.).

37 No. 47 of 1937.

38 Van der Merwe (2000:320).

39 Van der Merwe (ibid.), taking authority from *Commissioner for Inland Revenue v Estate Crewe & Another*, 1943 AD 656 at 667.

40 Cowen (1949:417). Thus, a vested right entails an indefensible right, including the right of enjoyment, even though it may be postponed.

41 (ibid.); see also Van der Merwe (2000:320).

42 1955 (3) SA 361 (A) at 364.

therefore, when community members are obliged to request their national governments to grant them property rights.<sup>43</sup> In essence, this means that the notice gazetted by the Minister under the Local Authorities Act takes away these property-based rights and vests them in the state for the benefit of the local authority to be formed or already formed.

Wolfgang Werner states that that *vest* means “own”.<sup>44</sup> Considering the interpretation above and the elaboration thereof, this conclusion – like others to the same effect – would be wrong. For example, the Legal Assistance Centre submits the following:<sup>45</sup>

Section 17 makes it very clear that all communal land areas vest (**belong** to) in the State, which must keep the land in trust for the benefit of the traditional communities living in those areas. Because communal land **belongs** to the State, the State must put systems in place to make sure that communal lands are administered and managed in the interests of those living in those areas. The Act does this by incorporating the offices of the Chief or the Traditional Authority and by creating Communal Land Boards which will work together to ensure better communal land administration. [Emphases added]

In response to this it should be noted that section 17 of the Communal Land Reform Act does not make it “very clear” that all communal land is owned by the state; hence, the Legal Assistance Centre is also wrong.

The above explanation shows that the word *vest* does not mean “ownership”: it remains subject to a number of interpretations, none of which leads to absolute ownership. This point does not change the position of the Legal Assistance Centre and the Namibia National Farmers’ Union regarding the obligations which the state has in regard to the administration of communal land. The explanation below highlights this and expands on the position taken in this paper.

### ***Vest for the purpose of trust administration***

It should be noted that a right can be vested for the purpose of administration. The court in *Greenberg & Others v Estate Greenberg* confirms this when it

43 Lynch, O.J. 1999. “Promoting legal recognition of community-based property rights, including the Commons: Some theoretical considerations”. Paper presented at the Symposium of the International Association for the Study of Common Property, 7 June 1999, at the Workshop in Political Theory and Policy Analysis, Indiana University, Bloomington, 7 June 1999; available at <<http://www.indiana.edu/~iascp/symposium99.html>>; last accessed 23 February 2009.

44 See, for example, the conclusion by Wolfgang Werner, who says that “[i]n a formal legal sense, the State is the owner of all communal land”; Werner, W. 2000. “Land and resource rights: Namibia case study”. Case study prepared for the Inaugural Workshop of the Pan-African Programme on Land and Resource Rights, Cairo, 25–26 March 2000. p 1; available at <<http://www.acts.or.ke/paplr/docs/PaperCairo-fianoutput.pdf>>; last accessed 30 March 2009.

45 LAC & NNFU (2003:xvii).

indicates that, with reference to a beneficiary's rights, the term *vested* can have different meanings:<sup>46</sup>

When "vested" is used in this sense it is not however necessary that the right of enjoyment should accrue to the person in whom the property is vested. Property may be vested in someone purely for purposes of administration.

The above means that 'transferring' the administration of land from the declared local authority area which is envisaged under section 14 of the Ordinance and section 3 of the Local Authorities Act is misplaced: the state cannot transfer a vested right. A right is only transmissible when it forms an asset in a beneficiary's estate and is transmissible to the heirs, representatives, or cessionary upon its cession. For clarity, the law of succession can inform us here. *Vesting* and *transmission* are normally so closely associated in the law of succession that they are sometimes regarded as synonyms, or at least necessary correlatives.<sup>47</sup> This is not correct, according to Van der Merwe,<sup>48</sup> who says that while transmission is a normal consequence of vesting, it is not a necessary consequence.<sup>49</sup>

The trust formed under section 17 is a special form of a trust – a public trust. It is unconceivable that there can be a trust of this special nature where no legal obligations arise if the state fails to develop a declared local authority area as is the motive under the section. As the trustee of communal land, the state, according to the available statutory powers, has the discretion to develop the area or not. In other words, the section prevents the community involved from claiming full control and authority over communal land. Authority for this semantic intricacy can be derived from tax law cases.<sup>50</sup> The analysis below offers a close scrutiny of the relationship between the state and traditional communities residing on communal land, and offers a model for the state to follow in dealing with communal land.

## Procedural matters

In terms of section 16 of the Communal Land Reform Act, the President, with the approval of the National Assembly, may, by proclamation in the *Gazette*, withdraw from any communal land area any defined portion thereof which

46 See also *De Leef Family Trust NNO v Commissioner for Inland Revenue*, (1993) 55 SATC 207 at 215, and Honore, H & E Cameron (Eds). 1992. *Honore's South African Law of Trusts* (Fourth Edition). Cape Town: Juta & Co., pp 471–472.

47 *Samaradiwakara & Another v De Saram & Others*, 1911 AD (PC) 465 at 469–470; *Estate Kemp v McDonald's Trustee*, 1925 AD 491 at 500.

48 Van der Merwe (2000:323).

49 *In Re Alien Trust*, 1941 NPD 147 at 156; *Commissioner for Inland Revenue v Sive's Estate*, 1955 (1) SA 249 (A) at 257; and Cowen (1949:417).

50 *ITC 1570* (1994) 56 SATC 120; see also *ITC 1520* (1991) 54 SATC 168 for an example of a very loose application of this test in order to obtain the desired practical effect.

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is required for any purpose in the public interest, and in such proclamation may make appropriate amendments to Schedule 1 to the Communal Land Reform Act so as to redefine any communal land area affected by any change under the declaration. The fact that the President needs authorisation from the National Assembly shows a clear distinction between South Africa's wall-to-wall system and the Namibian system, in which Traditional Authorities have no direct say in central government decision-making processes. Thus, Traditional Authorities have only an indirect voice in Parliament, and according to the latter Act, no communal land can be withdrawn without parliamentary authorisation.

In addition to the stipulated procedures described above, concerning the conversion of land from communal land to townland<sup>51</sup> or any other type of local authority area, subsection 2 of section 16 of the Communal Land Reform Act provides that communal land may not be withdrawn unless prescribed statutory procedures are met. Section 16(2) of the Communal Land Reform Act provides the following in particular:

- (2) Land may not be withdrawn from any communal land area under subsection (1)(c), unless all rights held by persons under this Act in respect of such land or any portion thereof have first been acquired by the State and just compensation for the acquisition of such rights is paid to the persons concerned.

This illustrates that the state does not have absolute ownership and control of land in communal areas. The position is that the community-based rights – which include the right of ownership of land – have to be respected first. Therefore, in order for land to be withdrawn and in order for the state to absolutely own the land which is to be declared a local authority area, in terms of section 16 it has to acquire the community-based rights which the community has. These community-based rights, as explained above, include the right to ownership of land or, in simple terms, the right to land. Therefore, the state first has to acquire the right of ownership before such land can be effectively withdrawn from communal land. This also explains why, under section 16(2), the state is compelled to compensate the inhabitants for loss of the rights on the land they inhabited – or, in essence, owned. It is this loss, among others, which is compensated. The said compensation payable to a person in terms of subsection (2) must be determined either –

- by agreement between the Minister of Lands and Resettlement and the person concerned, or

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51 *Townland* means the land within a local authority area situated outside the boundaries of any approved township which has been set aside for the mutual benefit of the residents in its area, and for purposes of pasturage, water supply, aerodromes, explosive magazines, sanitary and refuse deposits or other public purposes or the extension of such township or the establishment of other approved townships. See section 1 of the Local Authorities Act.

- failing such agreement, by arbitration in accordance with the provisions of the Arbitration Act.<sup>52</sup>

What, one may ask, is the need for such agreement, and what is the need for arbitration should agreement not be reached? One may say that there is no vertical relationship between the Government and the community in such an agreement. The agreement is a private one: thus, the Government cannot invoke state authority to override the powers and rights of communities. This is further supported by the point that it is only when the compensation procedure has been followed that communal land can rightfully be regarded as lawfully withdrawn; any portion of a communal land area thus withdrawn and for which compensation has thus been paid ceases to be communal land, and becomes available for disposal as state-owned land. The jurisdictional question under the statute, therefore, is whether compensation has been paid so as to allow the state to withdraw communal land. In the light of this jurisdictional fact, it is clear that the Minister cannot act lawfully under section 3 of the Local Authorities Act without first respecting section 16 of the Communal Land Reform Act. It should be noted that, although this network of statutes is not well coordinated, but the procedure has to be followed.

In the case of newly declared local authority areas which have caused disgruntlement in northern Namibia, therefore, if all compensation was paid and the recent proclamation of these areas was done procedurally in terms of section 3 of the Local Authorities Act, and if section 16 of the Communal Land Reform Act was respected, then the Traditional Authority would not have a say on what is happening in Helao Nafidi – no matter how aggrieving it would be on the part of the communities who live there. Section 16 of the Communal Lands Reform Act gives validity to the notice under section 3 of the Local Authorities Act, and it gives meaning to section 14 of the Ordinance of 1963, as amended in 1992.

## Internal conflict of laws and its effect on Namibian land law

The conflict between statutes and customary law in the proclamation of local authority areas can be explained as a clash between traditionalism and modernism. *Tradition* is a cultural force with social, economic, and political correlatives.<sup>53</sup> This becomes clearer as we consider that Traditional Authorities in northern Namibia can strategically use tradition to resist the homogenising, atomising, and alienating effacement of history and particularity – the cost paid by post-modernity that, to many, seems inevitable in the new global order.

<sup>52</sup> No. 42 of 1965.

<sup>53</sup> Cf. Glenn, P. 2000. *Legal traditions of the world*. Oxford: Oxford University Press; and Glenn, P. 2004. *Legal traditions of the world* (Second Edition). Oxford: Oxford University Press.

The position of Traditional Authorities in northern Namibia finds expression in international jurisprudence as we note that the ‘founders’ of the Traditionalist School, René Guénon and Ananda Coomaraswamy,<sup>54</sup> did not talk about ‘traditionalism’ but about the religious, metaphysical and esoteric traditions of the world, in light of the one truth from which all such traditions proceed, and to which they provide formally distinct but essentially equivalent paths of return.<sup>55</sup> The said authors defined *tradition* as the transmission of a perennial wisdom, unanimous in essence, from the beginnings of the human race to this present moment: a transmission punctuated and channelled by spiritual or even divine revelations and sanctioned by community leaders who lead under the instruction of the spiritual, ‘original’ or traditional world.<sup>56</sup>

The systems of modern government are not guided by perennial wisdom. In essence, the legitimacy of traditional governance under Traditional Authorities and under central government or the decentralised offices thereof stand on opposite sides. The modern government derives its legitimacy from elections, whereas there is generally no election at traditional level. The position of Traditional Authority leaders in relation to elected members of local authorities is clearly shown by the provisions of Part II of the Local Authorities Act, which deals with the election of local authority officials. Without elections and subsequent procedural issues like oaths of affirmation, there would not be a legal local authority. Thus, it is apparent that local authorities do not derive their authority from traditional structures and are not subject to customary laws. In essence, the fact that Traditional Authorities do not have jurisdiction over an area declared a local authority area implies that such areas can never be subject to customary land law. Indeed, proclaimed local authority areas are now governed by statutory laws as opposed to customary laws, which in turn entail contrasting titles to land. While local authority laws on land entitlement are derived from national legislation, –<sup>57</sup>

[n]ative title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.

It is, therefore, not surprising that Traditional Authorities in northern Namibia are clashing with local authority officials over land allocation. Of importance

54 Generally, see Coomaraswamy, A. 1991. *What is civilisation? and other essays*. Oxford University Press.

55 Upton, C. “What is a ‘Traditionalist’? – Some clarifications”. *Sacred Web: Journal of Tradition and Modernity*. Available online at <[http://www.sacredweb.com/online\\_articles/sw17\\_upton.html](http://www.sacredweb.com/online_articles/sw17_upton.html)>; last accessed 26 January 2009.

56 (ibid.).

57 *Mabo v Queensland* [No. 2], (1992) 175 CLR 1 at 58. Many other cases were decided in this line; see e.g. *Calder v Attorney General of British Columbia*, [1973] SCR 313; *St Catherine’s Milling and Lumber Company v The Queen*, (1888) 14 App Cas 46, at 54; *Kruger & Manuel v The Queen*, (1977) 75 DLR (3d) 434; *AG for Canada v AG for Ontario*, [1898] AC 700; and *Te Weehi v Regional Fisheries Officer*, [1986] 1 NZLR 680, 691–692.

here is the King of the Ndonga, who is opposed to the actions of Chinese businessmen, who are blocking off *iishana*<sup>58</sup> for the purpose of erecting business structures. From the perspective of Traditional Authorities, the change in power to control land allocation is an insult to customary authority. Can this be called a clash of civilisations? Traditional Authorities keep trying to enforce customary laws regarding land rights, in ignorance of the fact that they no longer have the right to allocate land in declared local authority areas.

This relationship of conflict between state and customary laws evidences the compelling nature of customary law. According to Woodman, *custom* means the practices of the people.<sup>59</sup> But it is important to remember that custom is not simply what people practice: it expresses a set of values of communal life, as well as a way of maintaining order and relations of power. Chanock puts it as follows:

This tends to be forgotten in situations in which custom derives its identity from a contrast with, and an opposition to, and a rallying point against, the law of the state. The external, written, bureaucratized, enforceable order challenges the order of the local communities. Custom seeks to establish itself as representing something special about the local societies in terms of long-lived, and therefore acceptable and right practice, or as the expression of their cultural essence.<sup>60</sup>

Indeed, the “external, written, bureaucratized, enforceable order challenges the order of the local communities” in Namibia, and the allocation of land by Traditional Authorities is the “acceptable and right practice” in communities, and it is a strong “expression of their cultural essence”. This explains why Traditional Authorities find it hard to accept that they have no power to allocate land in a proclaimed local authority area. This has been evidenced by the events surrounding Helao Nafidi, where Traditional Authorities have been in conflict with Chinese companies which closed the *iishana* used by community members. The existence of a local authority area cannot find explanation in traditional laws but in statutes governing local authorities; thus, a Chinese businessman, for example, will not understand when a Traditional Authority asks him to stop blocking off the *iishana*. The misunderstanding is easily explained by the differences in the spheres of law in which the two men operate. According to Masaji Chiba,<sup>61</sup> there are three spheres of law, namely –

58 The plural of *oshana* (a slight depression temporarily filled with rain water) in Oshiwambo.

59 Woodman, G. 2007. “African customary law”. Lecture delivered on 8 February 2007, School of Oriental and African Studies, University of London, London.

60 Chanock, M. 1989. “Neither customary nor legal: African customary law in an era of family law reform”. *International Journal of Law and the Family*, 3:74.

61 Generally, see Chiba, M. 1989. *Legal pluralism: Toward a general theory through Japanese legal culture*. Tokyo: Tokai University Press. See also Menski, W. 2006. *Comparative law in a global context: The legal systems of Asia and Africa* (Second Edition). Cambridge: Cambridge University Press, p 519.



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- the sphere of official law
- the sphere of unofficial law, and
- the sphere of legal postulates.

While these spheres will not be explained here in more detail, suffice it to say that the example of the Chinese businessman and the local authority under which his business is operating falls under the so-called official law, whereas the Traditional Authorities operate under customary law. The Chinese businessmen who are blocking off *iishana* obtain authority to do so from local authority laws, that is, the official land law regarding municipal land allocation, which is different from the unofficial customary law which Traditional Authorities follow. Therefore, the actors in this clash are operating under two different spheres of law.

Traditional authorities often find themselves operating under unofficial laws derived from customary law originating from the obligatory nature and power of customs. The power of custom is found in the fact that it is reflected in the conduct of people toward one another. Thus, the further a society moves away from its customary law systems, the greater the need for laws coercively enforced by the state.<sup>62</sup>

The coercive enforcement of state law in the context of the Helao Nafidi incident will cause even more polarisation not only between statutory and customary law, but also between the state and Traditional Authorities, since the feelings of apartheid state brutality have not been forgotten. Indeed, the Government has been very cautious about this internal conflict of law, because it has the potential of creating political conflict. The fact that customary law is confirmed by the Namibian Constitution means that the state is obliged to respect customary structures. For this reason, the statutes provide for procedures to be followed in a case where a portion of communal land is to be withdrawn from a larger communal area. For example, section 17(2) of the Communal Land Reform Act requires compensation to be paid if the withdrawal affects customary or communal land rights, as explained above. It should be noted that the statutes may try to strike a balance between traditional and local government powers, but the internal conflict of laws will always be a living reality that may derail certain developmental projects such as the declaration of local authority areas. The constitutional confirmation of customary law is of little help in this instance, since the same confirmed customary law is subjected to the authority of statutory law when it comes to the proclamation of local authority areas.

However, with the constitutional confirmation of customary law and its appearance in a number of pieces of legislation, we see that the distinction

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<sup>62</sup> Generally, see Shapiro, M. 1981. *Courts: A comparative political analysis*. Chicago: University of Chicago Press.

between customary law and official law is blurred. This distinction shows the difference of existence of laws in a pluralistic society whereby traditional Authorities are governed by both state and customary laws. Some would say that Traditional Authorities are unofficial institutions and that local authorities are formal. Notably, a key distinction is that *formal institutions* are those backed by the law – implying enforcement of rules by the state – while *informal institutions* are upheld by mutual agreement, or by relations of power or authority, and where rules are, thus, enforced endogenously. This means that Traditional Authorities in Namibia are both formal and informal because they are backed by the Traditional Authorities Act and unofficial customary law and, at the same time, have rules that are enforced endogenously: their structures are upheld by mutual agreement or by relations of power or authority.

The question that arises now is whether customary law is not official law under Article 66 of the Constitution. This question can be answered most convincingly in the affirmative, but again, we should note that the **living** customary law is not necessarily part of the Constitution. Therefore, it can be said that the forces of tradition and modernity are at play whenever there are conflicts between local authorities and Traditional Authorities. Governance at central government level is mainly viewed as being from the top down. This stands in contrast to the traditional way of governance, where the law of the community flexibly governs traditional life. This law is autochthonous and local, which is why it is also called *the peoples' law* as opposed to the modern central government law, the latter often being referred to as *power's law*.<sup>63</sup>

In opposing the power of local authority law in the allocation of land, Traditional Authorities seem to be trying to assert their authority over the power's law. That land can only be allocated by the King, Queen or Chief seems to be the only 'truth' for Traditional Authorities. According to Nayar, an underlying thrust of the conceptual and practical implication of peoples' law as opposed to central government law is the reclaiming of peoples' rights to 'truth', manifestly in "the reappropriation from dominant sites and processes and the narratives of history and futures."<sup>64</sup> From this one can discern that, central to the politics of peoples' law, is the reclaiming of the right to right judgment. The withdrawal of communal land in this regard can be regarded as a way of silencing Traditional Authorities in the land allocation process – as indeed it is, since withdrawal of communal land comes with the removal of traditional power. This runs counter to the way customary structures work in the application of the peoples' law. The process through which peoples' law is made rejects the negation of voice; however, the process entails that the exclusionary tendencies of power's law. Hence, the Traditional Authorities Act and the Communal Land Reform Act

63 Nayar, J. 2003. "Thinking the 'impossible': Peoples' law". *Law, Social Justice and Global Development Journal*, 1. Available at <http://elj.warwick.ac.uk/global/issue/2003-1/nayar.html>; last accessed 28 January 2009.

64 (ibid.).

can jurisprudentially be regarded as legislative instruments which seek to emphasise the validity of peoples' fora of judgment, of 'doing law'. This is well supported by Nayar, who writes as follows:<sup>65</sup>

The people of peoples' law may determine the issues of contestations for themselves; they may affirm solidarities notwithstanding these contestations. They are not fictitious 'law-models' in any 'original position'; they exist in real time, real place and with real hopes, convictions, uncertainties. They do need it to be repeated unto them the patronising benevolence of 'civilised' law's promise of objective and universal resolution of their conflicts. The peoples of peoples' law are aware and conscious of their own need for critical self-reflection and corrective action. They move in fluid form and evolve into political manifestations. The peoples in peoples' law are a lived consciousness. They are self-defining. And for all their 'messiness' as a 'legal concept', they are the richer in their political voice.

It is clear from the Namibian statutory framework that there is no way Traditional Authorities can gain the power to allocate land in local authority areas or be consulted in the process of such allocation. The declaration of land as a local authority area and the removal of the Traditional Authority's jurisdiction over such former traditional structures is a reality which Traditional Authorities have to accept, albeit painfully. The declaration or proclamation is in itself an idea which embraces the concept of *urbanisation* – and that with a strong Western orientation. In this light we see that the powers of Traditional Authorities are victims of the internal conflict of laws and, in particular, the triumph of Westernisation over traditional power. It can be concluded in the context of Namibia's current statutory law that the project of Westernisation cannot fail to cause friction with traditional culture, rooted as the latter is in the unique history of each community.<sup>66</sup> In the context of clashes between local authority officials and Traditional Authorities in respect of land surrounding Helao Nafidi, it should be noted that Westernisation elicits three principal responses from traditionalists:<sup>67</sup>

- Attempts to suppress or, if possible, eliminate traditional culture, which is viewed as an impediment to modernisation
- Bitter resistance to modernisation, which is considered a threat to the traditional culture, and
- Efforts to accommodate and develop both modernisation and the traditional culture without destroying the latter, in the recognition that modernisation is historically inevitable or otherwise indispensable to national independence.

65 (ibid.).

66 Committee for Kokugakuin University Centennial Symposium. 1983. "Towards cultural identity and modernization in Asian countries". In Daigaku, K & NB Kenkyujo. 1983. *Cultural identity and modernization in Asian countries: Proceedings of Kokugakuin University Centennial Symposium Institute for Japanese Culture and Classics*. Tokyo: Institute for Japanese Culture and Classics, Kokugakuin University.

67 (ibid.).

The three points listed above are clearly manifested in the process of urbanisation in Namibia and, in reality, the three attitudes are of course complexly intertwined; indeed, it is inconceivable for any one of them to be present alone. The difficulties encountered in putting the third response into practice are not hard to imagine.<sup>68</sup> Tradition is clearly at play against the inevitable force of urbanisation, which is an element or facet of modernisation and globalisation. In this light, the internal conflict of laws in Namibia will always evidence the tradition/modernity dichotomy. This conflict also causes problems, for example, when it comes to cooperation in developmental projects.

In the light of the above, the proclamation of a local authority area under the Local Authorities Act is a juristic act that can be categorised under the concept of *modernity*. Equally important is the point that modernity – with its chaos of conversation; its chaos of lifestyles; its attitude that there is nothing more sacred than supremacy of the central government, central legislature and the dictates of the rich and powerful – is viewed as an inevitable reality.<sup>69</sup> Modernity, therefore, is an assault on the dictatorship of relativism.<sup>70</sup> Modernity does not respect traditional structures; it is on the opposite end of the spectrum of development, and stands opposed to tradition. Tradition, therefore, has to give in to modernity. It is for this reason that Traditional Authorities lose their power over land that has been declared a local authority area.

The events in Helao Nafidi regarding the proclamation of local authority areas indicate that community resistance to tenure imposition can be vociferous. However, such resistance can easily be thwarted by a colonising power. In independent Namibia today, although force is not being used, community resistance has nonetheless been thwarted by Government land tenure programmes, and the communities' political set-up has been seriously weakened as a result.<sup>71</sup>

The reality of traditional power structures cannot be ignored by the central government, for such structures carry the voice of the majority of the Namibian populace. If the majority of rural Namibia depend on traditional power structures for daily governance and dispute resolution, then the power of custom is clearly much stronger than can be contemplated under the constitutional confirmation of customary law in Article 66. This becomes self-evident if we

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68 (ibid.).

69 See the discussion in Vattimo, G, J Kristeva, B Smith, H Bloor, D Norris, C Boyarin, D Jeffrey, M Perl, Kenneth J Gergen, R Shusterman, JS Jeffrey, F Baine, HM Campbell, L Daston, Al Davidson & JF Goldhill. 2007. "Dictatorship of relativism?: Symposium in response to Cardinal Ratzinger's last homily. In memory of Clifford Geertz". *Common Knowledge*, 13:2–3.

70 (ibid.).

71 See Hinz, MO. 1998. "Communal land, natural resources and traditional authority". In D'Engelbronner M, MO Hinz & J Sindana (Eds). *Traditional authority in southern Africa*. Windhoek: Centre for Applied Social Sciences, pp 183–188.

consider Chanock, who superbly explores customary law in what he calls the “Third World”, the role of customary law in the absence of a powerful state legal system, and the impact of international organisations/international law in validating customary law.<sup>72</sup> The transformation effected by the application of Western notions of customary law to indigenous systems across the colonised world has evidently reordered societies and rewritten ‘traditional’ ideas and notions. Chanock explores the inherently dynamic nature of customary law, stating that “[t]raditional does not mean inflexible adherence to the past: it simply means time-tested and wise”<sup>73</sup>. However, the “time-tested and wise” principles will always give way to modern pieces of legislation which promote modernity or promote adherence to international standards as opposed to customary practices at community level – as is happening under Namibian local authority land law. In this light, it is not surprising that numerous conflicting or competing rule orders exist in Namibia, as they do in most of Africa, “characterised more often than not by ambiguities, inconsistencies, gaps, conflicts and the like”.<sup>74</sup>

Be that as it may, the two institutions continue to coexist, but also interact in a complex and dynamic manner. Sally Falk Moore asserts that reglementary processes which include modern government attempts to enforce laws and control the behaviour of traditional leaders through the use of explicit rules from formal laws take place at a multiplicity of levels within society, and within a variety of social fields.<sup>75</sup> With regard to community-based resource management, particularly land management, institutions mediating resource use need to be located within a complex institutional ‘matrix’ which links the position of social actors at the micro-level to the macro-level conditions that prevail in the wider politico-economic context.<sup>76</sup> Including an analysis of power and difference as central issues allows us to see that these matrices are likely to be very messy, and characterised by certain “gaps, ambiguities and conflicts”, as highlighted by Moore.

## Conclusion

The statutory position indicates that, although Traditional Authorities have the primary power to allocate land in communal areas, these powers are

72 See Channock, M. 2006. “The linkage between sustainable development and customary law”. In Orebeck, P, F Bosselman, J Bjarup, D Callies, M Chanock & H Petersen. *The role of customary law in sustainable development*. Cambridge: Cambridge University Press, p 254.

73 (ibid.).

74 Moore, SFM. 1975. *Law as process: An anthropological approach*. London/Henley/Boston: Routledge & P Kegan, p 3.

75 (ibid.:3). See also Ambler, J. 2001. “Customary law and natural resources management: Implications for integrating state and local law in Asia”. *Tai Culture: International Review on Tai Cultural Studies*, VI(1–2):43; Winston, KI (Ed.). 1981. *The principles of social order: Selected essays of Lon L Fuller*. Durham, NC: Duke University Press, p 213.

76 (ibid.).

extinguished when such land has been declared local authority area because the land is no longer communal land. The declaration of a piece of land as a local authority area constitutes a withdrawal of communal land in terms of section 16 of the Communal Land Reform Act. This means that Traditional Authorities have no say in what happens to land which has been declared a local authority area in terms of the Local Authorities Act or the Townships and Division of Land Ordinance of 1963, as amended by the Townships and Division of Land Amendment Act of 1992.

