

Children's Rights in Namibia

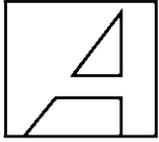
Edited by Oliver C Ruppel

2009

This publication would not have been possible without the generous financial support of the Konrad Adenauer Foundation.

Please note that the views expressed herein are not necessarily those of the Konrad Adenauer Foundation.

This publication is also available online at www.kas.de/namibia



**Konrad
Adenauer
Stiftung**

Konrad Adenauer Foundation
P.O. Box 1145
Windhoek
info.namibia@kas.de
www.kas.de/namibia

© Konrad-Adenauer-Stiftung and the Authors 2009

All rights reserved. No reproduction, copy or transmission of this publication may be made without written permission. No paragraph of this publication may be reproduced, copied or transmitted save with written permission. Any person who does any unauthorised act in relation to this publication may be liable to criminal prosecution and civil claims for damages.

Content editor: Oliver C Ruppel

Language editor: Sandie Fitchat and Helen Vale

Cover design: Anton Bösl and Gavin Damon

The cover design is based on the sculpture “Dancing Sisters“ by Dominic Benhura, Zimbabwe

Publication design: Oliver C Ruppel and Anton Bösl

Printing: John Meinert Printing (Pty) Ltd

Publisher

Macmillan Education Namibia

PO Box 22830

Windhoek - Namibia

Tel. (+264 61) 225568

ISBN 978-99916-0-891-4



Human Rights and Documentation Centre

Faculty of Law – University of Namibia

340 Mandume Ndemufayo Avenue

Private Bag 13301 Windhoek

Tel. (061) 206 3664

Fax (061) 206 3293

http://www.unam.na/centres/hrdc/hrdc_index.html

Dancing Sisters



**Sculpture created from Serpentine in 2000
by Dominic Benhura**

African Child

Victoria Hasheela

I'm a child of Africa
Daughter of terrific nature
In a beautiful black skin
Under a glorious sun

Firewood I must collect
Mama porridge to prepare
Off to school I should run
My dream to fulfil

I wish it was my turn
To take the Science book home
So much I need to learn
But I should understand
They are not enough

I'm an African child
But for some reason I have
A heavy load to bear
Whose sin I'm paying for
Remains a question on my mind

But through diseases and pain
Due to lack of vaccines
Through poverty and hunger
Due to lack of support
I'll still run my race
Africa is my pride

Contents

Foreword	iii
Anton Bösl	
Acknowledgements	v
List of contributors	vii
List of abbreviations	xvi
Introduction	1
Oliver C Ruppel	
The protection of children’s rights in Namibia: Law and policy	5
Lotta N Ambunda and Willard T Mugadza	
The protection of children’s rights under international law from a Namibian perspective	53
Oliver C Ruppel	
A major decision: Considering the age of majority in Namibia	101
Rachel Coomer and Dianne Hubbard	
Work in progress: The Child Care and Protection Act in Namibia	121
Lena N Kangandjela and Clever Mapaire	
The best interest of the child	145
Yvonne Dausab	
Children’s right to citizenship	159
Faith Chipepera and Katharina G Ruppel-Schlichting	
Custody and guardianship of children	177
Felicity !Owoses-/Goagoses	
Adoption: Statutory and customary law aspects from a Namibian perspective	189
Oliver C Ruppel and Pombili L Shipila	
Child labour: A universal problem from a Namibian perspective	201
Clever Mapaire	
Realising the right to education for all: School policy on learner pregnancy in Namibia	223
Dianne Hubbard	

Customary practices and children with albinism in Namibia: A constitutional challenge?.....	243
Ruusa N Ntinda	
Children in polygynous marriages from a customary perspective.....	255
Prisca N Anyolo	
“A man is not a man unless ...”: Male circumcision – A legal problem?.....	267
Manfred O Hinz and Moudi Hangula	
Restorative justice: The case for a Child Justice Act.....	283
Stefan Schulz	
High Court of Namibia Vulnerable Witnesses’ Project	327
Annel M Silungwe	
Child suggestibility in the Namibian justice system	331
Joab T Mudzanapabwe	
Understanding the perpetrators of violent crimes against children.....	347
Veronica C de Klerk	
Access to information by orphans and other vulnerable children in the Ohangwena Region	363
Chiku Mchombu	
Child trafficking, child prostitution and the potential dangers of the 2010 World Cup in South Africa	375
Michael Conteh	
The Ombudsman for Children in Poland: A model for Namibia?	391
Agata Rogalska-Piechota	
Accessibility of social assistance benefits in indigenous African communities from a South African perspective	409
Gugulethu Nkosi	
In search of a focus: Methodological provocations in the quest for the recognition and implementation of children’s rights and legal entitlements	425
Julie Stewart	

Foreword

The date 20 November 1989 marked a milestone in the protection and promotion of the rights of children across the globe. On that day – after ten years of negotiations – the United Nations (UN) General Assembly finally adopted the Convention on the Rights of the Child. By signing this Convention, governments for the first time internationally acknowledged their responsibility towards children and the protection of their rights. Some 20 years later, in November 2009, the Convention has been ratified by 193 states – the highest number of ratifications of all international Conventions to date.