The proclamation of local authority areas in Namibia shows the dictates of power's law over peoples' law in that power's law is transforming the shape and politics of Traditional Authorities. Moore refers to the –<sup>77</sup>

... continuous making and reiterating of social and symbolic order as an active process existing orders which include traditional structures are endlessly vulnerable to being unmade, remade and transformed, sometimes conflicting, and sometimes inconsistent.

The making, repeal and re-enactment of the laws regulating Traditional Authorities in the post-colonial era is a classic example of power's law prevailing over peoples' law. According to Moore, institutional analysis must, therefore, include both a structural analysis of complexes of rule orders – which includes “questions of domination/autonomy, hierarchy/equivalence, proliferation/reduction, amalgamation/division, replication/diversification in the relations within and among the constitutive levels and units”<sup>78</sup> – and a processual and actor-oriented analysis of struggle, i.e. of action which is “choice making, discretionary, manipulative, sometimes inconsistent, and sometimes conflictual”.<sup>79</sup>

This paper has shown that the internal conflict of laws in Namibia in general and the declaration of local authority areas has its jurisprudential background shrouded in legal duality and/or pluralism, and that law, whether customary or otherwise, is a system of representation: one that creates meaning within a system of power. The conflict regarding land allocation in urban and communal land evidences that the cultural significance of law as evidenced by the influence of custom should not be ignored. The general idea behind the internal conflict of laws is that customary law, as a product of custom, has inherent controversies. Even within such controversies as those regarding the declaration of communal land as local authority areas, it is observable that the powers of Traditional Authorities remain intact should the compensation procedures prescribed under section 16 of the Communal land Reform Act not be followed. This flows from the position that a declaration of communal land as a local authority area constitutes a withdrawal of communal land, and if such declaration affects the rights of the communities or communal residents concerned adversely, then the provisions of section 16 of the said

77 Moore (1975:3).

78 (ibid.:28).

79 (ibid.:3).

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Act become operational. In the context of the whole discussion, it is clear that the proclamation of local authority areas under Namibian law has its jurisprudential implications, which are philosophically evidenced in legal duality or pluralism and an internal conflict of laws.

# Confronting grand corruption in the public and private sector: A spirited new initiative from Tanzania

Chris Maina Peter\* and Juliana Masabo\*\*

I cannot understand how the radar can be a priority for Tanzania ... When I think about the poverty experienced by the schoolchildren whom I visited in Lunga Lunga, the concept of spending such an amount [US\$40 million] on military radar is shocking.

Daniel Kawczynski (MP)<sup>1</sup>

## Introduction: Understanding corruption

Corruption, like all vices the world over, has many names under which it hides in all languages.<sup>2</sup> It also takes many forms. These include bribery, fraud, nepotism, embezzlement, graft, money laundering, extortion, influence peddling, abuse of public office or property, gifts, insider trading, and under- or over-invoicing.<sup>3</sup> But notwithstanding gaining such prominence – or, rather, notoriety – the question remains whether we all understand what *corruption* actually means.

*Corruption* has been defined as follows:<sup>4</sup>

An act done with intent to give some advantage inconsistent with official duty and the rights of others. The act of an official or fiduciary person who unlawfully and wrongfully uses his station or character to procure some benefit for himself or for another person, contrary to duty and the rights of others.

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1 The Conservative Member of Parliament for Shrewsbury & Atcham Constituency in the United Kingdom. See the United Kingdom's House of Commons debate reproduced verbatim in "Tanzania's Radar Deal: System Cost of £28m an Extraordinary Amount," *The Guardian* (Tanzania), 7 April 2007, p. 9.

2 The term corruption is associated with terms such as putrefaction, putrescence, rotteness, adulteration, contamination, debasement, defilement, infection, perversion, pollution, vitiation, demoralisation, depravation, depravity, immorality, laxity, sinfulness, wickedness, bribery, dishonesty etc.

3 Some people have referred to corruption as a cancer. See Wolfensohn, James D. 2005. *Voice for the world's poor: Selected speeches and writings of the World Bank President*. Washington, DC: The International Bank for Reconstruction and Development & World Bank, p 45.

4 See the Centennial Edition of *Black's Law Dictionary* (1991).



Simply explained, *corruption* is an act or conduct of dishonesty which is intended to implicitly influence, deviate from and alter the just behaviour and accepted societal propriety in order to satisfy one's selfish and parochial interests.<sup>5</sup> It should be noted that, in all cases, corruption is a reciprocal process involving two sides: the corruptor and the corrupted. Both have interest in the success of their specific unethical and illegal aims, and stand to benefit from the corrupt act. This makes the detection of corruption extremely difficult.

Corruption is not monopolised by civil servants: it is found in the public sector as well as in the private sector and within civil society.<sup>6</sup> In most societies, and particularly in the developing world, corruption has developed into a culture: not accepted, not loved – but taken for granted and ignored, and left to exist and entrench itself.<sup>7</sup>

The adverse consequences of corruption are immense. Through corruption, right becomes wrong and vice versa; the victim becomes the accused and the accused a witness; white becomes black and day becomes night because the right price has been paid. In short, corruption is an enemy of the people. What makes it even worse is that the impact of corruption disproportionately falls on the poor and most vulnerable sections of society.

James D Wolfensohn, former President of the World Bank, puts it better:<sup>8</sup>

In country after country, it is the people who are demanding action on this issue. They know that corruption diverts resources from the poor to the rich, increases the cost of running businesses, distorts public expenditures, and deters foreign investors. They also know that it erodes the constituency for aid programmes and humanitarian relief. And we all know that it is a major barrier to sound and equitable development.

Thus, the poor are in a double jeopardy situation. In the case of grand corruption, where powerful government bureaucrats take large kickbacks and major service projects are not properly implemented, it is the poor who miss the services. In the case of petty corruption, it is again the poor and vulnerable who will miss services in hospitals and courts of law because they are unable to influence nurses, clerks and others who deal with administration.

Corruption is not a new phenomenon: it is as old as history itself. There are adequate references and condemnation of this vice in most of the holy books. For instance, the Holy Koran describes the evil of bribery as immorally and

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5 See Nyantakyi, Kofi. 2002. "Corruption: What is it?". In Friedrich-Ebert-Stiftung (Eds). *Corruption and development in Africa*. Accra: FES, pp 1–10.

6 (ibid.:8).

7 See Campos, J Edgardo & Sanjay Pradhan (Eds). 2007. *The many faces of corruption: Tracking vulnerabilities at the sector level*. Washington, DC: International Bank for Reconstruction and Development & World Bank, pp 1–25.

8 See Wolfensohn (2005:50).

unlawfully taking advantage of the efforts of others. It is falsehood that drags a person away from honesty and probity and takes him/her towards a life of dishonesty. The Holy Koran further says:<sup>9</sup>

A man who resorts to corruption is a faithless person to his family, friends, society and government. Such a person is the most unmanly, avoid his friendship and brotherhood.

Equally, the Holy Bible has many references to corruption. It attributes corruption to a deceitful lust for corrupting things on this earth, like gold and silver. According to the Bible, corruption blinds the eyes of the wise and twists the words of the righteous.<sup>10</sup> The Bible says that the corrupt are like whitewashed tombs that are full of dead men's bones and all uncleanness. The corrupt are full of hypocrisy and iniquity.<sup>11</sup> They are wicked for accepting bribes to pervert the ways of justice.<sup>12</sup> Therefore, the Holy Bible sees a corrupt person as the one who would call God "Lord", but will never do anything that God says. Being slaves of corruption such people will not even regard their corrupt ideas, habits and actions as evil, and will finally perish in their own corruption, depravity and bondage.<sup>13</sup>

Over the years, corruption has continued unabated – although it has increased in volume, changed form, and become more refined as society developed. However, age notwithstanding, it does not mean that corruption is a permanent and non-ending phenomenon. People should not lose hope; rather, the struggle against corruption should be intensified.<sup>14</sup>

## Corruption and constitutionalism

Corruption is very relevant to constitutionalism. This is because it undermines all the major tenets of constitutionalism, namely good governance, the rule of law, and the independence of the judiciary.

9 According to the Holy Koran, corruption spreads like wildfire. It spreads from a father to his offspring, from teachers to pupils, from false prophets to their followers, from buyer to seller and vice versa, and so on, until society as a whole is corrupted. See *Holy Qur'an*. 1983. Text, translation and commentary by A Yusuf Ali. Brentwood, MD: Amana Corporation.

10 See Exodus 23:8 and Deuteronomy 16:19.

11 See 2 Chronicles 19:7.

12 See Proverbs 17:23.

13 On what the Holy Bible says on bribery and corruption, see Lang, J Stephen. 1999. *Biblical quotations for all occasions*. New York: Gramercy Books, pp 77–78. See also The New Rainbow Study Bible. 1996. *Holy Bible: New international version*. El Reno, OK: Rainbow Studies, Inc.

14 It has been correctly noted that, in recent years, corruption has become an issue of major political and economic significance – hence the necessity to curb it. See Ruhangisa, John Eudes. 2007. "Anti-corruption and governance in East Africa". In Ojenda, Tom O (Ed.). *Anti-corruption and good governance in East Africa: Laying foundations for reform*. Nairobi: LawAfrica, p 215.

## **Good governance**

The main victim of corruption is good governance. In a society where corruption reigns, one can hardly talk of good governance. This is because good governance is the centre of constitutionalism. It involves the fair exercise of political, economic and administrative authority in the management of a country's affairs at all levels. Good governance affirms a form of governance which is democratic, and comprises mechanisms, processes and institutions through which citizens and groups articulate their interests, mediate their differences, and exercise their legal rights and obligations. Good governance is, therefore, about efficient and effective management in the public sector, which is underpinned by high standards of integrity. The most important pillars of good governance include transparency in all affairs of the state, accountability to the public, responsiveness to people's needs, effectiveness in meeting people's expectations, and efficiency in all spheres. When corruption sets in it demolishes this well-conceived structure.

## **The rule of law**

In any democratic society that believes in constitutionalism, the rule of law must prevail. The rule of law demands that all subjects be treated equally before the law. That means that all classes of people in a civil society should be treated alike by the law itself and before all the law enforcement bodies and agencies created by the law. The law should neither be made to benefit a particular section of society nor disadvantage another.

Equality before the law, which is central to the rule of law, requires all functions of the state that are likely to affect the basic rights of the people to be subjected before the law.<sup>15</sup> This means that the state and its organs should act according to and within the authority conferred by the law. This is in terms of administrative law, rather than a spin-off of equality. In the same vein, the law should not give unnecessary privileges, advantage and cushions to the state and its organs. This rule is strict in the sense that, apart from the state being 'a subject' of law as a juridical person, if the state is accorded such privileges, it will abandon its duty to act within the law and the rights of the individual will be at stake – and without a remedy in cases of excesses. The ideal situation created by the rule of law crumbles when corruption sets in. Sections of society demand and are granted, through corrupt means, rights which they do not deserve, and undermine the rights of others without just cause. In such a situation, one cannot talk of the rule of law: *it is the rule of the corrupt*.

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15 See Hatchard, John, Muna Ndulo & Peter Slinn. 2004. *Comparative constitutionalism and good governance in the Commonwealth: An eastern and southern African perspective*. Cambridge: Cambridge University Press, pp 5–11.

## ***Independence of the judiciary***

The independence of the judiciary is another important element of constitutionalism which can easily be eroded in a corruption-ridden society. In a society which believes in constitutionalism, the judiciary occupies a very special position. This is because it is entrusted with the duty of deciding who is right and who is wrong. This task is given to judges, magistrates and other judicial officers. Within the doctrine of the separation of powers, the legislature is supposed to make the laws, the judiciary to interpret and administer them, and the executive to enforce them. To be able to undertake its functions fairly and impartially, the judiciary is required to be independent of the other two organs of state and independent from political pressure.

However, it is not sufficient for the judiciary to be independent of the legislative and executive arms of the state and the influence of politicians. The judiciary should also be *free from corruption*. In a society in which judicial decisions are not dependent on the evidence adduced before courts of law, but rather on the social status of the parties involved and how much they have bribed the prosecutors and judges, one can hardly talk of judicial independence. *This is because the judiciary is not independent, but firmly in the hands of the corrupt.*

## **Grand corruption: Its main elements**

In most societies, the type of corruption which affects and troubles the common person is petty corruption. This type of corruption involves the small change that has to be given to the clerk for a court file that 'could not be found' to miraculously appear; to the nurse so that your sick relative can get a bed and other services in a hospital ward; to the traffic police officer to close his eyes to an obvious traffic violation such as illegal parking, going through a red light, and driving an unroadworthy vehicle on a public road.

While not trying to justify the actions or omissions of these public officials, these are usually actions by low-ranking officers who have been squeezed by the system and are trying to make ends meet. A society that is serious about fighting corruption needs to address the real conditions under which this category of corrupt public official lives. It is naïve to protest vociferously about the actions of these officials without scientifically studying their situation. If we pay a monthly salary that can only last a week, how do we expect the person to survive for the three weeks until payday?

However, the real problem of corruption which undermines the society and unfortunately goes unnoticed by the majority of the population relates to *grand corruption*. This form of corruption has three main elements which are worth comprehending. One, grand corruption has serious and *devastating effects*

on the economy of the country. A single dirty transaction by a public official affects citizens in their millions across generations for many years to come. Two, grand corruption does not come out of *need*, but out of *greed*. It is done by people who are already well-off and who are already being taken care of by the society. More often than not, they have all the basic needs of life and beyond. They are therefore getting into destruction of the society and its resources for leisure and luxurious needs. It is “primitive” accumulation for the sake of it and at best in order to force recognition in the society. Three, grand corruption does not involve rank and file. It is done by the *highly educated* and the *elite* in the society.

What constitutes *grand corruption* is contextual. It depends on the country and the level of its economy. This is because the actions of the corrupt officials affect the different economies differently depending on the size of corruption involved and the economy of the state. In the Tanzanian context, grand corruption has been given four elements which identify it well. These are as follows:

- It should involve a huge amount of money (about US\$1 million);
- The person(s) involved must have highly ranked government posts (e.g. a Director in a Ministry or Department, or a higher placement);
- The transaction(s) involved must affect or dent the economy of the country, and
- The transaction(s) must affect the public interest.

In other jurisdictions, the conditions and the levels making a corrupt transaction *grand* may be different. However, *grand corruption* entails large-scale transactions mainly involving the state, such as major road constructions, construction of dams, and the procurement of military equipment. These types of activities involve large sums of state money. If a small percentage of this money disappears into private pockets it could mean a lot to the lives of individuals in positions of power and influence in government. On the other hand, it seriously affects the country and its economy because once corrupted, the public official is incapable of effectively exercising oversight over the projects or transactions involved. Therefore, the country ends up being the loser. It gets sub-standard products or services and, in some cases, nothing at all. For instance, it is not surprising for expired medicine worth millions of US Dollars to be delivered with no questions asked; for roads which do not meet required standards and do not last long to be constructed while people are watching; and for the state to start paying for hydroelectric dams which are never built.

## Tanzania and grand corruption

For years, there have been many dubious transactions in Tanzania that have – and continue to – cost the country dearly, but with which any right-

thinking member of the community can easily detect that there is something fundamentally wrong. However, the avenues towards challenging a dubious transaction like that are almost closed. The law has not been facilitative, the media is by and large controlled by self-serving parties, and freedom of expression is simply non-existent. Over and above that, all large government transactions are stamped “confidential” and are kept well beyond public scrutiny. This was the case in Tanzania, particularly during the many years of one-party rule.

More recently, particularly after the introduction of a multiparty political system and democratisation in general, people are becoming brave and questioning old taboos. However, although no positive results have been registered so far because of the presence of a single strong party which monopolises the political space, the very fact that these issues are being raised is important. Two examples in most recent past in Tanzania which stink of grand corruption are worth closer examination.

### ***Radar system purchase from Britain***

In 1995, the Government of Tanzania raised the idea in the National Assembly that it wanted to purchase a radar system in order to make the country’s airspace safer and, in so doing, attract more airlines to the country. The majority of the Members of Parliament (MPs) objected to the idea. According to the legislators, Tanzanians had more serious and pressing problems which the government should treat as priority, namely those relating to poverty, and areas such as health and education.

Despite the MPs’ objections, the government went ahead with the project. In 2001 it decided to order a civilian/military radar system from BAE Systems in the United Kingdom, at a cost of £28 million. Strong objections were raised to the deal by the then UK International Development Secretary, Clare Short, and the former Chancellor of the Exchequer and now Prime Minister, Gordon Brown. The radar system was alleged to be four times more expensive than a normal civil air traffic control system, which Tanzania actually needed.

This matter divided the Labour Cabinet in UK. The opposing argument held that Tanzania, which already had eight military jets, did not need such a sophisticated aviation system. British MPs urged their government to assist Tanzania in addressing poverty instead. However, then Prime Minister Tony Blair supported the purchase – allegedly to salvage 250 jobs at BAE Systems at Cowes. Thus, he sided with Isle of Wight MP Andrew Turner, who argued that Tanzania was a grown-up government which should be allowed to make its own decisions without interference by the British. The project was also condemned by the World Bank, however, which called it a waste of money for a country with a per capita income of just £170 per year. Nonetheless, without any public debate in Tanzania, the controversial radar system was

delivered and installed. Tanzania's foreign debt was automatically increased by £28 million.<sup>16</sup> This was not to be paid by current politicians, but by future generations. A lengthy investigation by the Serious Fraud Office (SFO) in the UK subsequently discovered that 31% of the deal's contract price had been diverted via Switzerland. BAE had transferred the money to a subsidiary, Red Diamond Trading, registered anonymously in the British Virgin Islands. The latter moved the cash to a Swiss account in the name of a company that was secretly controlled by a Tanzanian middleman, Shailesh Vithlani. Vithlani allegedly passed the money on to Tanzanian politicians and officials. He also maintained close ties with top politicians and military leaders, and has acted as an agent not only on the radar deal, but also in the 2002 purchase from the United States of a top-of-the-range Gulfstream official jet for the then Tanzanian president, Benjamin Mkapa, at a cost of more than US\$40 million.

It is embarrassing that new information is now emerging, questioning the propriety of these two transactions. Information which has not yet been openly refuted by the Tanzanian Government indicates that, in the radar system deal, a Tanzanian middleman involved was paid US\$12 million (a 30% kickback) by BAE Systems to distribute to government functionaries who 'facilitated' the deal. This amount was paid directly into a Swiss bank account in the name of the middleman.<sup>17</sup>

### ***Purchase of a Presidential Jet***

In 2002, the Tanzanian Government decided to buy its President a brand new US\$40 million Gulfstream G550 Jet. This aeroplane could only land at three airports in the country: Dar es Salaam, Kilimanjaro and Mwanza. This was not, therefore, a facility by means of which the President would be visiting any villages where the majority of his electorate live. Indeed, it was capable of flying non-stop to London, Washington, DC and Beijing! Therefore, its use against its value was questioned. Hon. Samuel Malecela (MP), a senior politician who had held various top government positions in the country, including that of Prime Minister, observed as follows in Parliament:<sup>18</sup>

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- 16 See "British MPs discuss corruption allegations in Tanzania's radar deal", *ThisDay* (Tanzania), 19 July 2007, p 16; "How Tanzania wasted money that could have educated 3.5 million children", *ThisDay*, 2 August 2007, p 16; and Filiku, Philip H. "Poor Tanzania: Used radar, cars, military aircrafts, even used underwear?". *ThisDay*, 7 August 2007, p 19. On a closely related dirty deal, see "New revelations on military helicopters deal: Deliberately overpriced by close to \$20 million", *ThisDay*, 5 July 2007, p 1; and "Before military choppers deal landed in court ... Ikulu was warned, asked to intervene", *ThisDay*, 7 July 2007, p 1.
- 17 See "Tanzania's radar deal: System cost of £28m an extraordinary amount", *The Guardian* (Tanzania), 7 April 2007.
- 18 For this statement by the MP for the Mtera Constituency, see Kisembo, Patrick. 2007. "Sell Presidential Jet, MPs say". Available at <<http://ippmedia.com>>; last accessed 12 July 2007.

## Confronting grand corruption in the public and private sector

It is amazing to see that even the Presidential Jet cannot land in Dodoma [the official capital of the country]. The government has to do something.

A request by the World Bank for the government to explain its purchase fell on deaf ears. Questioning the logic and propriety of flying to Europe in a brand new jet to beg for aid for Tanzania, the Chair of the opposition Civil United Front (CUF), Prof. Ibrahim Lipumba, said that the money for the expensive jet could have been better spent on education and health.

Interestingly, the UK's International Development Secretary at the time, Clare Short, defended Tanzania's purchase of the jet, even while the UK government was giving the Tanzanian government £270 million in aid.<sup>19</sup> The World Bank noted that this was embarrassing for Ms Short, who had spiritedly fought against the Tanzanian purchase of a military radar system a year before.<sup>20</sup>

The government defended the purchase. The then Minister for Transport, Prof. Mark Mwandosya, said that the jet would make the President more independent by making it possible to stop hitching lifts from other presidents. As he rhetorically asked, —<sup>21</sup>

[w]hat is the cost of the pride of the nation? The number does not mean anything as long as we buy the plane, maintain it and look after the welfare of our people.

The former Finance Minister, Basil Mramba, was not that civil. As far as he was concerned, the Tanzanian Government was going to buy the radar system and the Presidential jet, whether the people liked it or not. He declared that "Tanzanians can just as well eat grass" – but that the purchases would go ahead.<sup>22</sup> His main arguments were that Tanzanian airspace should be safe for foreign airlines to land, and this would attract attract foreign investors. That, in his opinion, was the basis of the radar purchase. As to the presidential jet, the Minister said that the Tanzanian President was just too important to fly in the same planes – namely commercial airlines – that could be used by Al Qaeda as well. Since the President has now retired, however, it is not clear which planes he now uses. Are they not the same, in the words of the Hon. Minister, as those used by Al Qaeda?

At the end of the day it is Tanzanians who will have to pay for this and other similar dirty transactions. The question that troubles most Tanzanians is why

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19 See Hencke, David. 2002. "Short defends personal jet for Tanzania's President". *Guardian* (London), 27 July 2002.

20 See Hencke, David. 2002. "£15m Jet sparks new Tanzania row", *Guardian* (London), 22 July 2002.

21 Prof. Mwandosya was quoted by the British Broadcasting Corporation (BBC) on 6 October 2004; see <<http://news.bbc.co.uk/2/hi/africa/3719712.stm>>.

22 See BBC News. 2002. "Tanzania defends Presidential Jet plans", London: BBC, 23 July 2002.



a departing President should insist on buying a plane as he is about to leave office – a plane he would not be able to use himself. Why not rather allow the incoming leader to sort out his or her own transport problems?

## Addressing grand corruption through the law

Though not conceded by many, corruption – especially grand corruption – was introduced in Tanzania in particular and in Africa in general from the developed economies. In the latter economies, even today, corruption is condoned and euphemistically referred to as ‘grease’ or ‘lubrication money’ in foreign private investment circles, and a business person can get tax relief on such ‘expenditure’ because it is not regarded as taxable income.<sup>23</sup> Therefore, as we wholeheartedly embrace the market economy as part of globalisation, we take both the wheat and the chaff of the system, i.e. investments and corruption together.<sup>24</sup>

Tanzania began addressing corruption during the colonial period. Already during that era, elements of corruption, particularly in official circles and in the provision of services, the practice was becoming apparent. The colonial regime therefore introduced provisions against corruption in the Penal Code in 1932. This was followed by specific legislation on the subject, by way of the Corruption Ordinance (Chapter 400 of the Laws of Tanganyika). The first post-colonial legislation came in 1971<sup>25</sup> – ten years after independence – and was an indication that the ‘independence honeymoon’ was over and, after the Africanisation of the civil service, the new elite were developing evil fangs.

This law has been amended several times in response to changes in the political and economic situation in the country. However, apart from defining *corruption* and providing institutions to fight it, by and large, this law has remained narrow in its approach to corruption by mainly concentrating on petty corruption – perhaps because it was and still is prevalent in most spheres of public life in the country, and irritates members of the public on a daily basis.

On the international level, the Tanzanian Government has also been active in issues relating to corruption. It signed the Southern African Development

23 On this see Kaufmann, D & SJ Wei. 1999. “Does ‘grease money’ speed up the wheels of commerce?”. *International Monetary Fund Working Paper No. 00/64*. Washington, DC: National Bureau of Economic Research, IMF; Svensson, J. 2003. “Who must pay bribes and how much? Evidence from a cross-section of firms”. *Quarterly Journal of Economics*, 118(1):207; and Soreide, Tina. 2006. *Business corruption: Incidence, mechanisms, and consequences*. Unpublished doctoral thesis submitted to the Norwegian School of Economics and Business Administration, Oslo.

24 See Stiglitz, J. 2002. *Globalization and its discontents*. Allen Lane: The Penguin Press.

25 See Prevention of Corruption Act, 1971 (No. 16 of 1971), and Chapter 329 of the Revised Laws of Tanzania of 2002.

## Confronting grand corruption in the public and private sector

Community (SADC) Protocol against Corruption of 2001,<sup>26</sup> the 2003 African Union Convention on Preventing and Combating Corruption,<sup>27</sup> the 2003 United Nations Convention Against Corruption,<sup>28</sup> which were ratified in 2005 and 2006, respectively, by the Parliament of the United Republic of Tanzania. The next logical step was to domesticate these global and regional legal obligations through a legislative process.

To this end, in January 2007, the Tanzanian Government published a Bill introducing a new law on corruption: the Prevention and Combating of Corruption Act, 2007.<sup>29</sup> This Bill went through the country's usual process of approving legislation. It was discussed, inter alia, by the public (stakeholders) and, having gone through the Parliamentary Committees stage, came back to the National Assembly, was debated at length and passed, subject to a few insignificant changes, before it was signed into law by the President on 11 June 2007.<sup>30</sup>

According to the Director-General of the Prevention of Corruption Bureau, Edward G Hoseah, the new law is intended to take into account technological advances, best practices and evolving international and regional instruments against corruption.<sup>31</sup> This will make the task of combating corruption manageable and create a corruption-free Tanzania. More importantly, it shifts from the traditional and now outdated ways of addressing corruption and moves into new areas discussed in public but never legislated. For the first time, it also addresses grand corruption, which was only haphazardly addressed in the Penal Code and other laws but never treated as corruption per se. In the sections that follow, we carefully examine how this new law treats the issue of grand corruption in the country. By a rough estimation, this form of corruption accounts for more than 70% of corrupt practices on in Tanzania.

The new law incorporates some new types of corruption as well, which directly relate to grand corruption. These are mandatory provisions in any national law on corruption under the United Nations Convention Against Corruption (UNCAC) best-practice considerations and were emphasised by stakeholders. These offences include corrupt transactions in contracts;<sup>32</sup> corruption offences

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26 See United Nations Office on Drugs and Crime. 2005. *Compendium of international legal instruments on corruption* (Second Edition). New York: United Nations, p 259.

27 (ibid.:116).

28 (ibid.:21).

29 See Prevention and Combating of Corruption Act, 2007 (No.11 of 2007).

30 See "MPs call for limit to DPP powers over PCB [the Prevention of Corruption Bureau]," *ThisDay* (Tanzania), 14 April 2007.

31 Hoseah, Edward G. 2007. "An overview of the Bill on Prevention and Combating of Corruption Act, (PCCA) 2007". Mimeograph.