The Convention on the Rights of the Child defines a child as any human being under the age of 18, unless an earlier age of majority is attained (recognised) under the law applicable to the child. The Convention makes it very clear that children have rights, and that those rights are human rights. Children can no longer be considered as adult possessions or mere objects of their actions, but are internationally acknowledged as autonomous subjects of rights. Children's rights are not just promises: they are inalienable rights that children can claim in courts of justice.

It was the intention of this UN Convention to authoritatively stipulate the rights of the child to life, development, protection and participation. The instrument envisaged the improvement of the living conditions of all children, to enhance their development, to protect them from violence and all forms of exploitation, and to promote their participation in society.

Four principles lie at the core of the Convention, namely (a) the right to equal treatment (children must not be discriminated against); (b) the priority of the well-being and best interest of the child (in family and in society); (c) the right to life and development (meaning access to medical treatment, education, protection from exploitation, etc.), and (d) respect of the child's opinion. With these four principles, which became normative for the relevant legislation in many countries, the Convention has created the environment conducive to ensuring children's rights across the planet.

Namibia ratified the Convention on the Rights of the Child on 30 September 1990. However, a gap remains between ratification and practical implementation into national legislation. It took Namibia almost two decades to draft suitable legislation by way of the proposed Child Care and Protection Bill, which reflects the principles of the Convention in the Namibian context. It is hoped that this Bill will soon be fully enacted and operational.

National and international legal frameworks are a necessary but not sufficient means to grant adequate protection for the rights of children. States and governments can only

enforce legal frameworks: they cannot provide for the citizen's morality. In this respect, as a country, Namibia is on the right track in terms of establishing the required legal framework for the protection of her children. On the other hand, considering the reported facts that children in Namibia face murder, rape and abuse on a daily basis, all members of the Namibian society still have a long way to go to fully respect the rights and the dignity of children in the country.

With this publication, the Konrad Adenauer Foundation hopes to nobly serve the purpose of deepening the understanding of children's rights in general, and in Namibia in particular, strengthening their rights as full members of society and protecting and promoting their dignity.

Anton Bösl

November 2009

Acknowledgements

My first word of thanks goes to all the contributors of this academic publication, for their great work!

This publication is somewhat special: a good number of the contributors consisted of under- and postgraduate students. Ms Lena Kangandjela (who is at the same time employed at the Ministry of Gender Equality and Child Welfare), Mr Willard Mugadza and Ms Ruusa Ntinda are third-year B Juris students. Ms Lotta Ambunda and Mr Pombili Shipila are – like Mr Mugadza and Ms Ntinda – student assistants at the Human Rights and Documentation Centre (HRDC) and fourth-year LL B students. Ms Moudy Hangula is a final-year LL B student. Both Ms Prisca Anyolo and Mr Clever Mapaure are currently in the process of finalising their LL M studies, while Mr Joab Mudzanapabwe (Ministry of Labour) is a Ph D candidate in Forensic Psychology. All of them are currently enrolled with the University of Namibia. I am particularly proud of their contributions, as I consider their achievement as an exemplary reflection of how capacity-building measures and young professional empowerment can be achieved successfully. I am confident to find some of the aforementioned names attached to the title of Professor at some point in the future.

The students' contributions amalgamated in this publication with articles by internationally renowned legal academics such as Prof. Manfred Hinz (who holds the UNESCO Chair, Human Rights and Democracy, University of Namibia), Prof. Julie Stewart (Southern and Eastern African Regional Centre for Women's Law, University of Zimbabwe) and Dr Stefan Schulz (Department of Legal Studies, Polytechnic of Namibia). Their contributions, next to those of more junior colleagues like Ms Yvonne Dausab (Faculty of Law, University of Namibia) and Ms Gugulethu Nkosi (Faculty of Law, University of South Africa), also blended in with the excellent papers by members from within the legal fraternity at large, such as the one by Ms Felicity !Owoses-/Goagoses (Ministry of Justice), the one co-authored by my wife Dr Katharina Ruppel-Schlichting (Legal Research and Development Trust of Namibia), and those by Ms Dianne Hubbard and Ms Rachel Coomer (Legal Assistance Centre). Ms Hubbard and Ms Coomer had already done tremendous work in the preparation of the Child Care and Protection Bill. Ms Hubbard is thanked in particular for reviewing the article on the Child Care and Protection Bill prior to its publication in this volume.

Apart from the interdisciplinary contributions by Mr Michael Conteh and Ms Chiku Mchombu, I am particularly grateful for the contributions by Public Prosecutor Ms Faith Chipepera and by His Lordship the Honourable Mr Justice Annel Silungwe. To His Lordship, my fellow Rotarian and the Past District Governor, and to the Auas Rotary Club in Windhoek I would like to express my gratitude for the joint effort in making the High Court of Namibia Vulnerable Witnesses' Project a reality.

Special recognition for her interesting contribution goes to my colleague Ms Agata Rogalska-Piechota from the Office of the Plenipotentiary for the Proceedings before the International Organs of the Protection of Human Rights from the Ministry of Foreign Affairs in Warsaw, Poland. Thanks also go to Ms Veronica de Klerk and Women's Action for Development for the continuous activities in the process of women's (and children's) empowerment in Namibia.

The input by Ms Sandie Fitchat and Ms Helen Vale as regards the language editing deserves a special word of appreciation. Ms Vale was responsible for editing the contributions by Mr Mudzanapabwe, Ms Gugulethu Nkosi, Ms Agata Rogalska-Piechota, Dr Stefan Schulz, and Prof. Julie Stewart. The remainder of the content was edited by Ms Fitchat, who also did a wonderful job of the final layout.

I would furthermore like to express my sincere gratitude to all those who engaged in and participated during the Expert Workshop conducted by the Human Rights and Documentation Centre and the Konrad Adenauer Foundation on 28 September 2009 preceding this publication.

My most grateful thanks are extended to Dr Anton Bösl, the Konrad Adenauer Foundation's Resident Representative for Namibia and Angola, as well as the Konrad Adenauer Foundation itself for its financial support of this publication. KAS and the HRDC have teamed up before by way of a publication promoting human rights and the rule of law in Namibia and beyond.

My appreciation is also due to Prof. Christian Roschmann, Director of the KAS Rule of Law in the Sub-Saharan Africa Programme in Nairobi, Kenya, for his continuous support.

Dr Bösl kindly accepted the invitation to do the cover design and provide a Foreword for this book. Ms Victoria Haashela blessed it with the poem *An African Child*. I thank both cordially!

It is hoped that the book *Children's Rights in Namibia* appeals to the Judiciary, Legislature and the Executive. The same, of course, applies to academics, legal practitioners, researchers, students and the general public.

Oliver C Ruppel
20 November 2009

List of contributors

Ambunda, Lotta N is a student assistant at the Human Rights and Documentation Centre. She holds a B Juris degree and is in her first year of an LL B at the University of Namibia. Ms Ambunda originates from a small village in Ompundja in northern Namibia, where she attended elementary school. She completed secondary school at St Joseph’s Roman Catholic School in Windhoek. **Latest publication:** Ambunda, L & S de Klerk. 2008. “Women and custom in Namibia – A research overview”. In Ruppel, OC (Ed.). *Women and custom in Namibia: Cultural practice versus gender equality?*. Windhoek: Macmillan Namibia, pp 43–82. **E-mail:** lottanambunda@hotmail.com

Anyolo, Prisca N studied law at the University of Namibia. She obtained a B Juris, a Specialised Certificate in Customary Law, and an LL B in 2007, 2008 and 2009, respectively, from the University of Namibia. She is currently doing her LL M at the same university. Prior to studying law, she obtained a Diploma in Public Administration and Development Studies and an Advanced Diploma in International Relations and Diplomacy from the United Nations Institute for Namibia in Lusaka, Zambia. She became the first Town Clerk of the Rehoboth Town Council in 1992. She served as Secretary to the Council of Traditional Leaders from 1999–2004 under the then Ministry of Regional and Local Government, Housing and Rural Development. During the Namibian liberation struggle, Ms Anyolo was a youth leader and political commissar. She has also published in the field of customary law. **Latest publication:** Anyolo, P. 2008. “Polygyny among the *Ovambadja*: A female perspective”. In Ruppel, OC (Ed.). *Women and custom in Namibia: Cultural practice versus gender equality?*. Windhoek: Macmillan Namibia, pp 83–92. **E-mail:** anyolop@gmail.com

Bösl, Anton is the Konrad Adenauer Foundation Resident Representative for Namibia and Angola. Dr Bösl holds a PhD in Philosophy from the Ludwig-Maximilians-Universität in Munich (Germany), and a PhD in Theology from the Albert-Ludwigs-Universität in Freiburg (Germany). **Latest publication:** Bösl, A & J Diescho (Eds). 2009. *Human rights in Africa*. Windhoek: Macmillan Namibia. **E-mail:** info.namibia@kas.de

Chipepera, Faith completed her B Juris and LL B degrees at the University of Namibia (UNAM). She has worked as a graduate assistant at the UNAM Legal Aid Clinic and as a legal researcher at various institutions. She is currently a Public Prosecutor in Outjo. **E-mail:** fchipepera@yahoo.com

Conteh, Michael holds a Master’s degree in Development Studies from the Institute of Social Studies (ISS) in The Hague, The Netherlands. As a researcher/lecturer and gender trainer, Mr Conteh has researched women’s issues, social and developmental issues in Namibia such as HIV and AIDS, poverty and gender, and has demonstrated extensive

knowledge in gender sensitisation and awareness training workshops, gender budgeting, community discussions facilitation, participatory poverty assessment, key informants interviews, focus group discussions, and report writing. Mr Conteh directs the Gender Training and Research Programme (GTRP), and organises and conducts gender training, awareness and sensitisation workshops, the participants of which include government ministries, heads of non-governmental organisations, directors and other top-level government, parastatal and civil society representatives, as well as the youth. Mr Conteh's research achievements, to mention but a few, include participating in a recent national assessment on human trafficking in Namibia, commissioned by the Ministry of Gender Equality and Child Welfare (MGECW) with support from the United States Agency for International Development; a workbook on human trafficking and gender-related matters for the Parliamentary Women's Caucus of the National Council of Namibia; understanding the perpetrators of violent crimes against women, a study commissioned by the University of Namibia, the Ministry of Safety and Security and Women's Action for Development in 2006–2007; management of a nationwide gender survey in 2000; a multi-regional study of women's rights to inheritance during 2000 to 2005; and research on men's and women's attitudes towards gender equality in 2001. Mr Conteh has edited publications such as that published in 2004 on the structural conditions necessary for the progression of the HIV and AIDS pandemic in Namibia, and contributed a section in *Beyond inequalities: Women in Namibia*, representing research jointly undertaken jointly by the GTRP and the Southern African Research and Documentation Centre. **Latest publication:** Conteh, M, D LeBeau & Eunice Iiping. 2005. *Women's property and inheritance rights in Namibia*. Windhoek: Pollination Publishers/UNAM. **E-mail:** mconteh@unam.na