32 See Prevention and Combating of Corruption Act, Section 16 (1).

in procurement;<sup>33</sup> corrupt transactions in auctions;<sup>34</sup> bribery of foreign public officials;<sup>35</sup> and embezzlement and misappropriation.<sup>36</sup>

It is important to note that engagement in any of these offences has the potential of costing the nation very dearly because it involves huge sums of money. Again, inclusion of these offences comes at a time when top government officials have been trying to create a false picture that public contracts are confidential and should not be accessed by the public. The net result has been shielding grand corruption in the name of confidentiality, and creating a climate that is 'conducive' to investment by not exposing what the government and its officials actually agree with their investors. Once in office, bureaucrats quickly forget that they are representatives of the public and that it is members of the public who, in their collectivity, own the natural and other resources of the country. Therefore, by introducing provisions which target grand corruption, the law is demystifying the confidentiality theory upheld by the bureaucrats for the first time. It is good to see government bureaucrats being called upon to account for what they are doing on behalf of the public.

### ***Corrupt transactions in contracts***

Almost daily, government officials enter into various types of contracts on behalf of the country. The majority of these involve millions of shillings. By their corrupt actions, they impose liability on the nation. It is therefore important that transactions of this nature are done in good faith and with integrity, as well as with total transparency. However, experience indicates that this is not the norm. More often than not – in both developed and developing countries – public officials take advantage of public trust for their own benefit. There are stories galore of the 'Mr 10%'. That is to say, before the country got 90% of the transaction, the public official pocketed 10% of the deal. Things are worse today. In some countries, with total impunity, public officials have turned the whole transaction upside down: the country gets 10% and the official takes 90%. This explains the many imaginary bridges, dams, and factories that only exist on paper, but not on the ground – and yet the country is deeply in debt.<sup>37</sup>

Section 16 of the Act addresses corruption in contracts. It makes it an offence to offer any advantage to a public official as an inducement to facilitate any award of any contract or sub-contract with a public body. The contract may relate to performance of any work or supply of services.<sup>38</sup> It is also an

33 (ibid.:section 17(1)).

34 (ibid.:section 18(1)).

35 (ibid.:section 21).

36 (ibid.:section 28).

37 On stories of this nature in sectors such as forestry, electricity, education systems, transport, petroleum, water and sanitation, and financial administration, see Campos & Pradhan (2007).

38 Section 16(1).

offence for a public official to solicit or accept any advantage or reward as an inducement to facilitate procurement of a contract.<sup>39</sup> The problem here is the type of punishment provided for the commission of the offence. Originally, it was proposed that a person convicted under this section would be liable to a fine of not less than one million shillings but not more than three million shillings, or to imprisonment for a term of not less than three years but not more than five years, or both.<sup>40</sup> Both stakeholders and MPs called for a stiffer punishment. This has now been accepted. The new punishment is a fine not exceeding fifteen million shillings or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment. These changes do not appear in the Bill or in the Act, however: the sentence has remained as originally proposed!

What is puzzling is why legislators would want to maintain this most lenient punishment for corruption in contracts, and yet treat corruption in procurement, and auction differently. The latter is subject to a fine not exceeding fifteen million shillings, or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

### ***Corrupt transactions in procurement***

Governments make huge procurements. Because the government represents the public and there are millions of citizens involved, anything procured is usually in bulk – be it medicine, vehicles, military equipment, or services. Officials in decision-making positions as regards procurement are highly sought after by the business world. They will be offered all forms of inducements because a single purchase by the government is likely to keep the business afloat for months – if not years. Here again, kickback offers of 10% or more are common. The kickback is willingly paid due to the gains anticipated by the business.

Section 17 of the Act makes it an offence to offer any advantage or reward to any person for purposes of withdrawing of a tender or refraining from inviting a tender for any contract with a public or private body for the performance of any work or supply of services.<sup>41</sup> Again, it is also an offence to solicit or accept such advantages or inducement to such a withdrawal of tender or refraining from inviting tender.<sup>42</sup> A person convicted for this offence is liable for a fine not exceeding fifteen million shillings, or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.<sup>43</sup> The advantage or amount of value received in this transaction is liable for confiscation.<sup>44</sup>

39 Section 16(2).

40 Section 16(3). In addition, any advantage or value received is obliged to be confiscated by the government, as per section 16(4).

41 Section 17(1)(a).

42 Section 17(1)(b).

43 Section 17(2).

44 Section 17(3).

## ***Corrupt transactions in auctions***

Auctions of public property are a controversial area. This is because officers of the government involved try to bend all the rules to ensure that they, their children and/or their relatives and friends benefit from the auction. In other words, they ensure that they directly benefit from the ‘privatisation’ of the public property being auctioned. It is not strange, therefore, to find government buildings – particularly living quarters, farms, vehicles, furniture being ‘auctioned’ under suspicious circumstances and taken at giveaway prices by people with connections to the powers that be. Thus the whole process of auction is stage-managed to fool the public.

This endemic social problem is addressed in section 18 of the Act. It is an offence to offer any advantage as an inducement or reward on account of that other person’s refraining or having refrained from bidding at an auction conducted by or on behalf of any public or private body.<sup>45</sup> It is also an offence to solicit or accept any advantage as an inducement or reward for refraining from bidding.<sup>46</sup> The punishment for this offence is a fine not exceeding fifteen million shillings or an imprisonment term not exceeding seven years, or both such fine and imprisonment.<sup>47</sup>

It should be noted that this provision does not go far enough to block persons with inside information – that may give them the advantage over others – from taking part in the auction. It is recommended that persons with an interest in or with the potential of gaining inside information relating to an auction should be barred from taking part in such auction. Moreover, once an auction has taken place and it is discovered that a person’s success was due to having gained such information prior to the auction, the whole exercise should be declared null and void and a prosecution should follow. This should not be limited to auctions only, but should be extended to tenders as well.<sup>48</sup>

## ***Bribery of foreign public officials***

Many developing countries depend on donor funds for their economic and social development. These may entail funds from bilateral or multilateral

45 Section 18(1)(a).

46 Section 18(1)(b).

47 Section 18(2).

48 The decision last year by the US Government to award a staggering US\$35 billion contract to the European Aeronautic Defence and Space Company – the owner of Airbus – to build an aerial refuelling aircraft and refuse the bid by the American aircraft builders Boeing, on top of imposing a fine on the company for having access to inside information prior to preparing its bid, speaks volumes. It is a movement in the right direction and sends the right signals in business circles. On this important push for cleanness in business, see “Boeing outflanked for Air Force tanker deal by Bold Ideas”, *International Herald Tribune*, 10 March 2008; and “In tanker bid, it was Boeing vs. Bold Ideas”, *New York Times*, 10 March 2008.

donors, international non-governmental organisations, or international inter-governmental organisations. These institutions usually provide huge amounts of money. It has been argued that officials in these institutions are not angels. Notwithstanding the rhetoric about good governance, transparency, integrity, and so on, they are not beyond suspicion. They may be involved in corrupt transactions in their relationship with their local counterparts, i.e. the individuals and institutions to whom they are making grants.

It is this possibility which is targeted by section 21 of the Act. The provision makes it an offence for any person to intentionally promise, offer or give any foreign public official or an official of a public international organisation, or any other person or entity an undue advantage in order that such foreign public official acts or refrains from acting in the exercise of his official duties to obtain or retain business or other undue advantage in relation to a local or international economic undertaking or business transaction. Equally, it is an offence for such foreign public official to solicit or accept such undue advantage. The punishment for this offence is a fine not exceeding ten million shillings or a prison term not exceeding seven years, or both such fine and imprisonment.

This is also an interesting new area of corruption. However, apart from the punishment being too lenient, the net needs to be cast further out in order to capture local staff working in offices of this nature as well, and not only the foreign officials who do. Indeed, section 21 makes reference to foreign public officials or officials of public international organisations. The latter, in my opinion, includes local officials working in these organisations.

### ***Embezzlement and misappropriation***

Interestingly, in the area of embezzlement and misappropriation, the Act stretches itself to cover both the public and private sectors. According to section 28 of the Act, any person who dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him/her or under his/her control or allows any other person to do so commits an offence. The penalty for this offence is heavy: it constitutes a fine not exceeding ten million shillings or imprisonment for a term not exceeding seven years, or both such fine and imprisonment, depending on the gravity of the offence.

### ***Supporting provisions to curb grand corruption***

Corruption is a worrying offence because taming it not as easy as is the case with other crimes. This is because law enforcement agents face *two willing parties* to the crime; both both are equally guilty, and stand to gain if not detected. Logically, both have an interest in hiding the transaction because, as indicated above, in one way or the other they stand to gain tremendously from it at the public's expense – financially or morally. In such a situation,

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one requires provisions to facilitate the detection of corruption. The Act provides such avenues. They include the requirement that public officials give an account of their property; the requirement that such officials explain the source of such property; the presumption of corruption; the freezing of assets; and forfeiture of the proceeds of corruption.

- (a) *Requirement to give account of one's property:* Since the introduction of the market economy and its liberalisation, public officials have become very evasive about property ownership. Some even argue that asking them what they own is an interference with their right to privacy. The Act now gives officers of the Prevention of Corruption Bureau the power, upon due authorisation by the Director-General, to require any public official in writing to provide within a specified period of time a full and true account of all or any class of property which such an official or agent possesses or possessed when s/ he held public office.<sup>49</sup> This is an important provision because the requirements under the Leadership Code are too loose.<sup>50</sup> In complying with the latter, public officials fill in forms as a mere formality: nobody checks the truth of their declarations. The forms are simply filed, but there are stringent requirements when it comes to public access to such information, particularly by the media. Therefore, where the Bureau suspects that a public official has acquired property corruptly, this provision empowers it to require the person concerned to fully account for his/her wealth.<sup>51</sup>
- (b) *Requirement to explain sources of property and maintenance of high lifestyle:* Over and above providing a detailed account of property owned, section 29 of the Act requires a public official to explain how such property was acquired. This is particularly important if the property owned is disproportionate to his/her present and past lawful income, or where the official is seen to be maintaining a standard of living above that which is commensurate with his/her present and past lawful income.
- (c) *Presumption of corruption:* Section 35 of the Act provides that, where it is proved that an advantage was offered, promised or given; or solicited, accepted or obtained or agreed to be obtained by a public official by or from a person or an agent or person holding or seeking to obtain a contract from a public office, the advantage is deemed to have been offered, promised or given, solicited, accepted or

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49 Section 26(1).

50 On the highly watered-down ethical conditions for leadership, see the Public Leadership Code of Ethics Act, 1995 (No. 13 of 1995), as amended by Act No. 5 of 2001.

51 The information provided can be used in the prosecution of the official (section 26(2)). Refusal to provide the information required or providing false information is an offence attracting a fine not exceeding five million shillings or a prison term not exceeding three years, or both such fine and imprisonment.

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obtained or agreed to be accepted or obtained as an inducement or reward unless the contrary is proved. This provision has the effect of *shifting the burden of proof to the accused* to prove otherwise. This is important in corruption cases, where it might not be easy to meet the normal standards in criminal law of proving a case beyond reasonable doubt. Thus, it is only fair to pressurise the accused to deliver reasons once one side has proved its case.

- (d) *Freezing of assets*: When a public official is under scrutiny for any corrupt or corruption-related transaction, it is quite easy for him/her to deal with the property related to the investigation in such a way as to frustrate or defeat the investigators' efforts. This may include selling, transferring or destroying the property. In order to avoid such eventualities, section 38 of the Act allows the court, upon application by the Director of Public Prosecutions, to order the freezing of the suspect's property. Once this order has been made, any payment, transfer, pledge or other disposition of such property is null and void.<sup>52</sup>
- (e) *Forfeiture of proceeds of corruption*: Any property that is derived or obtained by a person from the commission of corrupt offences is permitted to be confiscated and forfeited to the government.<sup>53</sup> This includes situations where the accused is convicted. It is the duty of the Bureau, in collaboration with the Office of the Attorney-General, to ensure that such proceeds are indeed confiscated and forfeited. This forfeiture serves to preclude situations where the convicted official comes back to enjoy the proceeds of his/her corrupt actions after serving a prison term. This is meant to send a warning to all those involved in corruption that society will not allow them to enjoy the fruits of their illegal transactions in future, and thus, discourages them from indulging in corrupt practices.

There is no doubt that the net is closing in on the authors of and participants in grand corruption in Tanzania. However, its final degree of success will depend on the implementation of the new law which has just come into effect.<sup>54</sup>

## Critique of the spirited attempt to address grand corruption

By and large, the new law seems to carry a new and spirited attempt to deal with corruption in the country, namely by moving from the old tradition of

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52 Section 38 (7).

53 Section 40.

54 See Islam, Mbaraka. 2007. "New anti-graft law comes into effect", *ThisDay* (Tanzania), 3 July 2007, p 1.



restricting the war on corruption to petty corruption only. This development is partially due to the contribution of the Warioba Commission's Report in educating the public on the widespread nature of the problem of corruption in the country.<sup>55</sup>

However, if one critically examines the anti-corruption efforts to date, one does not see the political will on the part of the government to wage a full-fledged war on corruption. This is clearly discernible from the government's general attitude towards corruption. Firstly, the government is not keen to have all avenues of corruption – and grand corruption, in particular – closed. For instance, it is very nervous about legislation on *politically related corruption* and for wrongdoers to be prosecuted and punished.<sup>56</sup> The fears of consequences of legislation in this field, albeit understandable, are not accepted as genuine and legitimate. What exactly are the fears, and how have they been expressed? Secondly, the punishment being recommended in corruption offences is trivial. It is not commensurate with or reflective of the seriousness of the offences being dealt with. It is as the punishments are being suggested by persons who are potentially going to be affected by them, i.e. potentially corrupt elements likely to be prosecuted at any point, and thus preparing a smooth landing for themselves.

To start with, the fines provided in the law for those convicted in grand corruption cases are paltry. They do not take into account the gravity of the offences involved. Experience from cases involving narcotic drugs has indicated that, where convicts are fined small amounts, they pay up promptly and rush back to their old habits without any feelings of remorse. The same should be expected

55 Warioba, Joseph S. 1996. *Report of the Presidential Commission of Inquiry Against Corruption*, Dar es Salaam: Government of Tanzania.

56 Political corruption, of which the political class in Tanzania is so weary, is grand corruption. It is engaged in by persons in influential or decision-making government positions. On this form of corruption, see e.g. Amundsen, Inge. 2006. *Political corruption*. Bergen: Anti-Corruption Resource Centre, Chr. Michelsen Institute; Blake, Charles & Christopher G Martin. 2006. "The dynamics of political corruption: Re-examining the influence of democracy". *Democratization*, 13(1):1; Brinkerhoff, Derick W. 2000. "Assessing political will for anti-corruption efforts: An analytical framework". *Public Administration and Development*, 20(3):239; Harris, Robert. 2003. *Political corruption: Beyond the nation state*. London: Routledge; Heidenheimer, Arnold J & Michael Johnston (Eds). 2002. *Political corruption: Concepts and contexts*. New Brunswick/London: Transaction Publishers; Heywood, Paul. 1997. "Political corruption: Problems and perspectives". *Political Studies*, 45(3):417; Jain, Arvind K (Ed.). 2001. *The political economy of corruption*. London: Routledge; Johnston, Michael. 2005. *Syndromes of corruption: Wealth, power and democracy*. New York: Cambridge University Press; Kotkin, Stephen & Andreas Sajo. 2002. *Political corruption in transition: A sceptic's handbook*. Budapest: Central European University Press; Lederman, Daniel, Norman V Loayza & Rodrigo R Soares. 2005. "Accountability and corruption: Political institutions matter". *Economics and Politics*, 17(1):1; and Rose-Ackerman, Susan. 1999. *Corruption and government: Causes, consequences and reform*. Cambridge/New York: Cambridge University Press.

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in corruption cases. Public officials – having been arrested, charged, convicted and fined – will rush back to ‘business’ as if nothing has happened.

One may in fact argue that, by imposing fines, the government actually wishes to participate in corrupt practices by sharing the spoils of the crime with the criminals. By imposing a fine, the government actually takes from the criminal something that was collected in a corrupt transaction. It is as if the government had sent the criminal to engage in corruption with the intention of sharing in the spoils. In other words, the government treats corruption and corrupt practices as a source of revenue for its treasury. This is absurd to say the least – not least because the fines are levied in addition to forfeiture.

It is being recommended here that, as a general rule, fines should not be allowed in corruption cases. The only option available for the convict should be a term in prison. In very exceptional circumstances where fines are to be imposed, they should be over and above prison terms and should be high, i.e. about ten times the value of the alleged value of the corrupt transaction. This may sound unreasonable, but corrupt transactions have never been reasonable. The aim should be to make those involved realise that the government and Tanzanian society at large are serious about fighting corruption. Therefore, there must be a sense of proportionality, and grounds for imposing any sentence.

As argued before, the very idea of having fines in corruption cases is unacceptable. They simply fuel corrupt practices by raising the stakes. The corrupt official will peg his/her demands on the amount of the fine for a corrupt act and ensure it is financially worthwhile to commit it. Thus, we are not dealing with the root of the disease here, but with the symptoms. As with offences related to theft in the Penal Code, corruption offences should only attract terms of imprisonment on a criminal’s conviction. This will send the right signals to those involved.

Another disheartening situation is the restriction of the powers of the Prevention of Corruption Bureau to prosecute the cases they have investigated. The government still insists on retaining the massive powers of the Director of Public Prosecutions (DPP) to sanction all corruption-related prosecutions. The problem with this is that the DPP is not an independent office in Tanzania: it is directly under the supervision of the Attorney-General, and can receive instructions from either the Attorney-General or his/her Deputy. Interestingly, the Attorney-General is a member of Cabinet, the chief legal adviser to the government of the day, and an ex officio MP. Giving such an office power over an institution which can potentially prosecute top government officials misses the point entirely and reveals a lack of understanding of the seriousness of the issues involved.

This conflict of interest situation is not solved by the government’s compromise to opt for giving the DPP a specific period in which to decide the fate of

corruption cases. According to the Act, the DPP is given 60 days in which to decide whether or not to prosecute cases relating to corruption referred to his/her office by the Prevention of Corruption Bureau.<sup>57</sup> This is yet another indication of a lack of seriousness on the part of the current government to deal with corruption up front. The question is this: why not allow the Prevention of Corruption Bureau to proceed when it finds it proper to prosecute? Why create a monopoly of the duty to prosecute criminals in a situation where the office of the DPP is incapable of handling all criminal matters in the country, particularly specialised crimes such as corruption? Reading section 57, it seems that Bureau has the mandate (without the DPP's consent) to prosecute only petty corruption listed under section 15.

## Conclusion

The struggle against corruption in general and grand corruption in particular is a serious matter. It is an all-out war which should be fought on all fronts with all the means available and without compromise. As it has been correctly observed and recommended:<sup>58</sup>

The opportunity cost of corruption is so high, and because corruption undermines human development, **the war against corruption must be fought on all fronts and we must do so with vigour**. Success requires steadfastness and cooperation from all arms of Government, Parliament and civil society, including the media and the private sector. [Emphasis added]

This is because corruption – whether grand or petty – distorts and disrupts development in any society.

As the Law Reform Commission of Tanzania rightly observed, the battle against corruption cannot be won simply by legislating against the scourge. It needs to be fought on different fronts, including putting in place a sound strategy to deal with the problem and empowering the justice system to deal with the offence.<sup>59</sup>

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57 See section 57(2). Also see the statement by the former Minister of Justice and Constitutional Affairs, Hon. Dr Mary Nagu, to Parliament. This was the coercion of the ruling party Chama Cha Mapinduzi (CCM) legislators by the then Prime Minister Edward Lowassa in "DPP given 60 days to decide on prosecution", *The Citizen* (Tanzania), 17 April 2007, p 1. See also "Bunge passes new Anti-Graft Law, but ...", *ThisDay* (Tanzania), 17 April 2007, p 1; and "Corruption Bill debate roars on", *Daily News* (Tanzania), 17 April 2007, p 2.

58 See the opening remarks by John Hendra, former United Nations Development Programme Resident Representative and United Nations Resident Co-ordinator to the United Republic of Tanzania at a Parliamentarians' Seminar on Corruption held at Golden Tulip, Dar es Salaam, on 19 February 2003.

59 See United Republic of Tanzania. 2004. *Report on the review of legislation relating to corruption*. Dar es Salaam: Law Review Commission of Tanzania, p 109.

But there is more than that. Over and above perfect legislation (and the current one is far from this state),<sup>60</sup> there are a few issues worth considering. At the general level, those in business who are beaten in an otherwise even playing field by elements who have bribed their way to victory should not sulk and give up. They should be brave enough to blow the whistle and expose corruption. There is nothing evil about reporting corruption.<sup>61</sup>

At national level, the issues to take into account include taking *ethics, integrity* and *societal values* seriously, as well as *political will* on the part of the political elite. Globalisation and, in particular, the introduction of a market economy has greatly eroded *patriotism* and *national values*, which go hand in hand with the struggle for the well-being of a society. It would seem that it is now “Every man for himself, God for us all, and Devil take the hindmost!” Public officials are plundering national treasuries at will and with impunity! *Thieves and robbers* are slowly becoming *national heroes and role models – the clever lot* who are moving with time! On the other hand, *honest and hard-working civil servants* are regarded as *fools!* They ‘slept’ and never took advantage of the vast opportunities offered to them while they were in public service! This attitude fuels corruption – and grand corruption in particular – in developing countries. It is time to change this attitude if the war against corruption is to be won.

At the same time, there is a need for *political will* among politicians and the government in general to fight corruption. This is currently lacking. Tanzanian politicians have been dragging their feet on concretely addressing corruption for years. They even had the audacity to sanction corruption in elections, calling it “African hospitality”.<sup>62</sup> Such politicians cannot be taken seriously.

60 On some of the earliest criticism to the new law, see Kija, Anil. 2007. “New Law on Graft and the ‘Dead on Arrival’ Syndrome,” *ThisDay* (Tanzania), 5 July 2007, p 9; “PCCB now seeks to block media coverage on graft”, *ThisDay* (Tanzania), 28 July 2007, p 1; and Kija, Anil. 2007. “A new PCCB legislation threatens investigative journalism”, *ThisDay* (Tanzania), 8 August 2007, p 19.

61 On this, see Soreide, Tina. 2006. *Beaten by bribery: Why not blow the whistle?*. Bergen: Chr. Michelsen Institute.

62 In 2000, the Elections Act, 1985 was amended through Act No. 4 of 2000. Through this amendment, section 98(2) was deleted and replaced, and a new subsection 3 was added. The amendments introduced provisions which legalised the offering by a candidate in election campaigns of anything done in good faith as an act of hospitality to the candidate’s electorate or voters. The introduced amendments are popularly known as *takrima* (“hospitality”). However, the so-called *takrima* provisions were silent on the amount and timing of the ‘hospitality’ to be provided to the electorate. Candidates who contested the said elections and the survey that was carried out during the electoral process showed that the parliamentary candidates practised these acts of ‘hospitality’ in the 2000 general elections. The study also showed that the election campaigns were marred by loopholes in the said law, which unduly influenced the electorate to vote in favour of the ruling party. The *takrima* provisions were declared offensive and as having encouraged corruption in the electoral process because they violated the right to not be discriminated against, the right to equality before the law, and the right

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Their true colours emerged during the current debate on the Prevention and Combating of Corruption Act, 2007. A former Cabinet Minister responsible for good governance cautioned a shocked house that they should not allow the Bill to prevent politicians from getting rich.<sup>63</sup> The way this Bill was prepared, the way it was debated in the National Assembly, and the form in which it was eventually adopted clearly indicate this lack of political will and gravity in dealing with corruption in the country.

It would seem that it is the Prevention of Corruption Bureau and the donor community which have been pressurising a reluctant government to act on corruption. Therefore, by bringing this Bill, it is obvious that the government is not acting on its own volition. The fact that some of the donors decided to freeze aid and assistance to the country last year due to the government's failure to meet its promise to prepare and table the Bill in Parliament must have shocked the government into acting. However, this half-hearted attitude towards fighting corruption does not make the future look bright. A government whose leaders may be thinking of becoming involved in corruption in future and wish to escape with impunity or paltry punishments appear to be protective of corrupt practices and be relied on in the war against corruption. Such a government is a liability to its own people, and has no business being in office in the first place.

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of Tanzanian citizens to participate in free and fair elections. These rights aim at promoting integrity, transparency, good governance and democracy. See *In the Matter of the Constitution of the United Republic of Tanzania, 1977 and In the Matter of a Petition to Enforce a Constitutional Basic Right under the Basic Rights and Duties Enforcement Act, 1994 and in the Matter of the Elections Act No. 1 of 1995 and in the Matter of a Petition to Challenge as Unconstitutional Sections 98 (2) and 98 (3) of the Electoral Law (Miscellaneous Amendment) Act 4/2000 between Legal and Human Rights Centre and Two Others v The Attorney General*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 77 of 2005. On corruption in elections in Tanzania, see Chambua, Samuel E, Vincent Kihyo & Gaudens P Mpangala (Eds). 2002. *Multiparty elections and corruption in Tanzania: With special reference to the 2000 elections*. Dar es Salaam: Dar es Salaam University Press Ltd.

63 See the statement of Hon. Wilson Masilingi, former Minister responsible for good governance in Beda, Joe. 2007. "Graft Bill must not prevent us to get rich – Masilingi". *The African On Sunday* (Dar es Salaam), 15 April 2007, p 1.

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# JUDGMENT NOTES

## **S v Teek: A critical review and analysis** **Kajjata Kanguuehi\***

### Introduction

The case of *S v Teek*<sup>1</sup> raises a number of legal matters with considerable implications for the precedent of Namibian law. In this case, the accused stood arraigned on a number of charges in the High Court. The state led its evidence and, at the close of the latter's case, the defence applied for the accused to be discharged in terms of section 174 of the Criminal Procedure Act.<sup>2</sup> The High Court ruled that the state had not proven a prima facie case and that there was no evidence upon which a reasonable court would convict, so the accused was discharged. The state appealed against this ruling and the Supreme Court set the decision aside. In doing so, the Supreme Court assessed all the evidence which had been led in the High Court, and held that, "on the evidence before the trial Court, there is ample room for conviction of the respondent on all the charges against him".<sup>3</sup> Thus, the High Court had erred in having discharged the accused.

In the light of this holding, the Supreme Court ordered that the trial in the High Court be continued. The accused had originally asked the High Court to order that the trial be started de novo and before a different judge. In motivating this proposal, reference was made to the strong credibility finding by Bosielo AJ against the state's main witnesses, and his severe criticism of the conduct of the police investigation.<sup>4</sup> The state counter-argued that the trial be continued and finalised before the same judge. In its turn, the Supreme Court held that the question of whether a retrial should be ordered was not a matter of law: it depended on the exercise of the court's discretion in the circumstances of the particular case. In exercising that discretion, "the court will obviously be guided by what is fair to both the accused person and the State".<sup>5</sup> In this matter the accused conceded that he could think of no potential prejudice he might suffer if the matter were to continue before Bosielo AJ. The court took the same position and held that, since the only party who might be prejudiced was the state, there was no reason why it should not be guided by the state's request to have the case continued before the same judge. The court thus referred back to the court a quo for a continuation and finalisation before Bosielo AJ.

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1 (SA 44/2008) [2009] NASC 5 (28 April 2009).  
2 No. 51 of 1977.  
3 (ibid.:para. 30).  
4 (ibid.:para. 31).  
5 (ibid.).