Coomer, Rachel is the Public Outreach Manager for the Gender Research and Advocacy Project at the Legal Assistance Centre, where she produces a range of educational material, engages in advocacy, conducts research, disseminates research findings and takes responsibility for media liaison. Rachel is a graduate of the University of Oxford in the United Kingdom. Rachel has assisted the Ministry of Gender Equality and Child Welfare with its consultation process around the proposed Child Care and Protection Bill, and has worked with the Ministry of Education on the development of a draft policy for the prevention and management of learner pregnancy. **Latest publication:** Coomer, R. 2008. *Addressing gender-based violence through community empowerment: A guide for community activists*. Windhoek: Legal Assistance Centre. **E-mail:** rcoomer@lac.org.na

Dausab, Yvonne is a full-time lecturer at the Faculty of Law, University of Namibia. She holds an LL M from the University of Pretoria (South Africa), and a BA (Law) and an LL B from the University of the Western Cape (South Africa). Ms Dausab is an admitted Legal Practitioner of the High Court of Namibia. **Latest publication:** Y Dausab. [Forthcoming]. "The Disclosure Provision in terms of sections 113, 114, 115 of the CPA (Act No. 25 of 2004): Their potential effect on the right to a fair trial". **E-mail:** ydausab@unam.na

De Klerk, Veronica C has headed one of Namibia's most prominent women's movements – Women's Action for Development (WAD) – for the past 14 years. WAD empowers both women and men in the socio-economic and social upliftment fields of development across Namibia, and actively strives to advance women's status in Namibian society. Together with Bishop Zephania Kameeta, she was nominated by Global Call to Action against Poverty (GCAP) in 2006 as a Goodwill Ambassador for Namibia, in recognition of the exemplary work WAD has performed in reducing poverty in the country. Ms De Klerk is acknowledged in the *Guide to Namibian Politics* as one of 192 individuals that have influenced politics in Namibia. In 2005, the French Association of Friendship and Solidarity with African Peoples (AFASPA) nominated her as one of 52 African Women Who Make Africa Move. In 2007, the Minister of Works, Transport and Communication, Hon. Joel Kaapanda, nominated Ms De Klerk as Namibia's Road Safety Ambassador. **Latest publication:** De Klerk, V. 2008. "Women's Action for Development: 15 years of experience with customary practice in rural Namibia". In Ruppel, OC (Ed.). *Women and custom in Namibia: Cultural practice versus gender equality?*. Windhoek: Macmillan Namibia, pp 33–42. **E-mail:** vdeklerk@mweb.com.na

Hangula, Moudi holds a B Juris degree and is currently in her final year of LL B studies at the University of Namibia. **E-mail:** moudihangula@yahoo.com

Hasheela, Victoria was born in Endola in the Ohangwena Region, Namibia, in 1985. She is pursuing a career in the field of Computer Science. She is currently doing her Master's in Business Informatics at the University of Mannheim (Germany). **Latest publication:** Nghaamwa, TM & VT Hasheela. 2007. *Shower of voices*. Windhoek: John Meinert Printing. **E-mail:** vihash@gmail.com

Hinz, Manfred O studied law and philosophy at the University of Mainz (Germany), where he graduated in law. He did his Legal Practitioner examination in 1964, the year in which he also obtained his PhD from the University of Mainz. After studying anthropology, sociology and African and Oriental languages at the same University, he became assistant lecturer, teaching Anthropology and Public Law. In 1971, he was appointed full Professor at the University of Bremen. In 1989, he went to Namibia where, after Independence, he assisted the Ministry of Justice. He joined the University of Namibia's Faculty of Law upon its inception. Prof. Hinz holds the United Nations Educational, Scientific and Cultural Organisation's Chair for Human Rights and Democracy in the Law Faculty's Human Rights and Documentation Centre. Prof. Hinz has published widely in his areas of specialisation, in particular in the fields of Legal and Political Anthropology, and Constitutional and International (Economic) Law. **Latest publications:** Hinz, MO & HK Patemann (Eds). 2006. *The shade of new leaves: Governance in traditional authority – A southern African perspective*. Münster: LIT Verlag; Hinz, MO & OC Ruppel (Eds). 2008. *Biodiversity and the ancestors: Challenges to customary and environmental law. Case studies from Namibia*. Windhoek: Namibia Scientific Society. **E-mail:** okavango@mweb.com.na

Hubbard, Dianne is the Coordinator of the Gender Research and Advocacy Project at the Legal Assistance Centre. She holds degrees in English literature from the University of North Carolina (United States of America) and Stellenbosch University (South Africa), and a law degree from Harvard Law School (USA). Her primary areas of research are gender-based violence and family law, and she has worked in partnership with government on a variety of law reforms relating to women and children. She taught a course in Gender and the Law at the University of Namibia for two years, and has served on Namibia's Law Reform and Development Commission subcommittees on domestic violence, divorce and marital property. **Latest publications:** Hubbard, Dianne. 2007. *Rape in Namibia: An assessment of the operation of the Combating of Rape Act*. Windhoek: LAC; LaFont, Suzanne & Dianne Hubbard (Eds). 2007. *Unravelling taboos*. Windhoek: Legal Assistance Centre (LAC). Hubbard, Dianne. 2008. *Baby-dumping and infanticide*. Windhoek: LAC; Hubbard, Dianne. 2008. *Stalking: Proposed new legislation for Namibia*. Windhoek: LAC. **E-mail:** dhubb@africaonline.com.na

Kangandjela, Lena N is a fourth-year LL B student at the University of Namibia and a Chief Development Planner for Women and Family Development at the Ministry of Gender Equality and Child Welfare. She holds a B Juris as well as a Bachelor's in Education and a Postgraduate Diploma in Gender and Development Studies from the University of Namibia. **E-mail:** lex1229@yahoo.com

Mapaure, Clever studied law at the University of Namibia. He graduated with B Juris in 2007, and in 2008 he graduated cum laude in the Specialised Certificate in Customary Law. In 2009 he obtained an LLB cum laude, and was awarded the Vice-Chancellor's Medal as UNAM's Best Undergraduate Student. Mr Mapaure currently works a Legal Advisor to the UNAM Student Representative Council (SRC) and a Master of Laws Candidate specialising in environmental law. **Latest publications:** Mapaure, C. 2009. "Jurisprudential aspects of proclaiming towns in communal areas in Namibia". *Namibia Law Journal*, 1(2):23–48; Hinz, MO & C Mapaure. 2009. "Legal pluralism and the apartheid past: Challenges to Namibian family law reform and development". *Family Law* (Eds). *International survey of family law*. Bristol: Jordan Publishing Ltd, pp 301–327. **E-mail:** mapaurec@live.com

Mchombu, Chiku has a Master's in Library and Information Studies from the University of Botswana. She also obtained a Social Sciences degree at that University, where she majored in Accounting and Public Administration, as well as a Diploma and Certificate in Library Studies. Additional qualifications include a Certificate in Human Rights and one in Gender in Development. She is a Senior Documentalist at the Human Rights and Documentation Centre (HRDC) at the University of Namibia (UNAM), and teaches part-time courses on Special Libraries and Documentation Centres, Collection Development, Basic Information Science, and Modern Librarianship at UNAM's Information Studies Department. Some of her achievements are setting up documentation centres such as those at Botswana's Ministry of Finance, the Central Statistics Office in Gaborone, at

the United Nations Children's Fund office in Gaborone, and at the HRDC. Her areas of interest include information provision on HIV and AIDS, orphans and other vulnerable children, and information and human rights. She is currently a part-time PhD student at the University of Zululand (South Africa). **Latest publication:** Mchombu, CM, J Mostert & D Ocholla. 2009. "Information needs and information-seeking behavior of orphans and vulnerable children and their caregivers in Okahandja, Namibia". *African Journal of Libraries, Archives and Information Science*, 19(1):39–52. **E-mail:** cmchombu@unam.na

Mugadza, Willard T is an international assistant at the Human Rights and Documentation Centre and a student in his third year B Juris studies at the University of Namibia (UNAM). He was the Best Non-final Year Student in UNAM's Faculty of Law for the 2008 academic year. In 2009, he participated in the African Human Rights Moot Court Competition in Lagos, Nigeria, organised by the University of Pretoria in South Africa. He completed his primary and secondary education in Zimbabwe. Prior to studying law, he worked in Zimbabwe as a banker for three leading financial Institutions before joining Screenlitho Printing Private Company where he rose through the ranks to become its Personnel and Administration Manager, the position he last held before enrolling at UNAM. **E-mail:** wt.mugadza@yahoo.com

Mudzanapabwe, Joab T is a Clinical Psychologist by profession. He holds a BSc Honours degree in Psychology and a Master's degree, both from the University of Zimbabwe. He is currently the Chief Vocational Counsellor at the Ministry of Labour and Social Welfare. Before joining the Ministry, he worked as a Clinical Psychologist at the Windhoek Central Hospital's Psychiatry Department, where he was involved in forensic psychiatric evaluations of mentally ill offenders. He runs a private practice in Windhoek where he sometimes carries out psychological assessments for legal purposes. He is currently enrolled for PhD studies in Clinical Psychology at the University of Namibia. **E-mail:** jmmudzanapabwe@mol.gov.na

Nkosi, Gugulethu obtained her LL B from the University of KwaZulu/Natal (South Africa) and an LL M from the University of the Witwatersrand (South Africa). She is currently pursuing her LL D at the University of South Africa (UNISA). Her research topic is "Social Security Regimes and Child Care in South Africa: A Legal Analysis". Ms Nkosi is a Senior Lecturer at UNISA's School of Law. Her research interests include African Indigenous Law and Social Security Law. **Latest publications:** Co-authored. 2007. "Indigenous African marriage and same-sex partnerships: Conflicts and controversies. *International Journal of African Renaissance Studies*, 2(2):200; Co-authored. 2007. "Registration of customary marriages under the Transkei Marriage Act: *Wormald NO & Others v Kambule* [2004] 3 All SA 392 (EC), *Wormald NO & Others v Kambule* 2006 (3) SA (SCA), and *Kambule v Baduza & 7 Others* 1833/2006 (EC). *Speculum Juris*, 2 (co-authored). **E-mail:** nkosigs@unisa.ac.za