This ruling of the court raises a number of questions which this comment seeks to address. The issues include whether the accused was not being subjected to double jeopardy, since the High Court had already discharged the accused. Such discharge, it could be argued, was made on the merits of the case; thus, a determination had already been made that the accused was innocent. Other issues include the probable outcome of the case: do we expect Bosielo AJ to rule against himself and convict the accused? Will this not seem to be a contradiction of his own decision if he initially said there had been no evidence on which to convict the accused? In Judge Bosielo's opinion, the state had failed to prove the guilt of the accused; so what would be the effect of the defence's evidence? The High Court had held that the state had failed to establish a prima facie case; thus, the evidence did not 'call for an answer'. If the accused now has to testify, will that not be a breach of the rights that are guaranteed by the Constitution, and if there is a conviction, will such a conviction not be based exclusively upon the accused's self-incriminatory evidence? The following analysis seeks to address these intriguing questions.

### Implications of appeals under section 174

The Criminal Procedure Act provides for an appeal by the prosecution from a decision handed down in favour of the accused in a lower as well as a superior court on any question of law.<sup>6</sup> It used to be controversial whether the decision of the court to discharge a person at the end of the prosecution case was subject to appeal. Academic commentators subscribed to the position that such a decision was not appealable. One such commentator was Du Toit, who submitted the following:<sup>7</sup>

The decision as to whether to refuse or grant a discharge is a matter solely within the discretion of the presiding officer and may not be questioned on appeal.

This position was supported by cases like *R v Lakatula and Others*<sup>8</sup> and *R v Afrika*,<sup>9</sup> which were decided under the previous versions of the Act. As the law developed, the position became clearer and, in *Attorney-General Venda v Molepo and Others*,<sup>10</sup> the court held that a decision by a court to grant an

6 Sections 310 and 319.

7 Du Toit, E. F de Jager, F Paizes, A Skeen & S van der Merwe. 1987. *Commentary on the Criminal Procedure Act*. Cape Town: Juta, pp 22–30.

8 1919 AD 362.

9 1938 AD 556.

10 See *Attorney-General Venda v Molepo & Others*, 1992 (2) SACR 534 (V), at 538 A–C. Shortly thereafter, the Appellate Division, in *Magmoed v Janse van Rensburg* (1993 SACR 67(A)), elucidated the inherent nature and scope of a question of law in the field of criminal appeals. Although the appealability of a section 174 discharge was not specifically considered in this decision, there can be no doubt that the principles applied in this decision should likewise be applied

application for the discharge of an accused in terms of section 174 amounted to a question of law which may be appealed by the prosecution in terms of section 310 of the Act. In that case, the court held that a decision to grant an application for the discharge of the accused at the end of the state's case in terms of section 174 of the Criminal Procedure Act was appealable, and Le Roux CJ gave an extensive explanation why such a decision could be appealed against.

In Namibia, about three judgments were delivered by the High Court elucidating that the state could appeal against an order to discharge the accused under section 174. This happened in the case of *S v Van Den Berg*<sup>11</sup> and in *S v Kooper*,<sup>12</sup> where the state appealed against the decision by the magistrates to discharge the accused at the close of the state's case. The High Court allowed the appeals, holding that orders for discharge were wrongly made at the close of the prosecution case. In *S v Hihanguapo and Another*,<sup>13</sup> where a magistrate discharged the accused, the High Court allowed an appeal and ordered the case to go back to the magistrate's court, where it was to start de novo. The High Court ordered as follows:<sup>14</sup>

For the foregoing reasons the appeal is allowed; the order made in the court a quo that the two respondents are found not guilty and discharged is set aside and the case is remitted to the Magistrate's Court for the trial to commence de novo.

The reasoning of the courts is premised on the fact that, if the state can appeal against an acquittal, why not also a discharge under section 174? Therefore, the state can appeal just as it does in acquittals and sentence. However, provided that the law of the land was applied correctly to the facts, our courts have in the past always accorded finality to a verdict of acquittal on the factual merits of a case.<sup>15</sup> The reluctance of our courts to grant the prosecution a 'second bite at the apple' on the factual merits of a case (even in appellate proceedings on the same issue) had also never been interfered with by the legislature. At present, there is no doubt that the law allows appeals against the decision of a court under section 174.

The above situation raises questions regarding whether the accused is not being subjected to the predicament of double jeopardy when the matter is referred to the trial court for the trial to proceed. This question strikes at the heart of a long tradition of our courts regarding procedural issues surrounding

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in determining whether such a discharge amounts to a question of law which may be appealed by the prosecution.

11 1995 NR 23.

12 1995 NR 80.

13 *S v Hihanguapo & Another*, (CA 93.97) [2000] NAHC 10 (28 April 2000).

14 (ibid.:6).

15 See *R v Brasch*, 1911 AD 525; *R v Gasa*, 1916 AD 241; and recently, *Magmoed v Janse van Rensburg*, 1993 SACR 67(A), at 67.

section 174. In order to adequately address the matter, it is imperative to consider the nature of a discharge under section 174 of the Criminal Procedure Act in the light of the requirement for the plea of *autrefois acquit*.

## The nature of a section 174 discharge

In the case which forms the crux of this comment, namely *S v Teek*, the Supreme Court held that the High Court had erred in finding that there had been no reasonable evidence upon which the court could convict, and thus ordered the matter to be heard in the High Court. It should be noted that a decision made under section 174, on the basis that there is no evidence upon which a reasonable person can convict, is a question of law involving “the social judgment of the court”.<sup>16</sup> However, the question arises as to whether an accused whose case has been referred back for continuation of trial is not subjected to double jeopardy. The issue of whether or not double jeopardy is at play can be adequately answered by looking at the nature of the discharge and its implications in the light of the plea of *autrefois acquit*.

A close analysis of cases that deal with the plea of *autrefois acquit* indicates the philosophy of the plea to have been that the law requires a party with a single cause of action to claim in one and the same action, whatever remedies the law affords him/her upon such cause. This is the ratio underlying the rule that, if a cause of action has previously been finally litigated between the parties, then a subsequent attempt by one of them to proceed against the other on the same cause for the same relief can be met by an *exceptio rei iudicatae velitis fimitae*. The reason for this rule is given by Voet 44.2.<sup>17</sup> as follows:

To prevent inexplicable difficulties arising from discordant or perhaps mutually contradictory decisions, due to the same suit being aired more than once in different judicial proceedings.

This rule is part of the very foundation of Namibian law as derived from Roman–Dutch legal principles, and is of equal application to Namibian criminal law. The rule has its origin in considerations of public policy, which requires that there should be a term set to litigation and that an accused or defendant should not be twice harassed upon the same cause. It is from this legal background that our courts have held that the plea of *autrefois acquit* can succeed if the accused proves that s/he is being charged on similar or the same charges for similar or the same facts. It should also be shown that the acquittal was on merit.

From the above requirements, it seems that whether or not a judicial determination that ends proceedings will support a plea of *autrefois acquit*

16 See *S v Basson*, 2004 (6) BCLR 620 (CC), at 646 F–H and *S v Bochrus Investments (Pty) Ltd & Another*, 1988 (1) SA 861 (A).

17 Gane, P. *The selective Voet being the commentary on the Pandects*, Vol 6. Durban: Butterworths, p 553.

depends on the nature of the legal basis for the decision. It seems again that decisions based on substantive legal principles will generally support a plea of *autrefois acquit*, while decisions based on procedure are more complex. This holds if we consider that some decisions may end defective proceedings without barring the state from starting anew; other decisions may amount to a final determination that can be appealed, but cannot be replaced by new proceedings. A formula precisely covering all possible situations is virtually impossible. Let us keep in mind for now that, from these requirements of the plea and from the way the Supreme Court reasoned in the case under analysis, it is rational to deduce that factors important to the decision are the nature of the defect involved, the stage in the proceedings at which it is raised, and the degree of prejudice to the accused.

The availability of *autrefois acquit* depends on the nature of the legal decision made at the earlier trial and whether there was 'acquittal on the merits'. With this in mind and in the context of the case of *S v Teek*, the direct question will therefore be as follows:

- Does a section 174 discharge constitute a termination of proceedings on the factual merits of a case?, or
- Does it amount to a question of law which, in terms of current legislation as set out above, may be appealed against by the prosecution?

Section 174 provides the following:

If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.

Hoffmann and Zeffert<sup>18</sup> indicate that this section owes its existence to rules which evolved in England to control juries, thus preventing them from reaching perverse verdicts. Under these rules the judge would direct that, as a matter of law, the jury should acquit the accused unless there was evidence on which a reasonable man could convict. The case would, therefore, only proceed to the hearing of the defence if the state had made out a *prima facie* case. Although trial by jury was finally eliminated from South African procedure in 1969,<sup>19</sup> the remnants of the old practice relating to discharge remain as part of the Act and apply to both superior and lower courts.

## **Is a section 174 discharge an acquittal on the merits?**

In Namibia, most of the appeals against the refusal of discharge or the order to discharge are made from magistrates' courts. As mentioned above, the High Court has entertained some cases of appeal against an order discharging

18 Hoffmann, LH & DT Zeffertt (Eds). 1981. *The South African Law of Evidence* (Third Edition). Durban: Butterworths, p 392.

19 See the Abolition of Junes Act, 1969 (No. 34 of 1969).

accused persons. The recent case of *S v Teek* raises similar questions as to what the implications are when a person has been discharged at the close of the state's case. In *S v Teek*, the High Court ruled that there had been no evidence upon which a reasonable court would convict the accused. The state appealed against this decision to discharge. In the Supreme Court, it was decided that the High Court had erred in deciding as it had, and that it had not exercised its discretion judiciously. Thus, the Supreme Court was empowered to reverse the High Court decision.

### ***The position in South Africa***

It seems that there is no case in South Africa or Namibia that has dealt directly with the issue of whether the accused discharged under section 174 has been acquitted, and whether the possibility exists that a retrial or a continuation of trial would expose the accused to double jeopardy. Academic authors have commented that subjecting the accused to retrial would amount to double jeopardy, implying that a plea of *autrefois acquit* is available. One such author is Jordaan,<sup>20</sup> who holds the following opinion:

Inherently, the decision of a court to discharge amounts to factual determination of the guilt or innocence of the accused. The fact that such a determination takes place at an early stage in the trial does not alter the nature of the determination in any material sense. Moreover, this is in full accord with the principle or legal tenet that, in a criminal case, all elements of the offence must be proved by the prosecution beyond reasonable doubt. If the prosecution fails to do this, the defence does not have to present its own evidence in order to gain an acquittal.

The author goes on to conclude as follows:<sup>21</sup>

The above discussion clearly shows that a section 174 discharge amounts to an acquittal in the sense of an adjudication upon the factual merits of a case. It is therefore concluded that such a determination by a competent court of law may not be questioned by the prosecution by way of an appeal on a question of law in terms of sections 310 and 319 of the present Criminal Procedure Act.

From this conclusion, it is clear that the author was not directly concerned about the question whether referral by a superior court to the trial court for the continuation of a trial where the accused had been discharged would amount to double jeopardy. The author concentrated mainly on whether the discharge of the accused at the end of the prosecution's case was a question of law which could be challenged by the prosecution on appeal. This question

20 Jordaan, L. 1995. "Discharge of the accused at the end of the Prosecution's case – A question of law which may be challenged by the prosecution on appeal?". *Tydskrif vir Hedendaagse Romeins-Hollandse Reg/Journal of Contemporary Roman-Dutch Law*, 58: 111.

21 (ibid.).

has since been answered in the affirmative in both Namibia and South Africa. Jordaan's question is now redundant; therefore, the premise of the argument is now different, and the conclusion Jordaan reached cannot be regarded as applicable to the issue being investigated here.

### ***The position in Namibia***

It is rather intricate to ascertain with certainty whether there is any 'Namibian position' on the question under investigation here: Namibian courts have never decided a case addressing this issue. However, the procedures of our criminal justice system and the decisions of our courts evince a general policy of concern for an accused person in a criminal case.

The Namibian Constitution provides for the right not to be tried again for an offence for which one has already been tried. The protection against double jeopardy, therefore, is a constitutional imperative embedded in Article 12. As highlighted earlier, cases regarding trial after discharge have never come before any Namibian court, and this informs the purpose of this comment on the *Teek* case. Thus, the question of whether or not the plea of *autrefois acquit* is available has not been judicially or academically answered.

For the reasons to follow, and since there is no authority on this matter under Namibian law, it would stand to reason that an accused facing trial after the state has succeeded in a case of discharge under section 174 is not subjected to double jeopardy. This position is supported by the fact that the trial is not a new trial where new charges have to be brought and the accused has to plead again. The true legal position regarding the order by the Supreme Court to refer the case back to the High Court is that the case has to continue from where it stopped when an erroneous order to discharge was given. This means that the order to discharge does not exist in law for it arose from an error.

The above position has two meanings or implications:

- The first is that there was no acquittal at all in the case, that the discharge was granted in error, and that it was therefore reversed by the Supreme Court. This reversal means that the original trial has to continue from where it ended when the error was committed.
- The second implication is derived from the fact that the order calls on the High Court to continue the trial, meaning that the High Court has to start from the point when the defence has to present its case. This means that the accused still faces the same charges. This is 'single jeopardy', since there is no new case against the accused; neither was the previous jeopardy ended in the legal sense. The accused stands to answer the same charges in a continuing case as he did before the High Court erred. Furthermore, the accused will not have the chance to plead, since the stage of plea has already passed and

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there is no variation of charges to which he may be asked to plead again. Although the law allows the accused to plead *autrefois acquit* at any time in the proceedings, this means that the plea – if ever it can be raised – will be looked at as if there had been no discharge at all; thus, the plea will be baseless.

This position does not come from a vacuum: it should be looked at in the context of section 322(3) of the Act, which provides that, where a conviction and sentence are set aside by the court of appeal on the grounds that a failure of justice has in fact resulted from the admission against the accused of evidence otherwise admissible but not properly placed before the trial court by reason of some defect in the proceedings, the court of appeal may remit the case to the trial court with instructions to deal with any matter, including the hearing of such evidence, in such manner as the court of appeal may think fit. In terms of this section, therefore, an accused whose acquittal has been quashed cannot say that s/he is being subjected to double jeopardy when the matter is remitted for trial. If understood from this angle, the position in cases of discharge under section 174 would be that if the accused raises the plea of *autrefois acquit*, the said plea will be baseless since there is 'single jeopardy' in this one case that is being continued. However, the accused could have raised the plea of *autrefois acquit* if the Supreme Court had acquitted him and the state had then arraigned him for similar or the same charges for similar or the same facts.

Reasoning by analogy from South African decisions on the said plea, it is clear that, if the charges have been quashed and the state has to come up with new charges, the accused cannot allege that s/he is being subjected to double jeopardy. In *S v Basson*<sup>22</sup> in South Africa, the Constitutional Court said it could not be held that an accused was in double jeopardy where charges were quashed. Taking this into account, how can it be double jeopardy when the Supreme Court of Namibia orders that the trial be continued on the same case record? In the case of quashed charges, the accused has to plead to new charges on the same facts; and, in a case of annulment of an order to discharge, the accused has to continue by putting forth his defence. This means the idea that there will be double jeopardy is totally misplaced.

Similarly, in *S v Mthetwe*,<sup>23</sup> the accused pleaded *autrefois acquit* in the magistrate's court on the basis that, at a previous trial in respect of the same offence, he had pleaded not guilty and was formally acquitted because the prosecution had failed to lead any evidence at all. The issue which arose on review was whether the magistrate in the second trial correctly rejected the plea of *autrefois acquit* on the grounds that the previous acquittal was not on the merits of the case, as no evidence was led. Harcourt J took the following view:<sup>24</sup>

22 2004 (1) SACR 285 (CC) 315a.

23 1970 (2) SA 310 (N).

24 (*ibid.*:315 E–F).

## *S v Teek: A critical review and analysis*

The test is, in my judgment, not whether or not evidence was led, but whether or not the acquittal was “on the merits”. And the fact that no evidence was led does not prevent the decision being one “on the merits”. The true antithesis is, in my view, whether the acquittal was “on the merits” or on a technicality. And, in my judgment, the present case is one where the acquittal was “on the merits” in the sense that there had been no evidence led against the then accused upon which they could have been convicted.

The Namibian case of *S v Hihanguapo & Another*<sup>25</sup> shows that the proven unavailability of the presiding officer in a criminal trial results in a trial being a nullity. This is why, in the latter case, the High Court ordered that the proceedings be started *de novo*. In such a case the plea of *autrefois acquit* is not available since, in law, there were no proceedings at all; thus, the *de novo* proceedings constitute single jeopardy.<sup>26</sup> The accused in the *Teek* case actually asked for the trial to start *de novo* before another judge. This request was not accepted; but even if it had been, the plea of *autrefois acquit* would not have arisen – taking authority from the foregoing. Thus, in the *Teek* case, the court ordered that the case be “referred back to the court *a quo* for continuation and finalisation”. It boggles the mind how double jeopardy can arise if this case is simply a continuation for the purpose of finalisation. The requirements of same offence or substantially identical facts or charges seem not to arise here since, in the first place, there are no two trials here, and this is a single case being continued.

Even if the Supreme Court had ordered the case to be heard *de novo* before a different judge, the same holds: the plea of *autrefois acquit* would still not arise. This is correct because, if and when a charge is laid before that or another judge, it will be the first time the accused is in jeopardy before a judge having jurisdiction on the accused and the subject matter. The reasoning will be that there was nothing to be acquitted of, and for this reason, there is no ‘*autrefois*’, as there was no offence; and no ‘*acquit*’, as there was no jurisdiction to acquit or convict. Above all, the trial judge’s decision is open to appeal. Assuming error is found, the Supreme Court will direct the judge to reorient his reasoning, continue, and finalise the trial. There is no double jeopardy in that procedure.

### **Prima facie case and the possible outcome**

The question which arises, however, is whether there is in fact a *prima facie* case and what the probable outcome of the case will be. This question arises since, in the judgment under analysis, it was ruled that the case cannot be tried *de novo* before another judge, but that it should continue before the same judge – Bosielo AJ. Now do we expect Judge Bosielo to rule against himself and convict the accused? Will this not seem to be a contradiction of himself

25 *S v Hihanguapo & Another*, (CA 93.97) [2000] NAHC 10 (28 April 2000).

26 *Du Toit et al.* (1987).



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if, in the first place, he said there was no evidence to convict? In his opinion, the state had failed to prove the guilt of the accused; so what would be the effect of the evidence of the defence? It seems on face value that it would be a formality for Judge Bosielo to preside over the case because the presumption of innocence would trump any reasoning to the contrary. However, before we conclude this issue, it would be trite to consider what *prima facie case* means.

For Judge Bosielo to convict the accused in this matter, there has to be a *prima facie case*. The position is that a conviction must be based on all the evidence, including that adduced by the defence, and it is exclusively for the trial court to decide whether what suffices to establish a *prima facie case* is adequate to convict – if that is indeed all the evidence before it.<sup>27</sup> The term *prima facie* has been translated as “at first sight”, “accepted as so until proved otherwise”, and “on the first impression”. The Oxford English Dictionary defines – or perhaps translates – it as “arising at first sight based or founded on the first impression”; it notes its legal association, listing “*prima facie case*” as being defined as “a case resting on *prima facie* evidence”.<sup>28</sup> In South African law, *prima facie* has been considered in a number of cases, some of which are referred to below and the position is the same in Namibia.

Commenting on the phrase “*prima facie*” in section 174, Bennun says that the section does no more than state the common-law requirement that there must be a *prima facie case* at the end of the prosecution’s case if the accused is to be put on their defence.<sup>29</sup> In *S v Zimmerie*,<sup>30</sup> Friedman J said that it would be in order to refuse an application for the discharge of the accused if there was reason to expect that the state case would be strengthened by defence evidence. Similar remarks were made in *Ex parte The Minister of Justice: in Re R Jacobson & Levy*, where the following was held:<sup>31</sup>

If the party, on whom lies the burden of proof, goes as far as he reasonably can in producing evidence and that evidence “calls for an answer” then, in such case, he has produced *prima facie* proof, and, in the absence of an answer from the other side, it becomes conclusive proof and he completely discharges his onus of proof. If a doubtful or unsatisfactory answer is given it is equivalent to no answer and the *prima facie* proof, being undestroyed, again amounts to full proof. These principles are to be extracted both from decisions in the Courts of South Africa and in England.

27 See Zeffertt, DT, AP Paizes & A St Q Skeen. 2003. *The South African Law of Evidence*. Cape Town: LexisNexis/Butterworths, pp 121ff.

28 See Bennun, ME. 2005. “The Mushwana Report and Prosecution Policy”. *The South African Journal of Criminal Justice*, 18(3):290.

29 Cf. in England and Wales, the Crime and Disorder Act 1998, Schedule 3 cl 2(2), which provides that the judge may dismiss a charge “if it appears to him that the evidence against the applicant would not be sufficient for a jury properly to convict him”.

30 1989 (3) SA 484 (C).

31 1931 AD 466, at 478–479.

This, however, should not be understood to mean that, if the accused fails to rebut the prima facie case (which the High Court has found not to be present), then the evidence becomes conclusive of his guilt. The High Court, upon commencing a trial, must still consider whether, on the whole of the evidence, the state has proved the guilt of the accused beyond all reasonable doubt. This already the High Court has said was not done. If ever the judgment of the Supreme Court were to influence the High Court, then it becomes a question of what weight should be attached to the evidence already produced, having regard to the rule of the onus always being on the state. This seems not to be the probable outcome, however, since the initial question is answered in the negative or is less probable. It should be noted that, in *S v Zimmerie*<sup>32</sup> cited above, Friedman J was following *S v Shuping*,<sup>33</sup> where Hiemstra CJ first articulated the principle. However, the criticism<sup>34</sup> which followed Hiemstra CJ's judgment was given legal force in *S v Lubaxa*<sup>35</sup> where, with the unanimous concurrence of a full bench of five judges, Nugent AJA said that if, at the end of the prosecution case, the only possibility of a conviction depended on self-incriminating evidence, the accused is entitled to be discharged.

The failure to discharge an accused in those circumstances – if necessary mero motu – is, in my view, a breach of the rights that are guaranteed by the Constitution, and will ordinarily vitiate a conviction based exclusively upon his/her self-incriminatory evidence.

The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to –

- the burden of proof (or its concomitant, the presumption of innocence)
- the right of silence, or
- the right not to testify,

but arguably from a consideration that is of more general application. Clearly, a person ought not to be prosecuted in the absence of a minimum of evidence upon which s/he might be convicted, merely in the expectation that at some stage he might incriminate him-/herself. That is recognised by the common-law principle that there should be reasonable and probable cause to believe that the accused is guilty of an offence before a prosecution is initiated.

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32 1989 (3) SA 484 (C).

33 1983 (2) SA 119 (B).

34 See Bennun (2005) and authorities cited therein, including A St Q Skeen. 1985. "The decision to discharge an accused at the conclusion of the State case: A critical analysis". *South African Law Journal*, 102:286; H Rudolph. 1994. "The 1993 Constitution – Some thoughts on its effect on certain aspects of our system of criminal procedure". *The South African Journal on Human Rights*, 111:497, 510. See also *S v Phuravhatba*, 1992 (2) SACR 544 (V); *S v Mathebula*, 1997 (1) SACK 10 (W); *S v Tsoetsi* (2) 2003 (2) SACR 638 (W).

35 2001 (4) SA 1251 (SCA), at 1256–1257.

From this dictum, it is discernible that there will not be any probable conviction. The reasoning behind this is that if the state has, in the opinion of Judge Bosielo, failed to present a prima facie case, then what he is waiting for is conviction based exclusively upon the accused's self-incriminatory evidence. This would violate Article 12 of the Constitution. In this light, it is most probable that the Judge will not rule against his initial opinion. This argument is further supported by the position that the effect of a prima facie case under section 174 is that if, in the opinion of the trial court, there is evidence upon which the accused might reasonably be convicted, its duty is straightforward: the accused may not be discharged and the trial must continue to its end.<sup>36</sup>

## Concluding observations

The Supreme Court held that the High Court had given a wrong answer to the questions which arise out of section 174. Where an acquittal is based on the wrong answer to a legal question, a retrial does not in fact amount to double jeopardy.<sup>37</sup> The court therefore held that, where a trial court has erred on a question of law, the institution of a new trial will not infringe upon section 35(3) (m). A retrial on the same charges will not place the respondent in jeopardy again. He was not in jeopardy before the trial court because of that court's error of law.

If we consider the *Jacobson & Levy* case cited above, where it was held that, if the evidence 'calls for an answer', then prima facie proof has been produced. Thus, we see that conviction cannot be anticipated: Judge Bosielo, who is going to continue the hearing in the High Court, has already said that the state evidence did not call for an answer – thus there was no prima facie proof. We should note, however, that Judge Bosielo may be affected by the ruling of the Supreme Court, which maintains that the state evidence does indeed call for an answer. Thus, the state has produced prima facie proof. How then can we navigate through these two opinions, even though the High Court one is regarded as a nullity now? If there is this predicament – where we see that the High Court judge may retain his opinion – then we should understand that what is decisive is not the fact that there was no (or at least no acceptable) answer, but that what called for an answer was in the circumstances so cogent that, if unanswered, it would amount to "sufficient proof".<sup>38</sup>

This could be taken to mean that there must be evidence sufficient to put a

36 See *S v Lubaxa*, para. 11.

37 See De Villiers, WP. 2008. "Plea of autrefois acquit following failure of judge to call witness In terms of section 186 of the Criminal Procedure Act 51 of 1977". *Journal of Contemporary Roman Dutch Law/Tydskrif Vir Hedendaagse Romeins-Hollandse Reg*, 71(1), February:136–141; *Director of Public Prosecutions, Transvaal v Mtsweni* [2007] 1 All SA 531 (SCA).

38 1959 (1) SA 771 (C), 776; Bloch J said that he preferred this phrase to 'full' or 'complete' or 'conclusive' proof, as used in *Jacobson & Levy*, at 478–479.

matter in issue, and if at the end of the day there is doubt, then it must be resolved in favour of the accused.<sup>39</sup> In *New Zealand Construction (Pty) Ltd v Carpet Craft*,<sup>40</sup> it was held that, if full effect were given to the approach in *Jacobson & Levy*, it would follow that every prima facie case, however weak, would become conclusive in the absence of evidence from the other side. With due deference to those cases, it would respectfully be doubtful whether such a conclusion would always be justified. If it were proper to have regard to this piecemeal form of reasoning, then we would prefer to say that the prima facie case may become conclusive.

However, in the new constitutional era, where Article 12 regulates all criminal litigation in Namibia, it is inconceivable that all prima facie evidence will be conclusive. In this light, it is conceivable that the High Court may proceed with a trial, but cannot sit and wait for self-incriminating evidence. Whereas the accused cannot raise the plea of *autrefois acquit*, failure to discharge an accused in the circumstances of this case, if necessary *mero motu*, and failure to acquit, is, a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon such self-incriminatory evidence.

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39 Cf. *S v Trickett*, 1973 (3) SA 526 (T), per Marais J, at 537.

40 1976 (1) SA 345 (N), at 348.

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# The banning of labour hire in Namibia: How realistic is it? Fritz Nghiishililwa\*

## Introduction

In *African Personnel Services v Government of Namibia and Others*,<sup>1</sup> the High Court ruled that section 128 of the Labour Act, 2007,<sup>2</sup> which outlawed labour hire activities in Namibia, was constitutional.

This means that it is unconstitutional and illegal to engage or conduct business as a labour broker or to hire workers to a third party for a reward.

Amongst the reasons given by the court were the following:

- That the contract of employment had only two parties: the employer and the employee
- That labour hire had no legal basis in Namibian common law, which is based on Roman law
- That the imposition of a third person, i.e. the labour hire company, in the employer–employee was unlawful, and
- That the right protected by Article 21(1)(j) of the Constitution of the Republic of Namibia did not include labour hire companies.

Examining the court's decision from a different perspective, one could argue that the approach employed was conservative and unrealistic. Secondly, the court's interpretation of Article 21(1)(j) was very narrow: surprisingly, it overlooked or omitted to consider the position of the International Labour Organisation (ILO) Conventions, which represent the law at international level in terms of labour hire. How does the ILO deal with this issue, therefore?

## Labour broking or labour hire in the context of the ILO

The ILO called for the abolition of profit-driven employment agencies shortly after its founding in 1919. This was given effect by ILO Convention 34 (1935), proposing the abolition of profit-making employment agencies in favour of a state monopoly. However, the demand for contingent labour created a demand for service providers: a demand not efficiently met by state actors and to which private entrepreneurs responded, despite legal restrictions or

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1 Case No. A4/2008.

2 No. 11 of 2007.

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prohibitions. The demand for change could no longer be ignored. Thus, the Convention Concerning Fee-charging Employment Agencies (No. 96) – which formed the legal basis of an ILO tenet that labour is not a commodity – was revised. Adopted in 1949, Convention 96 only regulated work recruitment and placement; basically, it authorised limited exceptions to the rule laid down in Convention 34.<sup>3</sup>

The ILO's main concern has been focused on workers who find themselves outside the protection of labour legislation. Among them are workers employed in a triangular employment relationship, namely when they are –<sup>4</sup>

... employees of an enterprise (“the provider”) perform work for a third party (“the user enterprise”) to whom their employer provides labour or services.

As mentioned earlier, debates over the role and function of private employment agencies in the labour market have a long history. The departure point for this was the Treaty of Versailles, which entrenched various core principles surrounding the rights of workers at the end of World War I.<sup>5</sup>

The ILO's adoption of Convention 181 served as a response to the serious tension within the prevailing regulatory regimes associated with the standard employment relationship. Raday pointed out that this tension centres on the perceived necessity to transform the normative model of employment, while simultaneously preserving security for workers engaged in employment relationships where responsibility could not be placed squarely on one entity in full.<sup>6</sup>

Convention 181 not only recognises private employment agencies as employers, but also establishes a minimum level of protection of their employees, who are made available to a user enterprise to perform contract labour. By adopting Convention 181, the ILO reversed its historic stance against labour market intermediaries and revised its sceptical view of non-standard forms of employment. In a way, Convention 181 also legitimises a triangular employment relationship, shifting from the standard employment

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3 See Finkin, Matthew W & Sanford M Jacoby. 2001. “An introduction to the regulation of leasing and employment agencies”. *Comparative Labour Law and Policy Journal*, 23(1):3–4.

4 Theron, Jan. 2008. “The shift to services and triangular employment: Implications for labour market reform”. *Industrial Law Journal*, 29 January:9:16–17.

5 Vosko, Leah F. 1997. “Legitimizing the triangular employment relationship: Emerging international labour standards from a comparative perspective”. *Comparative Labour Law and Policy Journal*, Fall, 19(1):48–49. The clause concerning the rights of workers' included freedom of association, the eight-hour day, weekly rest, the abolition of child labour, equal remuneration for work of equal value, and the general principle that labour was not a commodity.

6 (ibid.:44–47); see also Raday, Frances. 1999. “The insider–outsider politics of labour-only contracting”. *Comparative Labour Law and Policy Journal*, 20(413):1–2.

relationship towards a new model which embraces more 'flexible' forms of employment.<sup>7</sup> Article 1 of Convention 181 defines the term *private employment agency* as –<sup>8</sup>

... any natural or legal person, independent of the public authorities, which provides one or more of the following labour market services:

- (a) services for matching offers and applications for employment, without the private employment agency becoming a party to the employment relationships which may arise therefrom;
- (b) services consisting of employing workers with a view to making them available to a third party, who may be a natural or legal person which assigns their tasks and supervises the execution of these tasks;
- (c) other services relating to jobseekers, as determined by the competent authority after consulting the most representative employers and workers' organisations, such as the provision of information that does not set out to match specific offers of and applications for employment.

The purpose of Convention 181 is to allow the operations of private employment agencies as well as the protection of the workers using their services, within the framework of its provisions.<sup>9</sup> It is the responsibility of member states to determine the conditions governing the operations of private employment agencies in accordance with the system of licensing or certification, except where they are otherwise regulated or determined by appropriate national laws.<sup>10</sup> The Convention further provides that workers recruited by private employment agencies should not be denied the right to freedom of association and the right to bargain collectively.<sup>11</sup> Private agencies are prohibited to charge directly or indirectly, in whole or in part, any fees or fees or costs to workers.<sup>12</sup> Member states are obliged to ensure that the necessary measures are taken to provide adequate protection for workers employed by private employment agencies in relation to their working conditions.<sup>13</sup>

### Options open to the court

The first option was to follow the ILO stance by not banning the labour hire industry, but rather to suggest stricter regulation. Other countries have done the

7 Vosko (ibid.:44).

8 Article 1, ILO Convention 181 Concerning Private Employment Agencies, 1997.

9 See Article 2.

10 See Article 3.

11 See Article 4.

12 See Article 7.

13 The protection referred to in Article 11 is in relation to freedom of association; collective bargaining; minimum wage; working time and working conditions; statutory social security benefits; access to training; occupational health and safety; compensation in case of occupational accidents or disease; compensation in case of insolvency and protection of workers' claims; maternity protection and benefits; and parental protection and benefits.



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same.<sup>14</sup> Thus, to interpret Article 21(1)(j) in a purposive, broad and generous manner<sup>15</sup> so as to include the protection of the rights of all the parties to the labour hire relationship was crucial if the court was to arrive at an objective analysis of the issues raised in order to make the correct finding.

Protection of fundamental rights was tested in the case of *Kauesa v the Minister of Home Affairs and others*,<sup>16</sup> where a police officer challenged a police regulation that prohibited members of the force to publicly criticise its top leadership. The plaintiff, a police officer, participated in a televised discussion on police-related issues. During the debate, the latter criticised the top leadership of the force, which resulted in him being brought before a disciplinary hearing – at which he was found guilty. The officer challenged the regulation concerned, arguing that it infringed on his fundamental right to freedom of speech and expression as guaranteed in Article 21(1)(a) of the Constitution. The court ruled in favour of the protection of the fundamental right.

The court could have arrived at a different verdict had it exercised its discretion, as provided in Article 25 of the Constitution, which reads as follows:

- (1) Save in so far [sic] 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 other 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

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14 In France, for example, if a company is engaged in hiring temporary workers, it is obliged to declare this to the labour administration, and to provide some financial guarantee to ensure payment of wages to the workers and tax contributions to the state if the temporary work firm is ever declared insolvent. Hiring temporary work is the prerogative of the company. For more information on the French system, see Vigneau, Christophe. 2001. "Temporary agency work in France". *Comparative Labour Law and Policy Journal*, Fall, 23(1):2–3. In South Africa, labour hire is regulated. Theron (2008:9), for example, points out that, in 1983, an amendment to the Labour Relations Act (LRA), 1956 was introduced to regulate labour broking (as temporary employment services, or TESSs, were then known). Today, the relevant provision is section 198 of the LRA, 1995 (No. 66 of 1995).

15 *Minister of Defence v Mwandighi*, 1998 NR 96 (HC).

16 *Kauesa v Minister of Home Affairs & Others*, 1994 NR 102 (HC). The Supreme Court overruled the High Court decision. See also *Fantasy Enterprises CC t/a Hustler 'The Shop' v Minister of Home Affairs & Another*; *Nasilowki & Others v Minister of Justice & Others*, 1998 NR 96 (HC).

## The banning of labour hire in Namibia

of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid.

It may validly be argued that section 128(1) of the Labour Act, 2007 operates retrospectively in the sense that it has effectively taken away a fundamental right that existed before its enactment, namely the right to practise any profession, or carry any occupation, trade or business.

Section 128(1) appears unrealistic and unreasonable because it ignores what is happening in the labour market, thus rendering it defective. Roman law, on which our Namibian law is based, is outdated. Secondly, the law is not static: it is dynamic in the sense that it must address the legal, social and economic needs of the society it serves.

The High Court did not find it necessary to balance the right of the labour hire companies as protected in Article 21 with the disadvantages that labour hire has on the workforce – which was one of the fundamental issues in the *African Personnel Services* case. It is not realistic to argue that, once labour hire was found to be against the law and alien to the Namibian common law, the debate was over.<sup>17</sup> In my opinion, the debate is not over: it has only just started. There are many unanswered questions, one of which is this: is labour hire relevant to the global economy of the future? Should the answer be in the affirmative, are the available labour laws sufficient to regulate the industry or do we need additional laws?

Parliament sought to justify the prohibition of labour hire on the grounds that the practice was against public policy (*contra bonis mores*) because it offended decency and morality. Unfortunately, the law is silent here in the sense that it does not provide for or define which aspects of labour practices are actually guilty of such offence against decency and morality.

Do labour hire activities constitute a crime? In his book, *Principles of Criminal Law*, Burchell defines *crime* as follows:<sup>18</sup>

... a crime is any conduct which is defined by the law to be a crime for which punishment is prescribed.

He points out that certain conduct is a crime because the law pronounces it to be so. Conduct becomes a crime when society, acting through its chosen representatives, decides that a particular type of conduct is bad and ought to be repressed through the medium of criminal law.<sup>19</sup> It is true, therefore, that “the criminal law is the formal cause of crime ... Without a criminal code there would be no crime”.<sup>20</sup>

17 (ibid.:103).

18 Burchell, J. 2005. *Principles of criminal law* (Third Edition). Cape Town: Juta & Co. Ltd, p 58.

19 (ibid.).

20 (ibid.).

In an attempt to provide some clarity, Snyman noted that the concept of *unlawfulness* embraces a negative or disapproving judgment by the legal order of the act. The law either approves or disapproves of the act: it is simply either *lawful* or *unlawful*.<sup>21</sup>

Under common law, all persons are free to enter into lawful agreements, whether these individuals are two or more – including juristic persons such as labour hire companies.

The argument directed against labour hire companies refers to the exploitative nature of the industry as well as its similarities with the now defunct migrant labour system that existed before Namibia's independence, which commoditised labour. Obviously, no Namibian of sound mind would support exploitation or the sale of labour.

But the colonial masters have now left, and Namibia is a sovereign and democratic state, founded upon the principles of democracy, the rule of law, and justice for all.<sup>22</sup> Parliament has the power to pass appropriate and sound laws to regulate and guide social and economic activities. The question to ask, therefore, is whether Roman law is still relevant in Namibia today.

### Relevance of Roman law

Hoeflich gave the following warning to those who wanted to study Roman law:<sup>23</sup>

With the decline in the mercantile empires and the concomitant decline in comparative law during this period, no compelling reason remained for a jurist to study Roman and Civil law.

This appears to suggest that the relevance of Roman law in today's economic, political and legal set-up is diminishing, and relying on it may retard development.

In support of the existence of a triangular relationship in employment, Roskam explained that, in essence, –<sup>24</sup>

[i]f there is a labour broker or temporary employee services (TES), then there is a triangular relationship. The relationship between the labour broker and the workers is one of employment. The relationship between the labour

21 Snyman, CR. 2002. *Criminal law* (Fourth Edition). Durban: Lexis Nexis, p 97.

22 Article 1(1).

23 Hoeflich, MH. 1997. *Roman and civil law and the development of Anglo-American jurisprudence in the nineteenth century*. Athens/London: The University of Georgia Press, p 146.

24 Roskam, A. 2007. *An exploratory look into labour market regulation*. Cape Town: University of Cape Town Press, p 41.

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broker and the client is regulated by commercial contract. The relationship between the client and the workers is governed by statute in terms of which the client is jointly and severally liable with the labour broker in respect of certain contraventions of labour-related agreements, awards, statutes, or sectoral determinations. Therefore the client acquires the status of employer in certain circumstances.

In a study conducted in 2006 by the Labour Resources and Research Institute (LaRRI) for the Ministry of Labour, the Institute pointed out the following:<sup>25</sup>

... [o]utlawing labour hire while allowing other forms of outsourcing to continue might thus not solve the problem. Instead, the general practice of outsourcing would have to be severely limited by placing restrictions on companies. This would certainly be vehemently opposed by the private sector and given Namibia's pronouncements in favour of "free market policies" it is unlikely that the Namibian government would be prepared to take such a step.

The report has criticised the exploitative nature of the labour hire system<sup>26</sup> and that labour laws are not adhered to; however, it acknowledges that the system offers many advantages to client companies. The report proposed strict regulations for the industry. These cover –

- a licensing regime for labour hire companies
- compulsory licence fees
- the specification of responsibilities and liabilities of labour hire and client companies towards their workers, especially with regard to issues of occupational health and safety as well as retrenchments, and
- the role of trade unions in terms of negotiating on behalf of labour hire workers.

The complexity of the labour hire industry demands that a new but separate legal instrument be enacted to govern and regulate the industry.

Laplagne et al.<sup>27</sup> observed that changes in the industrial relations environment and practices by firms had contributed to an increase in the number of firms using labour hire. They also noted that, in addition to these changes in the labour environment and practice, widespread technological change and increased pressures on firms had influenced their employment strategies, including the use of labour hire.<sup>28</sup> The same is true in Namibia.

In South Africa, the term *temporary employment services* (TESs) is used rather than *labour hire*.

25 LaRRI/Labour Resources and Research Institute. 2006. *Labour hire in Namibia: Current practice and effects*. Windhoek: LaRRI, p 72.

26 (ibid.:15–19).

27 Laplagne, P, M Glover & T Fry. 2005. "The growth of labour hire in Australia". *Productivity Commission Staff Working Paper*, February:33.

28 (ibid.:34).

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Section 198 of the South African Labour Relations Act<sup>29</sup> defines *temporary employment services* as follows:

- (1) In this section, “temporary employment service” means any person who, for reward, procures for or provides to a client other persons –
- (a) who render services to, or perform work for, the client; and
  - (b) who are remunerated by the temporary employment service.

The interesting part in the latter law is found in section 198(2), which provides that the labour broker/TES is the employer of the workers – and not the client. Furthermore, in terms of section 98(4), the client is jointly responsible with the broker if there is a contravention of –

- a collective agreement concluded in a bargaining council that regulates terms and conditions of employment, or
- a binding arbitration award that regulates terms and conditions of employment.

Shortly after learning of the Namibian court’s ruling, South Africa expressed her support for the prospect of banning labour broking after the general elections. In South Africa, the industry employs approximately 500,000<sup>30</sup> people per year, in Namibia it employs about 20,000.<sup>31</sup> Looking at the number of workers affected, the disbandment of the industry will have a devastating effect on both nations in respect of their already high unemployment rates. The question that remains unanswered is this: whose interests is the ban serving?

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29 No. 66 of 1995.

30 Palmer, G. 2009. “Labour brokers under threat”. Available at <channel.co.za>; last accessed 15 May 2009.

31 LaRRI (2006:26).

## ***Matheus Hepute v The Minister of Mines and Energy & Northbank Diamonds (Pty) Ltd*** **Reinhard Töttemeyer\***

The importance of the so-called *Hepute* judgment lies in the fact that it, for the first time, firmly and authoritatively establishes the principle in southern African law that a party initiating litigation as a ‘man of straw’ and who effectively (although he has *locus standi*) acts as a front for another, can be ordered to give security for the costs of a respondent/defendant. As a result, the existence of a further category of persons who may be held liable to give security for costs has been confirmed.

### **The history and facts of the matter**

The litigation in question had a long history in which the landowner of the Farm “Aussenkehr”, situated on the northern banks of the Orange River, as well as various other associated parties sought to prevent Northbank Diamonds (Pty) Ltd (“Northbank”) from fully exploiting an Exclusive Prospecting Licence (“EPL 2101”) granted to it by the Minister of Mines and Energy (“the Minister”) and to declare the granting of EPL 2101 by the Minister as invalid.

The litigation commenced in 2000 in terms of an application brought under Case No. A 132/2000. It was brought by the landowner, Aussenkehr Farms (Pty) Ltd, and others. Northbank successfully opposed the application in the High Court, and an appeal by the applicants to the Supreme Court also failed. The Supreme Court judgment is reported at 2005 NR 21 (SC).

The legal costs incurred by Northbank in Case No. A 132/2000 were in the order of N\$1.5 million.

In November 2000, yet another application challenging the renewal of EPL 2101 was launched in the High Court, this time under Case No. (T) I 113/2000. The latter application was brought by two of the parties that had also been applicants in Case No. A 132/2000, and constituted the landowner, Aussenkehr Farms (Pty) Ltd.

Yet another application was commenced in June 2004, under Case No. A 57/04. This one was brought by Matheus Hepute and six other persons who are all low-income-earning employees living on the Aussenkehr Farm and at the Aussenkehr Village owned by Aussenkehr Farms (Pty) Ltd. It was common cause that the purpose of the latter application was also to prevent

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Northbank from fully exploiting EPL 2101. The application under Case No. A 57/04 prompted Northbank (the second respondent in the application) to deliver a notice in terms of High Court Rule 47(1) demanding security for their legal costs.<sup>1</sup>

Security for costs was claimed from Mr Hepute and the other five applicants jointly and severally, in the amount of N\$350,000 and on the following grounds:

- The applicants were persons of no or little means or assets (and effectively persons of straw) who would be unable to pay Northbank's costs in the event of Northbank being successful with its defence, and
- The applicants were effectively litigating in the matter in a nominal capacity or as a front for another or for others, more particularly for all (or one or more) of the following entities:
  - Nagrapex (Pty) Ltd
  - Aussenkehr Farms (Pty) Ltd, and/or
  - Other companies or institutions who were the applicants in the applications brought under Case No.'s A132/2000 and (T) I 113/2000.

Mr Hepute and the others making the application contested their liability to give security for Northbank's costs. This led to an opposed application in terms of Rule 47, in which Northbank claimed the said security. The latter application was opposed and Northbank succeeded in the High Court, where Muller J ordered Mr Hepute and the others, jointly and severally, to give security for Northbank's costs in an amount of N\$350,000.<sup>2</sup>

Mr Hepute and the others subsequently appealed against the High Court judgment. This appeal was opposed by Northbank and led to the judgment under discussion, delivered on 31 October 2008. The following facts were held to be common cause by the Supreme Court:<sup>3</sup>

- Mr Hepute and the other employees resided on the land of the landowner, Aussenkehr Farms (Pty) Ltd
- Mr Hepute and the other employees were not parties to approximately the same legal battles over similar disputes in the past, and
- Mr Hepute and the others –
  - were incolae of the Supreme Court
  - were low-income-earning employees with little means
  - commenced with proceedings that were approximately the same or closely related to those which the landowner and others had launched against Northbank in the past

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1 For an exposition of the above facts, see the *Hepute* judgment, pp 1–2, 10–12.

2 Reported at 2007 (1) NR 124 (HC).

3 (*ibid.*:10–12, 17–18).

- were represented by the same legal representatives and counsel as the landowner and others in the previous litigation
- were dependent on the landowner for the costs of opposing the application for security for costs, and
- The landowner foots the bill for the application brought under Case No. A 57/04.

On a balance of probabilities, the Supreme Court found that Mr Hepute and the others were persons of straw who were effectively put up as a front for another party, namely the landowner, in Case No. A 57/04.<sup>4</sup>

## The legal principles applicable and the import of the *Hepute* judgment

Before the import of the *Hepute* judgment is considered further, brief reference needs to be made to the applicable and generally accepted practice and principles in existence prior to that judgment regarding the liability to give security for costs.

It has been a long-accepted principle that *incolae* will not be ordered to give security for costs on the ground of impecuniosity alone, since the general rule is that every citizen should have uninhibited access to the courts. This was also recognised by the Supreme Court in the *Hepute* judgment.<sup>5</sup>

*Herbstein and Van Winsen*, with reference to numerous authorities, identify the following general categories of parties who may be held liable to give security for costs:<sup>6</sup>

- Peregrini
- Insolvents
- Companies (and in terms of section 13 of the Companies Act<sup>7</sup>)
- Litigants who institute vexatious proceedings, and
- So-called special cases.

It was common cause that Mr Hepute and the others did not fall into the first four categories referred to above. Although the Court *quo* held that the litigants were vexatious, that finding was, strictly speaking, *obiter*.<sup>8</sup> What called for consideration was, therefore, whether or not they could fall under what

4 (ibid.:27–30).

5 (ibid.:15, para 23; 16, para 24); see also *Witham v Venables*, (1828) 1 Menz 291.

6 De Villiers, L et al. 1997. *Herbstein and Van Winsen: The civil practice of the Supreme Court of South Africa* (Fourth Edition). Cape Town: Juta, pp 321–342.

7 No. 61 of 1973.

8 2007 (1) NR 124 (HC), at 134, para 30.



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is (generically) referred to by *Herbstein and Van Winsen* as being “special cases”.

With regard to special cases, *Herbstein and Van Winsen* state the following:<sup>9</sup>

It may be that where the process of the court is being abused by a man of straw being put up as a plaintiff while the real party shelters himself behind the dummy the Court will order security for costs to be given. But it must be clearly shown that the plaintiff is such in name only and that he possesses no property.

The above quote from *Herbstein and Van Winsen* suggests that a party with a substantial and real interest in the subject-matter of the litigation could never be ordered to give security even if he is put up as a dummy for another and is impecunious. However, on a proper analysis of the case law in existence before the *Hepute* judgment, it appears these cases do not fully support the above statement by *Herbstein and Van Winsen*.

In *Mears v Brooks’ Executor and Mears Trustee*<sup>10</sup>, it was held in an *obiter dictum* that the litigant who initiated the action in that matter (who was an unrehabilitated insolvent) could be ordered to give security on the basis that he had only a nominal interest in the litigation and had no real interest in the subject-matter thereof.

In the matter of *Pillemer v Israelstam and Shartin*,<sup>11</sup> the Court upheld the principle that a nominal plaintiff (without defining that term) must give security for costs in circumstances where he, as ‘a man of straw’, is put up as a plaintiff.

In a more recent judgment of the Transkei High Court in the matter of *Vanda v Mbuque and Others*<sup>12</sup> the Court (as per White J) – after setting out a full exposition of the grounds upon which a litigant may be ordered to give security for costs – held (almost in passing) as follows concerning the circumstances where an incola may be ordered to furnish security:

If an incola who is a man of straw litigates in a nominal capacity or **is a front for another**, he may be ordered to furnish security.

In the *Hepute* matter, it was common cause that Mr Hepute and the other applicants complained of a violation of a number of their constitutional rights. From their allegations made in application A 57/04, it thus appears that they had a real interest in the litigation. In that sense, therefore, it could not have

9 De Villiers et al. (1997:342).

10 1906 TS 546, at 550.

11 *Pillemer v Israelstam & Shartin*, 1911 WLD 158, at 160.

12 1993 (4) SA 93 (TkGD), 94 J–95 A.

been said that they in any manner fell in the category of being *nominal* litigants. In the High Court proceedings in the *Hepute* matter, the court followed *Vanda v Mbuque*.<sup>13</sup>

In the latter regard, the Supreme Court agreed with Muller J and held as follows:<sup>14</sup>

- [24] I agree with Muller J that the implicated exception creates two discrete categories: while being a man of straw litigating in a nominal capacity, or while being a man of straw being put up as a front for another. Both instances would amount to an abuse of the process of the Court. There is, or ought to be[,] a distinction between being a nominal plaintiff and being a front. In my view a nominal plaintiff/applicant is one who, although he might be entitled to maintain the action[,] has no interest in the subject-matter of the cause such as the case was in **Mears'** case supra, at 550 ...

A front on the other hand is one who is being used to shield another from the adverse consequences of litigation. In both respects the principle underlying the rule is sound and is founded on the public policy consideration that the abuse of the process of the court should be frowned upon: it is not fair to allow a plaintiff with no real interest in the litigation to drag another through litigation while being unable to meet an adverse costs order at the end of the day; and it is equally unfair to allow a party who has an interest in the litigation to use a poor man (who also has an interest) and in doing so hedge itself against an adverse costs order. It needs to be understood very clearly that in the application of the exception, a person is not ordered to pay costs because he or she is poor but because, while being impecunious, he or she is either a nominal plaintiff/applicant or is being used as a front by another. Poverty, without more, is no bar to seek justice.

- [25] A defendant/respondent who wishes to obtain security for costs on the strength of the implicated exception should, on a balance of probability, show that the plaintiff/applicant is poor and is, in addition, a nominal litigant or a front for another party. If the jurisdictional facts are established for the invocation of the exception, the Court may order security for the costs of the defendant/respondent upon application therefor.

The importance of the *Hepute* judgment is that it is the only authoritative statement in southern African law which fundamentally addresses the issues underlying the principle that persons who have a real interest in the litigation, but who are impecunious and who are put up as dummy litigants by other parties in order to advance the interests of the latter, can be held liable to give security for costs.

13 2007 (1) NR 124 (HC), at 131, para 21; and 132, para 25.

14 *Hepute* judgment, pp 15–16 para. 24–25; see also p 19, para 28.

In firmly establishing the aforementioned category, the Supreme Court emphasised that it is mindful of the well-established principle that the question of security is one of practice and not of substantive law and in which the courts enjoy a wide discretion.<sup>15</sup>

It is submitted that the Supreme Court judgment constitutes an important development in further enhancing procedural justice and to avoid that the processes of the court are abused at the respondents'/defendants' expense. When an impecunious litigant (with a real interest in the litigation) institutes proceedings whilst being backed by another party who also has a substantial interest in the litigation and who uses the litigant as a dummy to advance his/her own interests (whilst not entering the arena him-/herself), it has the inherent potential danger that –

- the initiator and backer of the litigation hedges him-/herself against a possible adverse order for costs should the litigation ultimately be successful, and
- injustice may be caused to respondents/defendants, who will be unable to recover their costs from the impecunious applicant/plaintiff should they be successful in their defence of the litigation. This will only be prevented if the initiator of such litigation – who in any event funds the litigation – is effectively compelled to give security for costs. This can effectively only be achieved by ordering the dummy litigant to give security.

An order for security for costs in the aforementioned circumstances will also prevent the impecunious applicant/plaintiff from being exploited by the initiator of the litigation in the sense that, should the litigation ultimately fail, the impecunious litigant will be held liable for costs (thereby being deprived of whatever meagre assets it may have) whilst the actual initiator could turn its back on the litigation and not be held accountable for costs at all.

### **A brief reference to other principles under discussion in the *Hepute* judgment**

Numerous other issues and principles were addressed by the Supreme Court, none of which were novel. One further aspect may, however, require mentioning. The Supreme Court held that the proposition by *Herbstein and Van Winsen*, namely that –<sup>16</sup>

[i]n deciding the application for security for costs, the Court will not inquire into the merits of the dispute but may have regard to the nature of the case[.]

<sup>15</sup> (ibid.:20, para 29; 21, para 30; 31, para 46).