Ntinda, Ruusa N is a student assistant at the Human Rights and Documentation Centre (HRDC) at the University of Namibia (UNAM). She is currently a third-year B Juris student at UNAM's Faculty of Law. She originated from the small village of Okapya in northern Namibia, and completed her secondary school education at Mureti High School in Opuwo. *E-mail:* ruusanntinda@hotmail.com

!Owoses-/Goagoses, Felicity obtained her B Juris and LL B degrees at the University of Namibia. She is currently a Legislative Drafter at the Ministry of Justice, responsible for drafting laws and scrutinising proposed laws for their constitutionality, amongst other things. In 2006, she obtained a Certificate in Legislative Drafting from the Institute of Advanced Legal Studies in London. She passed the Namibian Legal Practitioner's Qualifying examination in 2007. In 2008, she obtained a Certificate in Translating Policy into Legislation and Drafting from the Judicial and Legal Training Institute (ILKAP) in Malaysia. In 2009, she obtained a Certificate for having completed an International Senior Lawyers Project in Windhoek. She is a Member of the Commonwealth Association for Legislative Counsel. *E-mail:* feli@iway.na

Rogalska-Piechota, Agata holds the position of Expert on Human Rights Complaint Mechanisms and the Third Generation of Human Rights at the Ministry of Foreign Affairs of the Republic of Poland. She also serves as the Judicial Member of the Olsztyn Self-Government Board of Appeal (Poland). Ms Rogalska-Piechota graduated in law after studies at the Nicolas Copernicus University in Torun (Poland), subsequently passing the state Public Prosecutor's examination. She holds a postgraduate Diploma in Comparative Law from the Law Faculty of the Nicolas Copernicus University; a Diploma in International Human Rights Law from the Institute for Human Rights, Åbo Akademi University, Turku (Finland), as well as from the Poznan Human Rights Centre at the Polish Academy of Sciences (Poznan); and a Diploma in European Human Rights Law from Viadrina European University, Frankfurt/Oder (Germany). *Latest publications:* Wołaszewicz, J (Ed.). [Forthcoming]. "Third Informal Seminar for Government Agents and Other Institutions on Pilot Judgments Procedure in the European Court of Human Rights and the Future Development of Human Rights, Warsaw, 14–15 May 2009; Concept of the 'Statute of the Court'". Warsaw: National School of Public Administration. *E-mail:* agata.rogalska@wp.pl

Ruppel, Oliver C is the Director of the Human Rights and Documentation Centre (HRDC) in Windhoek, and a Senior Lecturer at the Faculty of Law, University of Namibia (UNAM). His major field of specialisation is Public International Law. Human Rights Law, Environmental Law and Public Law Aspects of International Trade are his main areas of teaching and research. He is engaged in various national and international legal consultancies, is a founding member of the United Nations Environmental Programme (UNEP) Association of Environmental Law Lecturers in African Universities (ASSELLAU), Nairobi (Kenya); a member of the World Conservation Union (IUCN) Academy, Ottawa (Canada); and Regional Resource Person in Southern Africa for Trade and Environment to the World Trade Organisation (WTO), Geneva (Switzerland). Dr

Ruppel graduated in Law after studies at the Universities of Lausanne (Switzerland) and Munich (Germany). He holds an LL M in Public Law from the University of Stellenbosch (South Africa), a doctoral degree in Law from the University of Bratislava (Slovakia), and he was one of the first lawyers to be awarded the academic degree Master of Mediation (MM) from the University of Hagen (Germany) with a specialisation in economic and environmental extrajudicial dispute settlement. Furthermore, he holds a postgraduate Diploma in International Human Rights Law from Åbo Akademi University, Turku (Finland), and a postgraduate Diploma from the Munich School of Philosophy SJ (Germany). At the moment he is also a Habilitation candidate (Public Law) at the Faculty of Law, University of Bremen (Germany). **Latest publications:** Ruppel, OC. 2009a. “Regional Economic Communities and human rights in East and Southern Africa”. In Bösl, A & J Diescho (Eds). *Human rights in Africa. Legal perspectives on their protection and promotion*. Windhoek: Macmillan Namibia, pp 284–318; Ruppel, OC. 2009b. “The SADC Tribunal, regional integration and human rights: Major challenges, legal dimensions and some comparative aspects from the European legal order”. In *Recht in Afrika / Law in Africa*. 2009/2. Köln: Köppe Verlag, pp 203–228. **E-mail:** ocruppel@unam.na; ruppel@mweb.com.na

Ruppel-Schlichting, Katharina G is the Business Manager and a Senior Legal Researcher at the Legal Research and Development Trust of Namibia in Windhoek. Dr Ruppel-Schlichting graduated in law after studies at the Universities of Passau and Munich (Germany). She holds a LL M degree from the University of Stellenbosch (South Africa), and a doctoral degree in Law from the University of Bratislava (Slovakia). **Latest publications:** Kanganje, A & K Ruppel-Schlichting. 2008. *Manual Do Delegado De Lista / Angola – Election observer manual for the parliamentary elections 2008*. Luanda: Konrad-Adenauer-Stiftung eV & Instituto de Desenvolvimento e Democracia; Visser, W & KGVS Ruppel-Schlichting. 2008. “Women and custom in Namibia – The legal setting”. In Ruppel, OC (Ed.). *Women and custom in Namibia. Cultural practice versus gender equality?*. Windhoek: Macmillan Namibia, pp 149–164. **E-mail:** katharina.ruppel@gmail.com