<sup>16</sup> De Villiers et al. (1997:330, 344); see also the authorities referred to therein.

should be approached with great caution, lest, in the process of trying to draw the very fine dividing line between what is properly “the merits of the case” as opposed to “the nature of the case”, the real purpose of the enquiry is lost and the court’s discretion is unduly fettered.<sup>17</sup>

The court also held that cases on which *Herbstein and Van Winsen* rely in support of their above proposition are of contestable authority in the light of recent judgments in South Africa.<sup>18</sup>

When security for costs is sought against an applicant who alleges an infraction of his/her constitutional rights, consideration of the nature and extent of the alleged violation is an important consideration in exercising a discretion one way or the other with regard to the furnishing of security for costs by such litigant.<sup>19</sup>

In the *Hepute* cases before the High and Supreme Courts, however, and also with reference to the history of the litigation between applicant and the other parties who instituted the earlier litigation referred to above, it is apparent that the violation of the constitutional rights of the inhabitants of Aussenkehr Farms (Pty) Ltd on account of the exploitation of the EPL 2101 had already been considered by the courts in the earlier litigation, which was resolved in favour of Northbank. As a result, the alleged infraction of constitutional rights relied on in the current main application (A 57/04) was not as weighty as might otherwise have been the case.<sup>20</sup>

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17 *Hepute* judgment, p 22, para 31.

18 See earlier herein.

19 (*ibid.*:22, para 32).

20 (*ibid.*:23–24, para 34).

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***Mathews Kristof Shikongo v Trustco Group International Limited & Others; Case No. [P] I 3625/2006, High Court of Namibia, 29 January 2009***  
Karin Klazen\*

**CORAM: Muller, J**

## Introduction

The law of defamation in Namibia has recently received significant judicial consideration. In 2008, two separate High Court judgments<sup>1</sup> outlined the unconstitutionality surrounding strict liability for the media in defamation actions. In the most recent case<sup>2</sup> on the subject, the plaintiff's action against the owner, editor (and author of the defamatory article) and printer of the *informanté* newspaper for publishing defamatory material against him resulted in a ruling which confirmed the rejection of strict liability of the media.

The facts of the *Shikongo* case are briefly as follows. On 21 September 2006, an article appeared on the first and second pages of *informanté*, entitled "Fincky aids Broederbond's land cause", and carried the following byline, "A Broederbond<sup>3</sup> cartel is said to have made a killing after buying municipal land in Olympia for one cent per square metre".<sup>4</sup> The author (the second defendant) alleged that the plaintiff was in cahoots with a Broederbond cartel for the sale of land in contravention of one of the conditions registered against the title deed of the property. The condition in question stipulated that the City of Windhoek had the right to the first purchase offer on the property, and that the property could not be sold unless the Municipality had exercised its right of first refusal. The newspaper article stated that the Council had never been advised of its rights in terms of this condition, and that the land had been sold without giving the City of Windhoek an opportunity to make a purchase offer.

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\* Legal Practitioner of the High Court of Namibia.

1 *Pohamba Shifeta v Raja Munamava & Others*, unreported judgment of Parker J, delivered on 5 December 2008; *Universal Church of the Kingdom of God v Namzim Newspaper t/a The Southern Times*, unreported judgment of Silungwe AJ, delivered on 9 December 2008.

2 *Mathews Kristof Shikongo v Trustco Group International Limited & Others* (hereinafter the *Shikongo* case).

3 A white Afrikaner supremacist organisation.

4 (*ibid.*:para. 1).

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The author further reported that the plaintiff had allowed the “underhand deal”<sup>5</sup> to go through in order to benefit his own interests as a board member of Bank Windhoek, in whose favour the mortgage bond over the property had been registered. The article also stated that the plaintiff had misled the City regarding the status of the land, and that he had caused the City to suffer a loss of some N\$5 million.<sup>6</sup>

In making the above allegations against the plaintiff, the author relied on information obtained from inside sources at the City of Windhoek and at Bank Windhoek.

On the basis of the article, the plaintiff instituted action for defamation against the defendants and claimed damages to the tune of N\$500,000.

In delivering its judgment, the court dealt with the following issues:

- The law in respect of liability of the media in defamation actions
- The onus of proof in proving publication of the defamatory material
- Whether the article as published was defamatory of the plaintiff
- Whether the defendants could successfully prove one or more of the recognised defences, and
- The quantum of damages.

## The law in respect of liability of the media

In examining strict liability of the media in defamation actions, Muller J discussed the law as it had developed in South Africa and Namibia, respectively. In South Africa, in *Pakendorf & Andere v De Flamingh*,<sup>7</sup> the Supreme Court of Appeal held that strict liability applied in respect of the media. This meant that the media was liable without fault. However, the *Pakendorf* decision was eventually changed by a ruling of the same court in *National Media & Others v Bogoshi*<sup>8</sup>, which rejected *Pakendorf* and the strict liability of the media in defamation actions.

Muller J noted that, prior to Namibia’s independence, the Namibian courts were bound by the *Pakendorf* case to hold the media strictly liable for defamatory publications. The *Pakendorf* decision was, thus, the applicable law at the time of Namibia’s independence. However, since 1990, South African decisions – including those of the Supreme Court of Appeal and the Constitutional Court – have carried only persuasive value in Namibian courts and, unlike the pre-independence era, our courts are not bound by such decisions.

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5 (ibid.:para. 11).

6 (ibid.:para. 12).

7 1982 (3) SA 146 (A) (hereinafter the *Pakendorf* case).

8 1998 (4) SA 1196 (SCA) (hereinafter the *Bogoshi* case).

Thus, the court in the present case was tasked with the duty to decide whether or not the media is still bound by the concept of strict liability.

Upon further reflection of recent Namibian<sup>9</sup> and South African<sup>10</sup> case law on the subject, Muller J was persuaded that –<sup>11</sup>

... the decision of *Pakendorf* to place a burden of strict liability on the media was wrong and was correctly rejected by the South African Appeal Court in the *Bogoshi* case.

The judge accordingly held that the media was not subject to strict liability in Namibia. It was made clear, however, that owing to the importance of the strict liability principle for Namibia, any decision made by the court might have to be confirmed by higher authority in future.

## Onus of proof

The principles of the law of defamation dictate that the plaintiff bears the onus of proving, on a balance of probability, publication of the alleged defamation in respect of him/her. Where the alleged defamatory material appears in a newspaper, publication is prima facie established and the plaintiff need only prove that the material is defamatory and relates to him/her. If the plaintiff successfully proves both requirements, the following presumptions arise:

- That the publication was unlawful, and
- That it was made animus injuriandi.

The onus then shifts to the defendant to rebut the presumptions by establishing any of the recognised defences.

In the present case, there was no dispute that the article had been written by the second defendant and published in the *informanté* newspaper. Therefore, in order for the presumptions to arise, the plaintiff had to prove the remaining requirement: that the article had been defamatory.

## Defamatory character of the article

The court invoked the ‘reasonable reader’ test in order to determine whether the article had defamed the plaintiff. Due to the objective nature of this test,

9 *Afrika v Metzler & Another*, 1994 NR 323 (HC); *Afshani & Another v Vaatz*, 2006 (1) NA 35 (HC); *Pohamba Shifeta v Raja Munamava & Others*; *Universal Church of the Kingdom of God v Namzim Newspaper t/a The Southern Times*.

10 *Khumalo & Others v Holomisa*, 2002 (5) SA 401 (CC); *Mtembi-Mahanyele v Mail and Guardian Ltd & Another*, 2004 (6) SA 329 (SCA).

11 *Mathews Kristof Shikongo v Trustco Group International Limited & Others*, at para. 41.



## RECENT CASES

the court was not concerned with the meaning that the author (the second defendant) of the statement had intended to convey, but was instead concerned with “the meaning which a reasonable man would likely give to the statement in its context and whether that meaning is defamatory”.<sup>12</sup>

After hearing arguments from counsel for the plaintiff and the defendant, the court was persuaded that the statements in the article were “clearly defamatory of the plaintiff”.<sup>13</sup> Muller J was of the opinion that –<sup>14</sup>

... the normal reasonable reader will come to no other conclusion, after reading the article, than that the plaintiff was part of an underhand and dishonest deal and in this regard abused his position as Mayor of the City of Windhoek to further his own interest for which he used his association with Bank Windhoek, which he failed to declare to the City Council when the decision was taken.

Following the successful proof of the publication having been defamatory, the presumptions referred to earlier arose: the onus was now on the defendants to prove the defences as relied on in their pleadings, namely –

- truth and public benefit, and
- reasonable publication.

### The defences

The defence of truth and public benefit requires that the publication be true and for the public benefit. It is not necessary for each and every detail in the statement to be true, but rather that the material allegations of the statement be true. Additionally, and in terms of what constitutes *public interest*, “the public benefit lies in telling the public something of which they are ignorant ...”.<sup>15</sup>

The court carefully assessed the evidence relating to both the factual situation and the article written by the second defendant. The judge found the allegations that the plaintiff had abused his position as Mayor of Windhoek to the detriment of the inhabitants of the City, that he had caused loss of revenue for the City, and the issue of the plaintiff’s alleged dishonesty were “without any merit”, “clearly wrong” and “unsupported by evidence”.<sup>16</sup>

The court held that the second defendant had based his article on information without establishing whether the content thereof was true and correct. On the evidence before it, the court further found that the information relied on in writing the article had been factually incorrect and never verified and, furthermore, that no efforts had been made to check the sources of the

12 The *Shikongo* case, at para. 45.

13 (*ibid.*:para. 53).

14 (*ibid.*:para. 51).

15 (*ibid.*:para. 55).

16 (*ibid.*:para. 69).

information. It was clear that the defendant had failed to prove a defence of truth and public benefit.

The second defendant also relied on the defence of reasonable publication, as laid down in the *Bogoshi* case. This defence provides that –<sup>17</sup>

...the publication in the press of false defamatory allegations of fact will not be regarded as unlawful if, upon a consideration of all the circumstances of the case, it is found to have been reasonable to publish the particular facts in a particular way and at a particular time.

The defendants bore the onus of proving the element of reasonableness. Citing *Mtembi-Mahanyele v Mail and Guardian Ltd & Another*<sup>18</sup> and the *Bogoshi* case, the judge agreed that, in determining reasonableness of publication, the relevant criteria were –<sup>19</sup>

- the tone of the publication
- the nature of the information published
- the reliability of the source, and
- the steps taken to verify the information.

On applying the above criteria to the facts of the case, Muller J held that the tone of the publication in the *informanté* newspaper had indicated a purpose to hurt and destroy the good name and reputation of the plaintiff. Furthermore, the judge found that the second defendant had not done enough to contact the plaintiff to verify the information, and that the defendant had acted recklessly in writing the article under the circumstances. The judge believed that, with the publication of information so detrimental, the second defendant should have made a serious effort to obtain the plaintiff's version before writing the article.<sup>20</sup>

As a result of the evidence placed before it, the court ruled that the second defendant had *animus injuriandi* when he wrote the article. The second defendant was unable to successfully prove any of his defences, and was therefore liable for defamation together with the first and third defendants, who endorsed the defamation subsequent to the publication.

## Quantum of damages

The purpose of awards for damages in a defamation action is not penal in nature. The rationale in awarding damages is to afford the victim personal satisfaction for the impairment of a personality right.

In determining the quantum of the damages to be awarded to the plaintiff, the

17 (ibid.:para. 55).

18 2004 (6) SA 329 (SCA).

19 (ibid.:para 70, 71).

20 (ibid.:para. 72).

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court considered awards granted in other defamation cases. The court also took account of the attitude of the defendants in failing to apologise for the defamatory publication.

Muller J ruled that an amount of N\$175,000 was reasonable and justifiable for the damages suffered by the plaintiff as a result of the defendants' defamatory publication.

Ultimately, the plaintiff succeeded with his action for defamation and the following order was made:

- Judgment was granted against the defendants, jointly and severally, in the amount of N\$175,000
- The defendants had to pay the interest on the amount of N\$175,000, jointly and severally, at the rate of 20% per annum, calculated from date of judgment to date of payment;
- The defendants had to pay the costs of the action, jointly and severally;
- The costs payable by the defendants included the costs of two instructed and one instructing counsel.

# OTHER NOTES AND COMMENTS

## Phase 1 of the Namibian Ascertainment of Customary Law Project to be completed soon\* Manfred O Hinz\*\*

### Introduction

Many lawyers still find it difficult to accept that customary law is not static, but that it changes – and even *is* changed in the communities where it applies.<sup>1</sup> The widely made reference to the Roman law perception of customary law, according to which one criterion to distinguish *customary law* from *customs* is the continued observation of the former over time,<sup>2</sup> is unable to explain the dynamics inherent in customary law recorded by legal sociologists and anthropologists. It is only recently that South African courts have acknowledged that the *living law* of communities differs from what has been reported to be the *official customary law*. The said courts have instead opted for the recognition of the living law.<sup>3</sup>

When the original Namibian Traditional Authorities Act<sup>4</sup> was re-promulgated in 2000,<sup>5</sup> the new Act contained a provision that was not contained in the

\* This comment is the shortened version of an article submitted to the conference “African customary law revisited: The role of customary law in the 21st century”, held at the University of Botswana from 23–24 October 2008. The long version of the paper will be published in the conference proceedings.

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1 On the concept of *customary law*, see D’Engelbronner-Kolff, FM. 1998. “The people as law-makers: The judicial foundation of the legislative power of Namibian traditional communities”. In D’Engelbronner-Kolff, FM, MO Hinz & JL Sindano (Eds). *Traditional authority and democracy in southern Africa*. Windhoek: New Namibia Books, pp 62f. The term *community* is used to denote traditional community as defined in the law that governs Traditional Authorities in Namibia, namely the Traditional Authorities Act, 2000 (No. 25 of 2000) and its predecessor, Act No. 17 of 1995, as amended.

2 The usual reference in southern Africa is *Van Breda v Jacobs*, 1921 AD 330.

3 Cf. Himonga, C & C Bosch. 2000. “The application of African customary law under the Constitution of South Africa: Problems solved or just beginning?”. *South African Law Journal*, 117:306ff.

4 No. 17 of 1995.

5 As the Traditional Authorities Act, 2000 (No. 25 of 2000).

original version of the Act. Section 3(3)(c) of the 2000 Act mandates Traditional Authorities to “make customary law”. This provision has legal implications that have not yet been fully explored and interpreted, including in constitutional terms, which suggests Parliament to be the main – if not only – lawmaker.<sup>6</sup> Apart from the authority to “make customary law”, the Traditional Authorities Act expects Traditional Authorities to “ascertain” the customary law applied in the various communities and also to “assist in its codification”.<sup>7</sup>

No effort has been undertaken to codify customary law in Namibia.<sup>8</sup> However, most traditional communities in Namibia have started a process of what has been called *self-stating* customary law.<sup>9</sup> *Self-stating* is understood as opposed not only to *codifying*, but also to *restating*, in the sense of the Restatement Project of the School of Oriental and African Studies at the University of London. *Self-stating customary law* refers to the communities themselves making and ascertaining their own customary law.<sup>10</sup> *Self-stating* is ascertaining customary

6 Cf. Article 44 of the Namibian Constitution. Does Article 44 imply that nobody other than the National Assembly has the power to enact law? For those who follow the Kelsenian state-centred approach, according to which all legal actions are eventually linked to the Grundnorm (basic norm), lawmaking by non-delegated authorities remains an unacceptable anomaly. Legal pluralism avoids the strictness of the state-centred approach by accepting that societal forces create and administer their own laws. On legal pluralism, see Hinz, MO. 2006. “Legal pluralism in jurisprudential perspective”. In Hinz, MO (Ed., in collaboration with HK Patemann). *The shade of new leaves. Governance in Traditional Authority: A southern African perspective*. Münster: Lit Verlag, pp 29ff; and Menski, W. 2006. *Comparative law in a global context: The legal systems of Asia and Africa* (Second Edition). Cambridge: Cambridge University Press, pp 82ff.

7 Section 3(1)(a) of the Act.

8 The ascertainment of customary law was the topic of an international workshop organised by the Namibian Ministry of Justice in 1995; cf. Bennett, TW & M Rüniger (Eds). 1996. *The ascertainment of customary law and the methodological aspects of research into customary law: Proceedings of workshop, February/March 1995*. Windhoek: Law Reform and Development Commission. Apart from the alternative of codifying customary law, its restatement – as practised in many African countries by the School of Oriental and African Studies of the University of London – was debated; cf. Allott, AN. “The Restatement of the African Law Project and thereafter”. In Bennett & Rüniger (ibid.:31ff). The author of the current article pleaded for “law reform from within” (Becker, H & MO Hinz. 1996. “Customary-law research in Namibia: Methodological remarks”. In Bennett & Rüniger (ibid.:77ff)), including the need to link the various communities in Namibia with each other in order to create an interactive process of law reform (ibid.:92).

9 See here Hinz, MO, 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, pp 3ff; Hinz, MO. 1997. “Law reform from within: Improving the legal status of women in northern Namibia”. *Journal of Legal Pluralism and Unofficial Law*, 39:69ff; Hinz, MO & JW Kwenani. 2006. “The ascertainment of customary law”. In Hinz (2006:203ff).

10 To what extent communities develop their laws by themselves, i.e. by their members, or at least in line with community-accepted rules, is a question to which this article will return at a later stage, although it will not be possible, on the basis

law by the people themselves, but *self-stating* also encompasses the making of rules by the communities concerned in accordance with their customary law, while ascertaining those laws. *Ascertaining* or *self-stating* customary law is very different from *codifying* it. When, for example, criminal common law is being codified, such codification is meant to replace the common law in force before it was codified. However, the law in force before may still be of help to interpret the codified law, but will otherwise cease to exist as law. The *ascertaining* of customary law, on the other hand, does not render the non-ascertained parts of the customary law concerned obsolete: this non-ascertained part of the law continues to exist. The ascertained part of it may even be revisited by the respectively underlying customary law solely in existence before the ascertainment.<sup>11</sup>

The following observations are intended to give an account of the state of affairs as regards what has developed over the years into the Namibian Ascertainment of Customary Law Project by Self-statement.

## From the Ongwediva Meeting to a nationwide project of self-stating customary law

At a conference organised by the Namibian Ministry of Justice in April 1992 on the administration of justice for magistrates, other judicial officers and Traditional Authorities,<sup>12</sup> one of the traditional communities – the *Vakwangali*, who live in the western part of the Kavango Region<sup>13</sup> – presented a document titled *The Laws of Ukwangali*.<sup>14</sup> These laws deal with different wrongs (such as murder, robbery, rape and assault) and the legal consequences a traditional court may impose in the case of conviction.

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of the available information, to provide the reader with a comprehensive answer.

11 What has been said in this paragraph is still open to further consideration. However, the outlined principles are concluded from opinions held in comparative law about the European approaches to codification (cf. Zweigert, K & H Kötz. 1996. *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts* (Third Edition). Tübingen: JCB Mohr, pp 84ff), common sense, and observations of traditional court practices.

12 Cf. Hinz. MO & MF Sichilongo. 1992. "Report of a seminar on the administration of justice for judicial officers, police officers, regional commissioners and traditional leaders, 4–5 April 1992". [Unpublished paper]; and Hinz, MO. 2008a. "Traditional courts in Namibia – Part of the judiciary? Jurisprudential challenges of traditional justice". In Horn, N & A Bösl (Eds). *The independence of the judiciary in Namibia*. Windhoek: Macmillan Education Namibia, pp 149ff.

13 In accordance with Article 102 of the Namibian Constitution, the country is divided into 13 Regions, each with its own regional government structure. Besides these, there are also traditional structures of government in place. In many parts of the country, traditional structures are the first (and sometimes only) governmental entry points for the people.

14 The Laws of Ukwangali can be found in Hinz (1995:119ff).

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The conference understood that the laws of *Ukwangali* were presented in order to create awareness about the workings of the law at the most local level and, by doing so, to call on the meeting to take note of the traditional administration of justice as an integral part of the overall justice system of the country. With this, the conference became a challenge to all who thought that the traditional administration of justice was something of the past. In fact, the debate at the conference turned into the starting point of a long process of investigating the administration of justice under customary law and its inherited legal framework, 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.

Research following the 1992 conference and visits to various traditional communities<sup>15</sup> revealed that other communities had compiled documents similar to the *Laws of Ukwangali*. A preliminary analysis of the documents showed that even communities belonging to the same language group and living close to each other provided for different consequences for the very same wrong. This led to several rounds of consultations in various parts of the country. The consultations were used to expose the communities to information about the legislative achievements of other communities in the country. The first consultation of this kind, a meeting with the *Oshiwambo*-speaking communities, was held in Ongwediva on 25–26 May 1993<sup>16</sup> and became, in retrospect, the most prominent one as it set the tone for meetings in other parts of the country and eventually led to the birth of the nationwide project to ascertain customary law in the various communities by self-statement.<sup>17</sup>

Indeed, the exchange of information prompted the *Oshiwambo*-speaking communities, the communities of the Kavango Region, and the Nama communities to consider the harmonisation of certain parts of their customary laws.<sup>18</sup> Efforts to harmonise customary law applied in particular to the fines for

- 15 Aspects of the research are summarised in Hinz, MO. 2008b. "Traditional governance and African customary law: Comparative observations from a Namibian perspective". In Horn, N & A Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia, 71ff.
- 16 The Ongwediva Meeting and the others that followed were organised by the Centre for Applied Social Sciences – an independent research institution later associated with the Faculty of Law at the University of Namibia – through its Customary Law Unit, in cooperation with the Ministry of Justice.
- 17 The work of the Customary Law Unit has been supported by several foreign donors. Among them are the Swedish International Development Agency, Sida, and more recently the Mission of Finland in Namibia, which has made its assistance available through the Human Rights and Documentation Centre of UNAM's Faculty of Law.
- 18 After the Ongwediva Meeting. The Kavango groups followed in Rundu from 8–9 June 1994, while the Nama communities of central and southern Namibia had their first meeting in the Kai-//Ganaxab Centre from 1–2 December 1994. The minutes of these meetings can be found in Hinz (1995:119ff). The Ongwediva Meeting minutes were also included in Elelo Iyopashingwana IyOshilongo shOndonga – Traditional Authority of Ondonga. 1994. *OoVeta (Oompango) dhOshilongo*

wrongs committed, i.e. the amount of compensation to be paid by guilty persons. An example of this can be found among *Oshiwambo*-speaking communities, under whose jurisdiction the amount of cattle to be paid as compensation in the case of killing a person ranged from 9 to 15. The Ongwediva Meeting decided to standardise the fines for killing at 10 head of cattle. Another matter of particular importance discussed during the consultative meetings with the *Oshiwambo*-speaking communities at Ongwediva and the communities of the Kavango in Rundu was the customary law of inheritance.

By the end of 1995, about 15 pieces of self-stated customary law had been collected.<sup>19</sup> Although there are many similarities, in many instances the documents differ according to what the respective community found important to put in writing. This can already be demonstrated by what happened in the 1994 version of the *Laws of Ondonga* in comparison with the 1989 edition. In the 1994 version, one can identify three types of changes effected in amendment:

- Formal changes to clarify the language used in the 1989 version of the laws
- Insertions of new offences and their reinforcements by defined fines, and
- Most importantly, the already reported changes to further strengthen the legal situation of widows, i.e. beyond the achievements in the 1989 version of the laws.

Although more research is needed to establish details about what happened in the various traditional communities with respect to the written ascertainment of their customary law, one can, with good reason, distinguish four steps of development in the documenting of customary law:<sup>20</sup>

- **Step 1:** Precolonial documentation
- **Step 2:** Colonially influenced statements of customary law
- **Step 3:** Customary law statements around Independence, including an emerging awareness of the need to ascertain and develop customary law in response to the challenge of the new socio-political order, and
- **Step 4:** Self-statement of customary law; Phase 1 of Step 4 comprises the existing Ascertainment of Customary Law Project.

### Step 1

Although systematic research will most probably reveal more information about lawmaking and documenting processes in other traditional communities, what we already know allows us to state that both lawmaking decisions and their

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*shOndonga – The Laws of Ondonga* (Second Edition). Oniipa: Evangelical Lutheran Church in Namibia, pp 75ff.

19 See Hinz (1995:9ff).

20 Cf. Hinz & Kwenani (2006:206ff), where I distinguished between the four steps slightly differently.



documentation have precolonial traditions. Williams reports on “traditional laws and social norms of Owambo kingdoms” in northern Namibia, which date back to the 19th century.<sup>21</sup> Loeb reports “new laws” enacted by King Mandume ya Ndemufayo of Oukwanyama when he came to power in 1917.<sup>22</sup> The seven sections of Mandume’s laws quoted by Loeb contain the demand for peace with the tribes of southern Namibia, provide for the termination of cattle theft by nobles within Oukwanyama, the payment of fines in cases of assault that drew blood, the prohibition of killing of a person accused of witchcraft, and the prohibition of abortion in the instance of a girl becoming pregnant before her initiation (*efundula* in *Oshiwambo*). All these provisions appear to have been necessary deviations from the order in existence before Mandume ascended to the throne.

## Step 2

The German colonial government was interested in documenting customary law through empirical research with the possible aim at codifying the law. However, it took quite some time for the administration in Germany to agree on how to achieve codification.<sup>23</sup> Several versions of a customary law questionnaire were developed and distributed to officials in the then German colonies.<sup>24</sup> What eventually resulted in several publications had no direct impact on the customary law of these colonies, however.<sup>25</sup>

The approach by the South African Government and legal anthropological scholars who worked on Namibian customary law during the South African colonial era was very different from what the Germans had started with. In line with the changed approaches in legal anthropology – away from the one-dimensional evolutionist concepts and more towards a functional understanding of law as part of the overall social system – in those years, legal anthropology concentrated on the functioning of customary law. The political understanding of separate development and apartheid prompted the focus on tribal entities and the law applied by them. The South African colonial administration’s particular interest lay in the *Oshiwambo*-speaking communities in northern Namibia, and in the communities that live in what are today known as the Caprivi and Kavango Regions, these areas being the most highly populated in the colony and, to a large extent, under the

21 Williams, FN. 1991. *Precolonial communities of southwestern Africa. A history of Owambo Kingdoms 1600–1900*. Windhoek: National Archives of Namibia, p 187.

22 Loeb, EM. 1962. *In feudal Africa*. Bloomington: Indiana University Press, p 33.

23 Boin, M. 1995. *Die Erforschung der Rechtsverhältnisse in den “Schutzgebieten” des Deutschen Reichs*. Münster: Lit Verlag, pp 36ff. Boin (*ibid.*) provides a detailed overview of the history of the German enquiry into the law of the people in Germany’s colonies.

24 (*ibid.*:57ff).

25 Cf. Steinmetz, DR. 1903. *Rechtsverhältnisse von eingeborenen Völkern in Afrika und Ozeanien*. Berlin: Springer; and Schultz-Ewerth, E & L Adam. 1929 & 1930. *Das Eingeborenenrecht*, Vol. I–II. Stuttgart: Strecker & Schröder.

jurisdiction of traditional governments. Apart from studies on individually selected communities, three major research projects were set up, aiming at compiling comprehensive records on the law in the three areas mentioned above.<sup>26</sup> Only one of the three projects, namely the Kavango project, resulted in a publication.<sup>27</sup> This publication contains the results of empirical research in the area, and refers, inter alia, to observed cases, but does not attempt to generalise Kavango customary law into a document of ascertained rules.<sup>28</sup>

However, one of the theses worked on during the South African colonial era and within the framework of attempting to research the colony's customary laws, is a study on the socio-political system of the *Aangandjera*.<sup>29</sup> Surprisingly, the study contains a document very relevant to the purpose of this article: the author attached to his work what he called a "code" of the *Ongandjera* customary law.<sup>30</sup> In an introductory remark,<sup>31</sup> he notes that although the "code" was prompted by white officials, it was nevertheless to be seen as the product of the community's secretary and established not only in cooperation with the King<sup>32</sup> of that community and his council, but also in line with practice in the community's traditional court.<sup>33</sup> Unfortunately, no research has been done to date on whether there were similar initiatives in the other *Oshiwambo*-speaking communities, and also not whether the 1989 version of the Laws of Ondonga, as referred to above, were related to a most probably standardised approach to ascertaining customary law in the *Oshiwambo*-speaking communities' areas.