Schulz, Stefan is Deputy Director (Academic) in the Department of Legal Studies at the Polytechnic of Namibia, where he has championed the development of the BA and Honours programmes in Criminal Justice Studies. The programme had its first student intake in 2009. At the Polytechnic of Namibia Dr Schulz has served in various positions, among others as Director of Rectorate Affairs (2007–2008). He also has extensive professional experience in the criminal justice system. From 1991 until he came to Namibia in 1997, he was Public Prosecutor, then District Judge, and eventually Senior Legal Officer in the Ministry of Justice in Mecklenburg-Vorpommern, Germany. He has specialised in the fields of Sociology of Crime and Criminology – with his particular field of interest being Theoretical Integration; Sociology of Law; Constitutional Law; and Human Rights Law. In his early career he was academic assistant at the Department of Public Law of Saarland University (Germany). He graduated in Law at the latter University, and holds a doctoral degree in Law from the University of Freiburg i.Br. (Germany). He is currently

conducting a survey on fear of crime and punitive attitudes among Namibian university and college students. **Latest publications:** Schulz, S. 2006. *Beyond self-control: Analysis and critique of Gottfredson and Hirschi's General Theory of Crime*. Berlin: Duncker & Humblodt; Schulz, S. 2008. "Community service from a different angle". In Ministry of Safety and Security (Ed.). *National Conference on Community Service*. Windhoek: Government of the Republic of Namibia. **E-mail:** schulz@polytechnic.edu.na

Shipila, Pombili L holds a B Juris from the University of Namibia, where he is currently an LL B student. He is employed as a researcher at the University of Namibia's Human Rights and Documentation Centre. Mr Shipila was born in northern Namibia and completed his secondary education at Concordia College in Windhoek. He has participated in various Moot Court Competitions across the world, such as the prestigious Philip C Jessup International Law Moot Court Competition held annually in Washington, DC (USA), and the All-African Human Rights Law Moot Court Competition in Pretoria, South Africa. **E-mail:** pshipila@gmail.com

Silungwe, Annel M is an Acting Judge at the Windhoek High Court, and an Acting Judge at the Supreme Court of Namibia. Hon. Mr Justice Silungwe is the former Director of the Justice Training Centre at the University of Namibia, former Judge at the Court of Appeal in the Seychelles, former Chief Justice of Zambia, former State Counsel of Zambia, nominated Member of the Zambian Parliament, and former Minister of Legal Affairs and Attorney General of Zambia. Furthermore, he is Director and Member of the Advisory Board of the Commonwealth Judicial Education Institute, Halifax, Canada; Africa's Representative on the Board of Governors of the London Good Enough Trust for Overseas Graduates; Council Member of the World Jurist Association of the World Peace through Law Centre; and Regional Chairperson, Leonard Cheshire Disability, Southern African Region (including the Indian Ocean Islands). Hon. Justice Silungwe holds an LL M degree from the University of Zambia, and is a Barrister-at-Law of the Inner Temple, Council of Legal Education, London, United Kingdom. **E-mail:** musenga@iway.na

Stewart, Julie is the Director of the Southern and Eastern African Regional Centre for Women's Law (SEARCWL) at the University of Zimbabwe. For about ten years, the SEARCWL (previously the Women's Law Centre) ran a Regional Postgraduate Diploma Programme in Women's Law. In 2003, it was transformed into a Master's programme. The latter focuses on developing research and analytical skills in mature students of both sexes who work within the formal legal arena or in legally focused non-governmental organisations and similar bodies. Prof. Stewart's research interests are in women and customary law, and in women's and men's access to law in plural systems of law. Other complementary areas of research are in Inheritance Law, Family Law and Human Rights Law. Most of her publications are in the above areas and on the research methodologies that need to be developed to carry out this kind of investigative and innovative work. **Latest publications:** Stewart, J with Anne Hellum, Shaheen Sardar Ali & Amy Tsanga (Eds). 2007. *Human rights, plural legalities and gendered realities: Paths are made*

by walking. Harare: Weaver Press; Stewart, J. 2007. “Arenas of anguish – Tracking multiple, perpetuating trauma in HIV/AIDS and gender-based violence intersections”. In Delpont, E (Ed.). *Gender-based violence in Africa: Perspectives from the continent*. Pretoria: Centre for Human Rights. ***E-mail:*** stewart@law.uz.ac.zw

List of abbreviations

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
AIDS	acquired immune deficiency syndrome
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
CSG	Child Support Grant
ECD	early childhood development
EMIS	Education Management Information System
ETSIP	Education and Training Sector Improvement Programme
FCG	Foster Care Grant
FGC	family-group conference
HIV	human immunodeficiency virus
ILO	International Labour Organisation
IMC	Inter-ministerial Committee
LAC	Legal Assistance Centre
LSP	life skills programme
MDG	Millennium Development Goal
NGO	non-governmental organisation
NIOSH	National Institute for Occupational Safety and Health
OPAC	Optional Protocol on the Involvement of Children in Armed Conflict
OVC	orphans and (other) vulnerable children
PHC	primary health care
POCA	Prevention of Organized Crime Act
REC	regional economic community
SADC	Southern African Development Community
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
US(A)	United States (of America)
VOM	victim–offender mediation
WHO	World Health Organisation
WTO	World Trade Organisation

Introduction

Oliver C Ruppel

There can be no keener revelation of a society's soul than the way in which it treats its children.