### Step 3

The third step fell, in broader political terms, into the period of the country's transition from colony to independent state, and heralded the first attempts to cope with the new socio-political order of Namibia under the overall guidance of the Constitution of 1990. The Constitution reaffirmed the validity of customary law as part of the law of the land.<sup>34</sup> However, the institution of traditional leadership was more or less ignored as many in the new political leadership held that the latter were something of the past, something unacceptable,

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26 According to oral information from academics involved in the three projects. Unfortunately, no research has been done on the background, implementation and achievements of the projects.

27 Van Rooyen, PH. 1977. "Die inheemse reg van die Kavango". Master's thesis, University of Stellenbosch, South Africa.

28 (ibid:156ff).

29 Louw, W. 1967. "Die socio-politieke stelsel van die Ngandjera van Ovamboland". Master's thesis, University of Port Elizabeth, South Africa.

30 (ibid:131ff).

31 (ibid.)

32 Louw (ibid.) uses the Afrikaans word *Kaptein*.

33 (ibid.:131).

34 Cf. Article 66(1) of the Constitution.

## OTHER NOTES AND COMMENTS

because of these leaders' cooperation with the colonial administration.<sup>35</sup> As much as this understanding proved to be wrong as a general assessment, post-independence inquiries showed that, despite unavoidable acts of cooperation with the colonial administration, the traditional leadership in the country enjoyed wide support by the people – and this was true throughout the country.<sup>36</sup>

What we find in the self-stated laws of these years are, indeed, very much the traditional leaders' responses to the new challenges: challenges originating from the new political and legal (i.e. constitutional) order. Changes in the customary inheritance law can be seen in this light. An interesting early example of a community's response to a constitutional controversy on the relationship between the general law of the country, customary law, and Article 12(2) of the Constitution (which guarantees that nobody should be convicted and punished again for any criminal offence for which conviction or acquittal had taken place) can be found in the Laws of Ukwangali mentioned above. The constitutional controversy, which occupies legal minds still today, developed around the difference between a traditional and a modern understanding of adequate legal consequences in serious criminal cases.<sup>37</sup> For a widespread traditional understanding, the appropriate reaction to killing is to sentence the perpetrator, or his/her family, to pay compensation to the victim's family. The modern understanding is based on the state monopoly in criminal law, and expects a perpetrator to spend part of his/her life in prison.

It is also interesting to note that the scope of self-stated laws changes. More recent versions of self-stated customary law have taken note of societal topics which we do not find regulated in the same manner in older documents. One of these relates to environmental concerns, for example, which have received a very prominent place in the Laws of Uukwambi, another *Oshiwambo*-speaking community. The Laws of Uukwambi contain long sections on water, trees, wild animals and grass.<sup>38</sup>

The interest that traditional communities have in respect of repositioning themselves in the new social and political order eventually led to a process of what I have elsewhere called the *re-appropriation* of the tradition.<sup>39</sup> This re-appropriation has manifested itself in two directions:

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35 Cf. Hinz (2008b:68ff).

36 See Republic of Namibia. 1991. *Report by the Commission of Inquiry into Matters relating to Chiefs, Headmen and other Traditional and Tribal Leaders*. Windhoek: Republic of Namibia.

37 Cf. here Hinz, MO. 2003. *Customary law in Namibia: Development and perspective* (Eighth Edition). Windhoek: Centre for Applied Social Sciences, pp 175ff; but also Horn, N. 2006. "Criminal or civil procedure? The possibility of a plea of *autrefois* in the Namibian Community Courts Act". In Hinz (2006:183ff).

38 Unpublished; on file with the Customary Law Unit.

39 Cf. Hinz (2008b).

## Phase 1 of the Namibian Ascertainment of Customary Law Project

- The state policy to accommodate parts of the tradition (its forms of governance and the customary law related to it) into Acts of Parliament, and
- The act of rediscovering tradition after colonial distortions by traditional leaders and traditional communities.

Traditional communities were certainly very capable of understanding that the legislative actions to re-regulate traditional governance and traditional courts would have an impact on their own authority. In fact, they learned about the expected inroads into their authority from the work of the Presidential Commission of Inquiry mentioned earlier,<sup>40</sup> the 1992 conference of the Ministry of Justice, and the subsequent consultative regional meetings. Consequently, they prepared themselves to exercise influence on the legislative process, but also to react to the challenges expected by the new laws.

The legislation on traditional governance, namely the Traditional Authorities Act that came into force in 1995,<sup>41</sup> and the envisaged legislation on traditional courts<sup>42</sup> were particular challenges. The challenge of the former prompted traditional communities to document their internal political set-up – a matter that eventually led to chapters on –

- the *constitution* of the community in self-stated pieces of customary law providing information about traditional hierarchies
- the functions of the various traditional stakeholders, and
- organisation division in traditional governance.

The challenge of the legislation on traditional courts prompted an increasing readiness in traditional communities to embark on the drafting of the self-statement of customary law as such, the redrafting of existing documents, and the extension to areas not covered in previous written versions of customary law.

### Step 4

It was eventually the Council of Traditional Leaders that elevated the project of ascertaining customary law by self-statement to a national project, i.e. a project for all the traditional communities represented in the Council.<sup>43</sup> The Council passed a resolution in 2001, according to which all Traditional Authorities were requested to embark on a project of self-stating their customary law. The University of Namibia's Customary Law Unit in the Faculty of Law was awarded the responsibility of assisting with conducting the project. National and

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40 Republic of Namibia (1991).

41 No. 17 of 1995.

42 The 1992 conference resulted in substantial efforts to research the traditional administration of justice and to draft the necessary legislation; cf. Hinz (2008b:70ff.) However, it took until 2003 for the legislation to be adopted by Parliament.

43 There are currently 47 traditional communities who have seats on the Council.

regional workshops were held to inform and guide the various communities in their task to ascertain their customary laws. The Council of Traditional Leaders was informed regularly about the progress made and obstacles encountered.

Some of the traditional communities in the country are more advanced in stating their customary law than others. Meetings with the various communities have shown that those in the northern part of the country are generally far ahead in their efforts to ascertain customary law on paper. The reason is that the communities in the North, where the colonial administration applied the policy of indirect rule, were able to operate their traditional courts during the colonial era, despite inroads made by the colonial administration. The communities in the central and southern parts of the country, which were exposed to direct colonial rule, now find it difficult not only to reappropriate their traditions of governance and law, but also to reset the necessary structures of traditional government and law.<sup>44</sup>

## Conclusion

In view of this, the Customary Law Unit informed the Council of Traditional Leaders at its 2008 meeting that the Ascertainment Project would be divided into two phases. Phase 1 would cover the 17 communities in the central and north-eastern parts of the country, i.e. the eight *Oshiwambo*-speaking communities, the five communities in the Kavango Region, and the four in the Caprivi Region. The remaining 30 communities in the north-western, central and southern parts of the country would be dealt with in Phase 2 of the project.

The Council was also informed that regional meetings with the 17 communities concerned had brought them to resolve to have their laws published in two languages: English, the official language, and the vernacular language in question. The laws of each community would be introduced by a community profile to offer the reader some background on the relevant community. This suggestion was noted positively by the Council in respect of the communities affected by Phase 2 of the Project.

At the same time, it was also repeated to the Council that it was not the Customary Law Unit's role to work through the laws in detail. It was clearly stated that only obvious contraventions of constitutional provisions would be highlighted to the communities for them to change. It will be the sole

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44 This statement does not hold true for communities not covered in Phase 1 of the Ascertainment Project. For example, the *Batswana ba Namibia* have achieved a situation quite comparable to communities in the North. Others, such as the San communities, which received official recognition only after Namibia's independence, have only just begun to organise their governance and law in terms of the post-independence statutes.

## Phase 1 of the Namibian Ascertainment of Customary Law Project

responsibility of the communities to decide what they wanted to include or exclude in their laws.

The work on the 17 communities' customary laws is almost complete; their publication is anticipated before the end of 2009. Should everything go according to plan, Phase 2 of the Project will be finalised in 2010.

OTHER NOTES AND COMMENTS

# NEW LEGISLATION

## The Children's Status Act, 2006 (No. 6 of 2006) Tousy Namiseb\*

This Act was signed by the President into law on 22 December 2006, but it only became operational on 3 November 2008 in terms of Government Notice No. 266 of 2008. The Act makes some significant changes to the common law and some other statutory provisions. For example, as far as inheritance is concerned, some far-reaching amendments are made in the common law rules relating to intestate succession. The Act provides the following:<sup>1</sup>

Despite anything to the contrary contained in any statute, common law or customary law, a person born outside marriage must, for purposes of inheritance, either intestate or by testamentary disposition, be treated in the same manner as a person born inside marriage.

The common law rule which provided that children born outside marriage could not inherit from their natural fathers is decisively changed by this statute. However, this rule had already been declared unconstitutional in a judgment<sup>2</sup> delivered on 11 July 2007, where the court declared the common law rule to have been unconstitutional from the time that Namibia adopted the current democratic Constitution. The court specifically ruled as follows:<sup>3</sup>

[i]t is declared that the common law rule[,] in terms of which illegitimate children could not inherit from their fathers, became unenforceable on 21 March 1990.

The initial Bill<sup>4</sup> had a somewhat problematic provision where the relevant section originally provided as follows:<sup>5</sup>

Despite anything to the contrary contained in any statute, common law or customary law, **a child** born outside marriage must for the purpose of inheritance, either intestate or by testamentary disposition, be treated in the same manner as a child born outside marriage. [Emphasis added]

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\* Chief of Law Reform, Secretary to the Law Reform and Development Commission; Legal Practitioner of the High Court of Namibia.

1 Section 16(2), Children's Status Act.

2 *Lotta Frans v Inge Paschke & Others*, heard on 28 June 2007 and delivered on 11 July 2007 by the High Court of Namibia (Case No. (P) I 1548/2005).

3 *Lotta Frans v Inge Paschke & Others*, at 17, para. 19.

4 The Children's Status Bill [B.13–2005].

5 Section 14, Children's Status Bill [B.13–2005].



## NEW LEGISLATION

A *child* is defined as a person who is under the legal age of majority.<sup>6</sup> This would, of course, exclude persons above that age who were born outside marriage from benefiting under the provision.

The Act now pertinently provides, in terms of testamentary succession, that the words “children” or “issue” in the Act are to apply to both persons born outside marriage and children born inside marriage.<sup>7</sup>

In circumstances where a person is born as a result of rape, of which the perpetrator has been convicted,<sup>8</sup> such perpetrator has no right to inherit as an intestate heir from the estate of the person who is born as a result of the said rape. However, the person born as a result of the rape inherits intestate from the perpetrator, and is also deemed to be included in the terms “children” and “issue” in the relevant testamentary dispositions.<sup>9</sup>

The Children’s Status Act further provides for presumptions of paternity.<sup>10</sup> The Roman–Dutch presumption expressed in the maxim *pater est quem nuptiae demonstrant*<sup>11</sup> is reaffirmed.<sup>12</sup> A man who has cohabited with the mother of the person in question will also be presumed to be the father of the person in question.<sup>13</sup> The issue remains more or less the same, as the problems experienced before this enactment could still be experienced.<sup>14</sup>

Custody of a child born outside marriage is provided for in the Act, and the issue is also clarified. Both parents of such a child now have equal rights to become the child’s custodian.<sup>15</sup> The mother will also not have a referent right above the rights of the father. In cases where the parents cannot agree, a competent court can be approached for an order. It is important to note that such a competent court is not limited to the High Court, but includes a Magistrate’s Court, a Children’s Court, and a Community Court.<sup>16</sup>

Likewise, guardianship is provided for, and the parent with custody is generally the guardian.<sup>17</sup> Furthermore, the father of a child born outside marriage is given more rights than was previously the case.<sup>18</sup>

6 Section 1, Children’s Status Act. The Bill [B.13–2005] contained a similar definition.

7 Section 16(3), Children’s Status Act.

8 Section 15(2).

9 Section 15(5).

10 Section 9.

11 See, for example, *Fitzgerald v Green*, 1911 EDL 432; *Williams v Williams*, 1925 TPD 538; *Van Lutterveld v Engels*, 1959 (2) SA 699 (A).

12 Section 9(1)(a), Children’s Status Act.

13 Section 9(1)(b).

14 See, for example, *F v L*, 1987 (4) SA 525 (W).

15 Section 11(1), Children’s Status Act.

16 Section 11(9).

17 Section 13.

18 See, for example, *Douglas v Mayers*, 1987 (1) SA 910 (Z); *Docrat v Bhayat*, 1932 TPD 125; *W v S*, 1988 (1) SA 475 (N) at 490.

## The Children's Status Act

In addition, the Act provides for the domicile of a child born outside marriage. Such child will be deemed to be domiciled at the place or country with which s/he has the closest connection.<sup>19</sup>

In conclusion, one would say that the Children's Status Act provides for the long overdue reforms to the parts of family law dealing with children born outside marriage. However, it should be noted that these reforms had already begun, albeit in a piecemeal fashion, by the courts.

Regulations<sup>20</sup> have also been made,<sup>21</sup> and form part of the principal Act. The Regulations provide for procedures to be used when an aggrieved party approaches the relevant court. Extensive templates for simplified forms are also provided, which should make the law more readily accessible.

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19 Section 18, Children's Status Act.

20 In terms of section 25 of the Act.

21 Government Notice No. 267 of 2008.

NEW LEGISLATION

# BOOK REVIEWS

***Human rights in Africa: Legal perspectives on their protection and promotion; Anton Bösl & Joseph Diescho (Eds), Windhoek, Macmillan Education Namibia, 2009, 408 pages***  
**Onkemetse Tshosa\***

It is now axiomatic that the adoption of the United Nations Charter in 1945 has tremendously influenced global respect and protection of human rights and fundamental freedoms. The influence is noticeable in the adoption of regional legal instruments such as the 1986 African Charter on Human and Peoples Rights. This and other similar instruments translate the laudable human rights ideals into legal prescriptions, thereby setting minimum legal standards by which the behaviour of states is to be assessed. The conduct of states requires frequent regulation, particularly in regions such as Africa, where human rights violations are rife, impunity abounds, and ordinary Africans living in both rural and urban areas continue to languish in poverty and deprivation. The book under review is a small but important contribution to the enduring search into the ways and means of ensuring that individuals generally and especially in those countries in Africa that have gone through difficult periods of internal wars and disturbances can be better protected in their human rights so that they, too, can enjoy peace and stability.

The book is divided into five sections, each of which deals with a specific theme. The themes are, however, interrelated since they employ standards in legal instruments to interrogate the specific issues. Section 1 deals with the paradigm of human rights and its relevance for Africa. The section has three contributions in which the authors deal with human rights issues of direct concern to Africa. The section begins with a jurisprudential inquisition into the whole notion of the universality of human rights on the one hand – as represented by the dominant human rights instruments such as the United Nations Declaration on Human Rights (UDHR) and its two sister covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) – and cultural relativism on the other. It then proposes an anthropological approach to an investigation of human rights protection, pointing out that, because the earlier debates that led to the adoption of the Western-oriented human rights instruments did not benefit from an anthropological input, there

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is a need to investigate further the universality of human rights and recognise the respect for human rights in other non-Western settings in places such as Africa, where some semblance of protection of human rights were – and are – observable, both at national and local levels of the state. The discussion uses Namibia and South Africa to demonstrate this point. The contribution of this chapter to the universality/relativism discourse lies in the degree to which an anthropological perspective can enrich current and future human rights debate.

The second chapter in the first section of the book provides immense and critical insights into the notion of transitional justice and human rights, and argues that the international system such as the International Criminal Court (ICC) for addressing human rights violations should be supported by, and interlaced with, regional and national peace-building initiatives. It gives poignant examples in countries such as Mozambique, Rwanda (with its *gacaca* courts), South Africa and Uganda, where traditional systems have been utilised to assist in truth and reconciliation processes with varying degrees of success. It rightly points out that oftentimes those involved in post-conflict reconciliation processes tend to look only at the international criminal justice system, which mainly focuses on criminal prosecutions, rather than engaging traditional systems in a bid to ensure that the peace process does not slide back into conflict. In traditional systems, community participation in decision-making processes plays a major role in delivering justice to victims, and brings the victim and abuser together to reconcile their differences.

The last chapter in the first section explores the all-important issue of education in promoting respect for human rights and fundamental freedoms, and building on the culture of human rights in Africa. However, it laments – and correctly so – that, in Africa, there is still a long way to go in educating people about human rights – despite the initiatives at international level such as the Decade for Human Rights Education and the United Nations Declaration for Human Rights Education of 23 December 1994. Importantly, the chapter notes that government alone cannot succeed in promoting human rights awareness and, along the lines suggested by the United Nations High Commissioner for Human Rights, recommends that there should be cooperation between government and civil society in educating people about human rights and promoting the culture of human rights in Africa.

Section two investigates the international justice system and human rights in Africa. It has two chapters which discuss the notion of an international justice system and its relevance to Africa. The first chapter concentrates on the United Nations and the advancement of human rights in Africa. It argues for a human-rights-based approach to development and poverty reduction. It focuses on the instruments that have been developed to address poverty, such as the Millennium Declaration and the People's Decade for Human Rights Education. These instruments assert that the human right to live in

dignity is a fundamental right, and is essential to the realisation of all other human rights. The chapter highlights some of the crimes that undermine the right of people to live in dignity, such as offences against women and crimes of sexual violence. However, according to the author, there are some attempts at the international level to ensure justice for victims of these crimes. Examples include the Statutes of the ICC and the Rwanda Tribunal, which specifically mention the need for victims of crimes to have justice. The Statutes also recognise the importance of poverty reduction – hence the ICC Trust Fund. The chapter concludes by arguing for a human rights approach to poverty eradication, development and international criminal justice.

The second chapter in this section discusses international criminal justice and protection of human rights in Africa, and concentrates on the role of three international tribunals – the Ad-hoc International Tribunal for Rwanda, the Special Court for Sierra Leone, and the ICC – in ensuring justice to victims of human rights violations. It argues that, because of its inherent weaknesses, the African human rights system is unable to address impunity and individual criminal responsibility for human rights violations, especially those which result from civil wars. It highlights the practical difficulties for the Rwanda and Sierra Leone Tribunals to contribute to national reconciliation, and notes that, in Rwanda in particular, this has occurred partly due to a “selective prosecutorial policy” where the Tribunal has chosen to prosecute some people who were responsible for human rights violation, but not others. This, it is argued, is contrary to the Statute of the Rwanda Tribunal and has the effect of limiting the effectiveness of the Tribunal in redressing human rights violations such as the genocide that occurred in the country in 1994.

In the third section, the book deals with the African Union and regional protection of human rights. It is divided into two chapters. The first discusses the evolution of human rights in Africa from the Organisation of African Unity (OAU) to the African Union (AU). The main tenor of the discussion is that, since its inception, the OAU has been preoccupied with human rights – as evidenced by the struggle for the decolonisation of Africa and its position against apartheid in South Africa. Thus, the OAU used human rights as the basis of the struggle for independence in Africa. Moreover, even the AU Constitutive Act makes human rights an explicit part of its mandate. The commitment of African states to human rights protection is also reaffirmed in the New Partnership for Africa’s Development (NEPAD), which places human rights at the centre of development. Therefore, human rights need to be discussed in historical context and against the background of the conditions prevailing in Africa. However, the chapter also points out that principles such as those on non-interference in domestic affairs make the Organisation ineffective in the promotion and protection of human rights on the continent. The other chapter in this section outlines the major human rights instruments which deal with human rights protection, such as the African Charter on Human and People’s Rights. This survey of human rights instruments is instructive as it provides

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comprehensive lists of instruments relating to human rights. In this regard, the book serves as reference material for those interested in knowing the sources of human rights law in Africa. The chapter also highlights some of the practical challenges to human rights initiatives in Africa, such as African culture and values, gender inequality, and the social exclusion of vulnerable groups.

The final chapter in section three deals with African courts and the African Commission on Human and People's Rights, and their contribution to the protection human rights in Africa. It argues that the African Commission on Human and People's Rights has helped in expanding rights in the African Charter on Human and People's Rights, although it has teething problems in that the framers of the Charter did not give it enough power to protect these rights. The chapter notes that the establishment of the two courts – the African Court on Human and People's Rights, and the Africa Court of Justice – would have served the useful purpose of improving the situation and bridging the gap. However, before they could do just that, both courts were prematurely replaced with the new African Court on Justice and Human Rights set up in July 2008, pursuant to the Protocol and Statute of the African Court on Justice and Human Rights. The chapter examines the new court; its composition, structure and jurisdiction; and some of the challenges it is likely to face – especially during the transition from the other two courts to the new court. The article concludes by applauding the advent of the new court, especially its human rights friendliness, and indicates that “African States are slowly warming up to international justice in the conduct of their internal affairs”. The author is optimistic that the new ‘architecture of human rights’ will provide an opportunity for redressing human rights violation in Africa.

Sub-regional human-rights-related institutions in Africa are the subject of discussion in the fourth section of the book. It consists of two chapters, in the first of which the author focuses on regional economic communities (RECs) in East and southern Africa, such as the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA), and investigates how the instruments establishing these communities deal with human rights issues. This is an important discussion in that it deals with a subject that is often overlooked in the human rights debate, that is, the relevance of human rights in trade matters. The author observes that the REC instruments also incorporate human rights issues, including HIV and AIDS, gender issues and children's rights – hence the need to develop a uniform human rights standard applicable to states within a particular regional economic community. The second chapter deals with RECs and human rights in West Africa (the Economic Community of West African States/ECOWAS and the West African Economic and Monetary Union/WAEMU) and African Arabic countries (the Arab Maghreb Union/AMU and the Community of Sahel-Saharan States/CEN-SAD). The chapter surveys the instruments in both these African regions and, like the preceding chapter, highlights the human rights clauses and stipulations in these instruments. It concludes that,

notwithstanding that human rights feature prominently in these instruments, there is little evidence that regional integration has brought with it development and protection of human rights in either region. This conclusion is instructive as it shows that, despite the proliferation of human-rights-related instruments in Africa, individuals are yet to fully enjoy these rights at a practical level.

The fifth and final section of the book discusses national human rights instruments in Africa. The first chapter focuses on human rights commissions and their role in the promotion of human rights, especially where other organs such as parliament, the judiciary and civil society fail. The chapter provides a survey of national human rights institutions in Africa, and mentions in particular the South African Human Rights Commission, the Ugandan Human Rights Commission, and the Commission for Human Rights and Good Governance of the United Republic of Tanzania. Based on the relative successes of these organs, the author concludes that the commissions are very effective in promoting human rights and reconciliation in Africa because they are flexible, less bureaucratic and easily accessible by ordinary people. However, the author also brings out the challenges faced by these institutions, including a lack of funding and, in some instances, the poverty of ordinary people who are supposed to benefit from these bodies. In Africa, these challenges cannot be overstressed. The second chapter deals with the other related institutions, namely truth commissions, which have to deal with post-conflict or repression endeavours to deliver justice to victims of violations of human rights by repressive regimes. The chapter is important in that it highlights the dilemma that societies emerging from a conflict situation face in terms of deciding whether to prosecute those who were involved in violations of human rights and war crimes or not to prosecute and reconcile the parties. The author cites examples of truth commissions in South Africa, Sudan and Uganda, where concepts such as *ubuntu* have been invoked to justify the need for reconciliation as opposed to the prosecution of offenders. The chapter concludes that, in post-conflict societies, there would always be justification for truth commissions because they play an important role in ensuring justice and accountability. Criminal courts, argues the author, are not as suitable, because they may not reveal the broad spectrum of crimes that have taken place during repression.

Thus, this book serves as an important contribution to human rights promotion and protection in Africa. It is particularly useful because it deals with practical issues involved in the protection of human rights and ensuring justice for victims of human rights violations in Africa. It deals with current issues in promoting human rights in Africa, both through the adoption of human rights instruments cataloguing a variety of human rights norms, and the establishment of judicial and quasi-judicial institutions at national and international levels to redress human rights violations – especially in post-conflict situations. These issues include impunity, individual criminal responsibility, justice, and truth and reconciliation.



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However, it should be pointed out that, although the form and language in which the book is presented makes it easy to read, there are a few typographical and stylistic matters that could have been attended to. For instance, in some chapters, there are no clear introductions. Furthermore, some chapters have abstracts while others do not. This notwithstanding, the book is recommended to readers, particularly those interested in the practical application of human rights standards in Africa.

***Judicial independence: Eine  
rechtsvergleichende Untersuchung der  
Sicherung unabhängiger Rechtsprechung in  
Südafrika und Deutschland,\* Hilke Thiedemann,  
Nomos Verlagsgesellschaft, Baden Baden,  
2007, 469 pp  
Oliver C Ruppel\*\****

The publication at hand, Hilke Thiedemann's doctoral thesis on judicial independence, is a comparative analysis on how judicial independence is safeguarded and implemented under South African and German law and practice. Although the text is written in German, an English summary is given at the end of the book.

The aim of this publication, which it successfully achieves, is to answer the question of how and to what extent the legal systems of South Africa and Germany create an environment for judges to deliver their judgements independently. The author points out that one of the reasons for doing this research was the 2001 United Nations Report on the Independence of Judges and Lawyers in South Africa, which raised concerns regarding judicial independence in South Africa's legal system.

The text's subdivision into four main chapters enables the reader not to lose orientation – considering the diversity of legal aspects covered by this well-elaborated publication. The first subdivision is a chapter giving some introductory remarks on the thesis itself, its structure and methodological aspects, before setting out a historical perspective on judicial independence in continental Europe and South Africa. Also part of this first chapter is a general introduction to the South African legal system.

The second chapter offers a broad overview of the constitutional provisions, legislation, and international standards relevant to the issue of judicial independence, followed by a sub-chapter dealing with the obligations of the judiciary under the respective constitutions, with the law, and with precedent.

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\* "The constitutional guarantee of judicial independence and its implementation in South Africa and Germany in law and practice" [Author's translation].

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The third chapter of the book covers multiple aspects of mechanisms suited to safeguarding judicial independence, and discusses limitations to the principle of judicial independence under both South African and German law. How the concept of *judicial independence* is implemented in Germany compared with South Africa is the focal point of the in-depth analysis within this chapter. To this end, inter alia, the author elucidates the concept of *impartiality* with regard to potential impacts from the powers of the legislative, the executive and the judiciary itself, and this is again treated from a South African as well as a German perspective.

The final chapter adeptly summarises the results of the preceding chapters, focusing on the concept of *judicial independence* from a comparative perspective. For obvious reasons, only some of these results can be highlighted in this review – as set out below.

An independent judiciary forms the foundation of the democratic state governed by the rule of law, and is an indispensable prerequisite for concepts such as a *separation of powers* and *checks and balances*. The individual can gain confidence in the judiciary if legal certainty is guaranteed by an independent and impartial judge. The author concludes that – considering that judicial independence is an evolving concept – the relatively young South African democracy has established a high degree of judicial independence, compared with that developed in Germany over several decades. Deficiencies in terms of the constitutional guarantee of judicial independence exist in both legal systems, however.

The author analyses the historical and legal background of judicial independence in both countries. The results of this analysis are that the constitutional concepts differ in how they are implemented, which also reflects on specific common law or civil law notions of the role of judges as such. The author states that the deciding factor in terms of an appropriate reconciliation between the aims of judicial independence and those of judicial accountability is whether or not the public has genuine confidence in a functioning court system. For this reason, obvious issues – like the appointment of judges, their security of tenure and employment, the independence of magistrates, how courts are organised, judicial self-administration, the recusal of judges, judicial activism and the separation of powers, and the influence on the judge from society and the media – play a fundamental role in determining that deciding factor.

The author emphasises that one of the major challenges to judicial independence is the executive's potential influence<sup>1</sup> when it comes to the appointment of

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1 This challenge has also been identified in other African countries; see e.g. Ruppel, OC. 2008. "The role of the executive in safeguarding the independence of the judiciary in Namibia". In Horn, N & A Bösl (Eds). *The independence of the judiciary in Namibia*. Windhoek: Macmillan Education Namibia, pp 207–228.

judges. This, according to the author, applies specifically to Germany, which follows the approach of the principle of merit in terms of appointing judges. In South Africa, judicial independence has, in principle, been strengthened by the establishment of the Judicial Service Commission, which plays a key role in judges' appointments.<sup>2</sup> The author recommends such an institution be established in Germany as well. She, however, cautions that, because of the size and composition of the South African body, its political influence on the judiciary remains a living reality.

As to the security of a judge's tenure, the South African practice of having the executive appoint 'acting judges' at its discretion is out of keeping with the concept of judicial independence – even though it might be a good way of alleviating the massive workload of the courts – because acting judges are not granted the same personal independence. One further point of criticism levied by the author in this regard is the South African practice that judges can be asked to continue to perform duties after their retirement.

The tension between judicial independence, on the one hand, and the public demand to make judges accountable for their decisions, on the other, is discussed and balanced in this book. The author stresses that, to this end, both legal systems provide a civil or penal liability for judges, and both attach strict requirements in terms of safeguarding judicial independence. South African and German law both know the mechanism of impeaching a judge under exceptional circumstances, namely on the ground of gross constitutional misconduct. In South Africa, such process requires the Judicial Service Commission to find that the judge suffers from incapacity, is grossly incompetent, or is guilty of gross misconduct. The finding by the Commission is to be supported by a subsequent resolution by the National Assembly, supported by at least two thirds of its members. In Germany, if the court finds that a judge has intentionally violated the constitutional order, s/he can be removed from office by a parliamentary initiative followed by a concomitant decision of at least two thirds of the members of the constitutional court.

The publication is valuable in many respects. Among these are that it makes an important contribution to the understanding of judicial independence in general, and it serves as an excellent reference work on the independence of the judiciary in South Africa and Germany. The book's comprehensive bibliography is a further useful source for comparative purposes, while its list of documents, press releases and the table of cases amply provide the reader with information related to South Africa.

The book offers not only a careful examination of the legal foundations of judicial independence under international, South African and German law, but also a multitude of legal aspects pertinent to judicial independence – such as the appointment of judges, their security of tenure, supervision over them,

<sup>2</sup> (ibid.:216).

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their civil and criminal liability as well as their impeachment, and their right to freedom of expression are analysed and practical examples and relevant court decisions are included to illustrate the points made.

Furthermore, the book contributes significantly to comparative studies on constitutional guarantees – in this case, the constitutional guarantee of judicial independence. The comparative analysis is of particular interest considering that the concept of judicial independence is not only analysed in two different countries, but also in different legal systems, namely the South African Roman–Dutch law system, which may be allocated within the group of common law legal systems, and the German civil law system. Nevertheless, both countries show substantial similarities with regard to judicial independence on the constitutional level, which might be because, in many respects, the German Constitution (*Grundgesetz*)<sup>3</sup> served as a model when the South African Constitution was being drafted. On the other hand, the author points out that the principle of judicial independence is implemented differently in South Africa and Germany, mainly because the role of judges within judicial proceedings differs substantially in the two countries. In addition, the book highlights the special role of judgements delivered in common law systems, since lawyers in South Africa are bound to precedents, but in Germany they are not.

In my view, it is understandable that an introduction is only given with regard to the South African legal system, taking that the thesis is published in Germany in German. The author might have assumed that the main target group for the book would be familiar with the German legal system. However, academics with a comparative law background who are not that familiar with the German legal system might regret that there is no specific chapter on the German legal system as a counterpart to the one on the South African system.

Even more value could have been added if the shortcomings identified in terms of judicial independence would have been translated into clear practical recommendations, formulated under a separate heading.

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3 The German word *Grundgesetz* can be translated as “Basic Law”. The Basic Law is the Constitution of the Federal Republic of Germany.

***An introduction to Namibian law:  
Materials and cases,***  
**SK Amoo, Macmillan Education Namibia,  
Windhoek, 2009, 482 pages**  
**Steve Gray\***

Never have I seen a book so greatly anticipated as *An Introduction to Namibian Law* has been here, at the Law Faculty of the University of Namibia (UNAM). Ask any of the 110 first-year law students in Sam Amoo's Introduction to Law class and they will be able to tell you not only when the book is due, but also name the ship it is arriving on and the day that ship is due in the Port of Walvis Bay. Not even John Grisham's next legal thriller has been awaited with such eager expectation.

The anticipation at the Law Faculty is quite understandable. This is the very first published textbook written by a UNAM Law Faculty member for use in Namibia. It is indeed a watershed event for the Law Faculty and the students. Mr Amoo, in his own quiet and unassuming way, has opened the door for his colleagues to follow in his footsteps.

This book should be recognised for the impact it will have beyond the Law Faculty in promoting the rule of law in Namibia and beyond. Lest you think I give too much weight to one book, let me explain.

Each year, 100 or so new law students enrol at UNAM to pursue the study of law. They are Namibia's future lawyers, prosecutors, legal advisers, magistrates, judges, parliamentarians and legal scholars. In essence, they are the future guardians of the Namibian legal system. Most are fresh out of high school and unaccustomed to the study of law, which is unlike almost any other they have participated in to date.

The study of law does not simply involve memorising facts or learning formulas, like many other studies do. The law is a living entity that is always changing. You cannot just memorise the law and think you will become a good lawyer. You must learn how to think like a lawyer.

As Amoo introduces so well in Chapter Two of the book under "The Sources of Law", –

One of the primary objectives of legal training is the inculcation, in the law student, of the ability to analyse facts, to locate the relevant law and to apply the law to the facts.

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What makes this book so important is that it provides a rock-solid foundation for the future guardians of the Namibian Constitution and the rule of law. In these times of political uncertainty across the southern African region and the world, this is no small thing.

I think one of the reasons that I was asked to review this book is because, like most of the students who will use this text in their course, I am a relative newcomer to the Namibian legal system. I have been visiting the Law Faculty for only six months now, and had not lived in Namibia before that. Granted, I have 20+ years' experience as a lawyer in another common law jurisdiction, but I discovered very quickly after my arrival that common law legal systems can be very different. So I jumped at the chance to review this book because I thought it would help me understand the Namibian legal system. I must say that my hopes were not disappointed.

In Chapter One, entitled "Jurisprudence", Amoo does a very competent job of getting the reader to begin to think about the meaning and reasons for law. Along with selected readings from all of the classical legal thinkers, he introduces other legal schools of thought that form the basis for other legal systems that differ from Namibia's. This allows students to put the rest of their legal studies in context right from the beginning.

In the chapter entitled "Sources of Law", Amoo provides an overview of the hierarchy of law in Namibia from the Constitution through to case law, legislation, and regulations. The chapter roots the concepts in reality by using an early Namibian Supreme Court case to explain the interplay of these different sources of law. This chapter also sets out the history of Roman-Dutch law, and explains how a common law system works.

Under the chapter entitled "Classification of Laws", Amoo takes some time to lay the groundwork for students understanding the rest of their legal studies. Although classifying law into different areas such as constitutional, commercial, criminal, family and customary is not strictly speaking a 'legal' topic, explaining the distinction between public and private law in this way was immensely helpful to this newcomer to the study of law in Namibia. I think the flow chart Amoo includes of the legal classification system used here would also be very helpful to new law students.

The chapter entitled "Structure of the Namibian Judicial System" was another one of those core chapters that I found essential for my understanding of the Namibian legal system. It was helpful to have not only the layout of the current structure of the judicial system, but also a history of the judicial structure, to enhance my understanding of how the system evolved.

No common law system can be adequately understood without an introduction to cases and authorities. Amoo does so in a separate chapter in which he

succinctly explains a case reporting and citation system, and gives some real-life examples of case decisions that I am sure form the basis of classroom discussion. In the middle of this chapter there is a section called “Some Hints on How to Answer Questions”. While this explanation of how law school exams work is undoubtedly useful to students in the class, I thought it was out of place in this chapter and might be more appropriate in an annexure.

Understanding the role of judicial precedent is another essential part of understanding a common law legal system. It is also the backdrop which the author uses to introduce the reader to Latin legal concepts. While the Church gave up Latin centuries ago, the law has not been as hasty. Lawyers are still required to have an understanding of key Latin phrases and the legal principles they represent. I think it was wise for Amoo to wait until Chapter Six for a serious exposure to Latin: any earlier in the book, he might have lost half of his class of first-years.

At the risk of pointing out the obvious, after reading the book, I found it to be an excellent contribution to the understanding of the Namibian legal system. However, it would be remiss of me if I did not offer the author at least a couple of suggestions for the next edition.

The book might appeal more widely if the discussion questions, exam hints and other items directly connected to the classroom study of the introduction to law are contained in a companion Study Guide. I appreciate that this is primarily a course book, but equally appreciate that much of the content has value beyond law students.

One other suggestion I would make is for the book to be regularly updated and possibly be published biannually; alternatively, it should be republished as changes in the Namibian legal system occur. For example, some of the structure of the judicial system has completely changed with the implementation of the Labour Act, 2007. This book has the potential to have impact for years to come if it is kept updated.

I would like to conclude this review by thanking and commending the author directly for all his effort on this book. The Law Faculty and its students as well as the country as a whole will benefit for years to come from all your hard work. And even though most of Namibia will not have a chance to read your contribution, this is one US lawyer who has, and commends you for a job well done.



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Isaacks & Benz Inc.	PO Box 23317 Windhoek	Mr B Isaacks	Partner	Atlas House, Office No. 11 C/o Mandume Ndemufayo & Sam Nujoma Avenue	061-309087	061-309088
Isaacks & Benz Inc. (branch office)	PO Box 4953 Rehoboth	Mrs VT Benz	Partner	Rehoboth Properties, Office No.4	062-523337	062-523337
James Radloff	PO Box 6693 Windhoek	Mr JM Radloff	Partner	Unit 9, 32 Schanzen Road	061-224326	061-226563
Jan Greyling & Associates	Private Bag 5552 Oshakati	Mr JH Greyling	Partner	Erf 849 Robert Mugabe Street	065-221617	065-221619
Jan Olivier & Co.	PO Box 597 Walvis Bay	Mr JH Olivier	Partner	Lund Building 131 Sam Nujoma Avenue	064-207871/2	064-207873
Jan Olivier & Co. (branch office)	PO Box 2303 Swakopmund	Mr R Pohl	Professional Assistant	Office No. 1, 1 <sup>st</sup> floor, Café Treff Plaza, Sam Nujoma Avenue	064-400942	064-400960
JC van Wyk	PO Box 3273 Windhoek	Mr JC Van Wyk	Partner	18 Love Street	061-225184/ 225438	061-220435
JNS Du Plessis Attorneys	PO Box 81289 Olympia	Mr JNS Du Plessis	Partner	6 Winterberg Street, Eros	061-222771	061-222826

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LEGAL PRACTITIONERS

Firm Name	Postal Address	Legal Practitioner	Position at Firm	Physical Address	Work Phone	Work Fax
<b>Karuaihe Legal Practitioners Kempen &amp; Scholtz</b>	PO Box 25382 PO Box 55 Gobabis	Mr MR Karuaihe	Partner	No. 67 Plato Street, Academia 40 Cuito Cuanavale Ave	061-306185 062-562602	061-306186 062-564401
		Mr WH Kempen	Partner			
		Mr M Scholtz	Partner			
		Mr W Maske	Professional Assistant			
<b>Kinghorn Associates</b>	PO Box 1455 Swakopmund	Mrs HE Ahrens	Partner	The Court Yard Daniel Tjongarero Avenue	064-405051	064-402683
		Mr PJ Burger	Partner			
		Mr PF Hamman	Partner			
		Ms J Vermaak	Professional Assistant			
<b>Kinghorn Associates (branch office)</b>				122 Theo Ben Gurirab Street		
<b>Kirsten &amp; Company Inc.</b>	PO Box 4189 Windhoek	Ms H Garbers-Kirsten	Partner	c/o Merensky & Nachtigal Street Snyman Circle	061-230691	061-232801
		Ms M Paschke	Partner			
		Ms LN Shikale	Professional Assistant			
<b>Kishi Legal Practitioners</b>	Private Bag 3725 Ongwediva	Ms F Kishi	Partner	Erf 912, Extension 2 Sam Nujoma Road Oshakati	065-220637	065-220638
		Ms H Hitula	Professional Assistant			
		Ms II Mainga	Professional Assistant			



## LEGAL PRACTITIONERS

Firm Name	Postal Address	Legal Practitioner	Position at Firm	Physical Address	Work Phone	Work Fax
<b>Keop &amp; Partners</b>	PO Box 3516 Windhoek	Mr JA Agenbach	Partner	33 Schanzen Road	061-382800	061-382888
		Mr PF Koep	Partner			
		Mr WC Kotze	Partner			
		Ms B Loch	Partner			
		Mr RTD Mueller	Partner			
		Mr ID Titus	Partner			
		Ms B de Silva	Professional Assistant			
		Mr A Sekandi	Professional Assistant			
<b>Krüger, Van Vuuren &amp; Co</b>	PO Box 4326 Windhoek	Mr H Krüger	Partner	27 Van Rhyn Street	061-257047	061-257194
		Mr CJ Jansen van Vuuren	Partner			
		Mr L Campher	Professional Assistant			
		Ms T Pearson	Professional Assistant			
		Ms CJ Van Wyk	Professional Assistant			
<b>Branch Office in Katima Mulilo xx</b>						
<b>KS Dannhauser</b>	PO Box 210 Gobabis	Mr KS Dannhauser	Partner	Elka Building 94 Church Street	062-562665	062-562909
<b>Kwala &amp; Co.</b>	PO Box 24350 Windhoek	Mr FM Kwala	Director	No.9, Cnr of Beethoven & Strauss Streets	061-385180	061-385181

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Firm Name	Postal Address	Legal Practitioner	Position at Firm	Physical Address	Work Phone	Work Fax
<b>Kwala &amp; Co. (branch Office)</b>	P O Box 1946 Rundu			Erf 900 Eugene Kakukuru Str.	066-256417	066-256677
<b>Lentin, Botma &amp; Van den Heever</b>	PO Box 38 Keetmanshoop	Mr GSG Van den Heever Mr P McNally	Partner Partner	J&G Building Hampie Plichta Street	063-223281/2	063-223793
<b>LorentzAngula Inc.</b>	Private Bag 12007 Windhoek/ Ausspannplatz	Mr EHT Angula Ms EM Angula Mr M Böttger Ms B Greyvenstein Ms S Hoffmann Mr R Philander Ms NPS Nambinga Mr AH Potgieter Mr HFE Ruppel Mr CHJ Visser Mr WD Wohlers Mr RM Rukoro Ms E Tomas	Director Director Director Director Director Director Director Director Director Director Director Professional Assistant Professional Assistant	LA Chambers, Unit 4, Ausspannplaza Dr Augustino Neto Street	061-379700	061-379701
<b>LorentzAngula Inc. Branch Office Oshakati</b>	PO Box 15638 Oshakati	Mr N Lakay Ms ETN Ndaluliwa	Professional Assistant Professional Assistant	The Palm Complex, Suite 103 Cnr Main Road & Robert Mugabe street, Metropolitan Building	065-224242	065-220226



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Firm Name	Postal Address	Legal Practitioner	Position at Firm	Physical Address	Work Phone	Work Fax
<b>MB De Klerk &amp; Associates</b>	PO Box 90181 Windhoek	Mr MB De Klerk	Partner	Room 209, South Block C, Centaurus Road, Maerua Park	061-271813	061-247020
		Mr S Horn	Professional Assistant			
		Mrs A Delpont	Professional Assistant			
<b>Mbaeva &amp; Associates</b>	PO Box 866	Mr T Mbaeva	Partner	Erf 156, Pomonia Street Rocky Crest	061-254814	061-306382
<b>Metcalfe Legal Practitioners</b>	PO Box 23990 Windhoek	Mr LH du Pisani	Partner	Metlaw House, 67 John Meinert Street	061-381400	061-249366
		Mr L Mokhatu	Partner			
		Mrs Y Campbell	Professional Assistant			
		Ms J Nghishekwa	Professional Assistant			
		Ms S Prollius	Professional Assistant			
		Ms HN Nandago	Professional Assistant			
<b>Metcalfe Legal Practitioners (branch office)</b>	PO Box 846 Walvis Bay	Mr RN Metcalfe	Partner	127 Theo-Ben Gurirab Street	064-217150	064-217160
		Ms N Lourens	Partner			
		Mr WJ Rossouw	Partner			
		Ms C Schroeder	Professional Assistant			
		Ms G Mugaviri	Professional Assistant			
		Adv D Sauls	Professional Assistant			
		Mr GH Olivier	Consultant			

## LEGAL PRACTITIONERS

Firm Name	Postal Address	Legal Practitioner	Position at Firm	Physical Address	Work Phone	Work Fax
<b>Metcalfe Legal Practitioners (branch office)</b>	PO Box 1100 Swakopmund			Groundfloor, Zi Wu Building 10 Libertina Amadhila Street	064-415380	064-415381
<b>Muluti &amp; Partners</b>	PO Box 96380 Windhoek	Mr PS Muluti	Partner	Unit 4, 32 Schanzen Street	061-302118	061 - 302119
<b>Murorua &amp; Associates</b>	PO Box 3920 Windhoek	Mr LH Murorua	Partner	Room 201, 2 <sup>nd</sup> floor, Continental building, Independence Avenue	061-238286	061-238272
		Mr SS Makando	Professional Assistant			
<b>Nakamhela Attorneys</b>	PO Box 5691 Windhoek	Mr U Nakamhela	Partner	Kessler Flats 6, Teinert Street	061-232155	061-232210
<b>Neves Legal Practitioners</b>	PO Box 23126 Windhoek	Mr LJ Karsten	Partner	89 Dr Frans Indongo Street	061-242842/3	061-242845
		Mr JMB Neves	Partner			
		Mr W Jansen Van Rensburg	Professional Assistant			
		Ms T Mbome	Professional Assistant			
<b>Olivier's Law Office</b>	PO Box 2606 Windhoek	Mr VMA Olivier	Partner	139 Hosea Kutako Drive	061-245130	061-245129
<b>Patterson Petherbridge &amp; Associates</b>	PO Box 369 Rosh Pinah	Mr I Petherbridge	Partner	557 Yellow Fish Street Rosh Pinah	063-274017	063-274022
		Mr PD Theron	Partner	Bahnhof Investment Building 45 Bahnhof Street	061-254669	061-254672
Mr H Von Wielligh	Professional Assistant					
<b>Petherbridge Law Chambers</b>	PO Box 1991 Windhoek	Mr D Bujan	Professional Assistant	No. 13 Feld Street	061-303490	061-303492
		Mrs M Petherbridge	Partner			
		Mrs F Schulz	Professional Assistant			

LEGAL PRACTITIONERS

Firm Name	Postal Address	Legal Practitioner	Position at Firm	Physical Address	Work Phone	Work Fax
<b>Pieter, J de Beer Legal Practitioners</b>	PO Box 6798 Windhoek	Mr PJ de Beer	Partner	Suite 1, 2 <sup>nd</sup> floor, Unit 3 Ausspammplaza, Dr Augustino Neto Street	061-305650	061-305651
		Mr J Roux	Professional Assistant			
<b>R Olivier &amp; Company</b>	PO Box 2198 Windhoek	Mr A Olivier	Partner	Realmar Building 122 Robert Mugabe Avenue	061-225757/8/9	061-223934
		Mr R Olivier	Partner			
<b>Rissik, Cox &amp; Probart</b>	PO Box 90 Keetmanshoop	Mr TW Probart	Partner	34 5th Avenue	063-222326 /223277	063-223989
<b>Rix &amp; Company Legal Practitioners</b>	PO Box 90316 Windhoek/Klein Windhoek	Ms MD Rix	Partner	32 B Jan Brand Street, Avis	061-220826	061-257699
<b>Shikongo Law Chambers</b> Branch Office Ongwediva xx	PO Box 96350 Windhoek	Mr EN Shikongo	Partner	4 Banting Street Windhoek West	061-254644	061-230448
		Mr B Usiku	Partner			
		Ms JM Brown	Professional Assistant			
		Ms P Kanguuehi	Professional Assistant			
		Mrs M Ovis	Professional Assistant			
<b>Sisa Namandje &amp; Co. Inc.</b>	PO Box 4240 Windhoek	Mr S Namandje	Director	13 Pasteur Street	061-259848	061-259849
		Ms M Jankie-Shakwa	Director			
		Mr AEJ Kamanja	Director			
		Mr TM Nekongo	Director			
		Ms H Shilongo	Professional Assistant			
<b>Stern &amp; Barnard</b> Branch Office in Grootfontein xx	PO Box 452	Mr JH Wessels	Partner	5 Bahnhof Street	061-237010	061-224111
		Mr I/T Hohne	Partner			

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Firm Name	Postal Address	Legal Practitioner	Position at Firm	Physical Address	Work Phone	Work Fax
<b>Stephen F Kenny Legal Practitioners</b>	PO Box 86108 Eros	Mr SF Kenny	Partner	Unit 18, 1 <sup>st</sup> floor, Hidas Centre Nelson Mandela Avenue	061-300324/6	061-260855
		Adv C Mostert	Professional Assistant			
<b>Suzanne P Prins Attorney</b>	PO Box 90517 Windhoek/Klein Windhoek	Mr B Viljoen	Professional Assistant	1 <sup>st</sup> Floor, Capital Centre	061-272751	061-272722
		Ms SP Prins	Partner			
<b>Tania Pearson &amp; Shakumu Inc.</b>	PO Box 3786 Ongwediva	Mr S-K Shakumu	Partner	Upper Floor, Shali Complex	065-222207	065-220337
<b>Thambapilai Associates</b>	PO Box 2325 Ondangwa	Mr A Thambapilai	Partner	Unit 5, Lanka Building, Ondangwa Main Road	065-240000	065-241843
<b>Theunissen, Louw &amp; Partners</b>	PO Box 3110 Windhoek	Mr EFF Gous	Partner	Schützenhaus, 1 Schützenstrasse Crn Schützen and Sinclair Streets	061-237856	061-228335
		Mr TJA Louw	Partner			
		Mr A Theunissen	Partner			
		Mr CJ Verwey	Partner			
		Mr JJ Jacobs	Professional Assistant			
<b>Titus Ipumbu Legal Practitioners</b>	PO Box 25095 Windhoek	Mr T Ipumbu	Partner	194 Bahnhof Street	061-305692	061-305693
<b>Tjitemisa &amp; Associates</b>	PO Box 848 Windhoek	Mr JN Tjitemisa	Partner	5 Webb Street, Windhoek North	061-224844	061-224850
		Mr EE Coetzee	Professional Assistant			
<b>Ueitele &amp; Hans Legal Practitioners</b>	PO Box 20716 Windhoek	Mrs A-DN Hans-Kaumbi	Partner	Cnr of Beethoven/Wagner Street 28, Windhoek-West	061-249942	061-242671
		Mr SFI Ueitele	Partner			
		Mr D Liswaniso	Professional Assistant			

## LEGAL PRACTITIONERS

Firm Name	Postal Address	Legal Practitioner	Position at Firm	Physical Address	Work Phone	Work Fax
<b>Ugène Thomas Legal Practitioners</b>	PO Box 3110 Walvisbay	Mr U Thomas	Partner	Unit 13, 2 <sup>nd</sup> floor, CLA Building, 84 Theo Ben Gurirab Street	064-205219	064-204498
<b>Van der Merwe Coleman</b>	Po Box 325 Windhoek	Mrs M Coleman Mr CJW van der Merwe	Partner Partner	7 <sup>th</sup> Floor Frans Indongo Gardens	061-370800	061-370808
<b>Van der Merwe-Greeff Inc</b> Branch Office in Okahandja xx	PO Box 2356 Windhoek	Mr CW Rall Mr BJ Van der Merwe Mr JS Steyn Mr J Kaumbi Ms MC Greeff	Director Director Director Professional Assistant Consultant	20 Bismarck Street	061-225497	
<b>Van der Westhuizen &amp; Greeff</b>	PO Box 47 Otjiwarongo	Mr CPD Bodenstein Mr CAA Van der Westhuizen	Partner Consultant	20 A Hage Geingob Street	067-304156	067-302068
<b>Van Heerden, Liebenberg &amp; Co.</b>	PO Box 13 Mariental	Mr MWG Liebenberg Mr PW Van Heerden	Partner Partner	No. 13, School Street	063-240397/8/9	063-242302
<b>Van Rensburg Associates</b>	PO Box 61 Swakopmund	Mr HC Jansen van Rensburg	Partner	1 <sup>st</sup> Floor, Am Strand Building Tobias Haiyeko Street	064-405343/ 405133	064-404727
<b>Van Zyl &amp; Partners</b>	PO Box 504 Mariental	Mr HA van Zyl	Partner	Erf 203 Drieboom Street	063-241933/4	063-241935
<b>Wouter Rossouw Legal Practitioner</b>	PO Box 3110 Walvis Bay	Mr PW Rossouw	Partner	Unit 13, 2 <sup>nd</sup> Floor, CLA Bldg 84 Theo-Ben Gurirab Str.	064-205219	064-204498
<b>WT Christians</b>	PO Box 4499 Rehoboth	Mr WT Christians	Partner	Room 7, Rehoboth Properties Building	062-523447	062-523424

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## Legal practitioners not required to hold a Fidelity Fund Certificate

<b>Legal Assistance Centre</b>	Mr N Tjombe	Tel. 061-223356
	(Director)	Fax 061-264953
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	Ms L Dumba	Windhoek
	Ms RMM Gomachas	4 Körner Street,
	Ms FA Hancox	Windhoek
<b>Legal Aid</b>	Mr Z Alberto	
	Mrs P Daringo	Tel. 061-2805281 Fax 061-230204 Private Bag 13370, Windhoek Justitia Building, Windhoek
	Mr TO Nakamhela	Magistrate's Court, Katutura, Windhoek 061-3201111 088612236
<b>Office of the Attorney-General</b>	Mr MI Asino	Tel. 061-2819111
	Ms M Burger (De Jager)	Fax 061-229788
	Mr C Chanda	
	Mr RH Goba	
	Ms ME Visagie	
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	Ms VE Katjiuongua	Windhoek
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	Mrs C Machaka	
	Mr NN Marcus	
	Mr LT Mayumbelo	
	Mr WP Oosthuizen	
Ms C Potgieter		
Mr PJ Swanepoel		
<b>Office of the Prosecutor-General</b>	Adv OM Imalwa	Tel. 061-374200
	Adv RL Gertze	Fax 061-221127
	Adv HC January	Private Bag 13191,
	Adv TT July	Windhoek
	Adv A Lategan	
	Adv S Miller	
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	Adv JA Truter	
	Adv HF Jacobs	
Mr JT Kuutondokwa		

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