Nelson Mandela

Children's rights are not isolated from other human rights. They are – without hesitation – universal. The starting point for this book was research conducted within the Human Rights and Documentation Centre (HRDC) of the University of Namibia's Faculty of Law in 2009. The research aimed at determining the extent to which Namibia had complied with its international obligations, the extent to which the various institutions and statutory enactments aimed at affording the necessary respect and protection to children's rights in Namibia existed, and the extent to which such rights had been implemented successfully.

The research found the legal framework relating to children in Namibia to be wide-ranging. However, it also showed that, regardless of the legislation and policy in place, the majority of children are still not conversant with the Namibian Constitution or the child protection system in Namibia. In the context of and in order to abide by the principle of serving the best interest of the child, the objective of this publication is to refer to all the issues that commonly affect children and, in so doing, adequately address them.

On 28 September 2009, an Expert Workshop on Children's Rights was held in Windhoek. The workshop, conducted by the HRDC in cooperation with the Konrad Adenauer Foundation in Namibia, accommodated contributions from prominent experts in the field of children's rights in Namibia, members from human rights organisations, and researchers in the children's rights field. The aim was to create a platform for correlating the thinking of all stakeholders. The workshop was well attended by various stakeholders in children's rights and the relevant line ministries were represented. These included the Ministry of Gender Equality and Child Welfare and the Ministry of Justice. The discussions touched on all kinds of issues that affect not only the Namibian child, but also children in general. All of the topics addressed during the workshop (and more) are reflected in the various contributions of this publication.

It becomes very clear from the overall findings of the research that the Namibian government has committed itself to address the situation of children in the country in a comprehensive manner in order to foster their development, protect them, and

prepare them more effectively to serve society. Children in Namibia are a priority on the government agenda, notwithstanding that some work still needs to be done, especially with regard to child poverty, policy support and services, HIV and AIDS, education, discrimination and, in some cases, harmful cultural practices.

With regard to cultural practices such as certain initiation rites and circumcision, the following question has been raised: How can serving the best interests of the child be rendered compatible with traditional African values in traditional societies? The answer is reflected in the research: the sensitive aspects under customary practices that do not conform to the constitutional principles of equality, fairness, and justice need to be identified, and those concerned need to be informed that such practices are not in line with Namibia's constitutional values.

A functioning child justice system can result in a significant reduction of youth delinquency and youth crime rates. Some law reform still needs to be done in this respect. With the envisaged Child Care and Protection Act, Namibia plans to address the challenges children and young people face. This long-awaited piece of legislation has received tremendous support from the various stakeholders, and its drafting by the Ministry of Gender Equality and Child Welfare is in the final stages. This law will help service providers and community members to improve the way they care for and protect children. The legislation addresses the fact that the challenges and issues that children face today are different from those at Independence in 1990. The scale or impact of the HIV and AIDS pandemic, urbanisation, the gradual erosion of traditional family life, a rise in international child trafficking, sexual abuse which children endure, and the large number of child-headed households are some of the principal issues which endanger Namibian children today.

The Child Care and Protection Act will become responsive to many of the findings of the HRDC research by outlining and improving the provision made for foster care, adoption, children's homes, medical treatment, child trafficking, child labour, and crimes relating to child abuse and neglect. The legislation will mark a milestone for Namibia, as it can be used as one of the best practices in the Southern African Development Community (SADC) – if not Africa. It will provide greater protection and prevention measures, and will promote the well-being of children in Namibia. As the 2010 FIFA World Cup approaches, attention is increasingly focused on two of the most pervasive crimes expected to accompany the boom in the southern African tourism industry: human trafficking and child prostitution. To this end, it is very important that the Namibian government works closely with its SADC neighbours to implement measures to prevent these crimes.

Overall, Namibia can be applauded for initiating law reform for the improvement of children's rights. This reflects Namibia's remarkable and strong commitment to protecting children's rights by, amongst other things, incorporating a broad variety of international legal instruments into the domestic system. Namibia is a State Party to the most relevant

legal instruments on the protection of children's rights at the global, regional and sub-regional level. Of course, effective implementation and the entire reporting system, which are imperative for enhancing the situation of children, can only work if States Parties collaborate to improve the situation in which children find themselves.

The contributions contained in this publication critically address a number of aspects of children's rights in Namibia. It is hoped that these multifaceted articles encourage all stakeholders from governmental and non-governmental organisations, the judiciary and civil society to enhance and protect the rights of children in order to put into practice one of the sub-visions contained in Namibia's Vision 2030:¹

Namibia will be a just, moral, tolerant and safe society with legislative, economic and social structures in place to eliminate marginalisation and ensure peace and equity and a conducive environment for child and youth development.

Please note that the content of the articles, including any final errors or omissions that remain, is the sole responsibility of the individual contributors.

1 Government of the Republic of Namibia. 2004. *Namibia Vision 2030. Policy Framework for Long-term National Development. Main document.* Windhoek: Office of the President, p 113.

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

Lotta N Ambunda and Willard T Mugadza

Introduction

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

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

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

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

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

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

The newspaper article continues as follows:³

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

1 Duddy (2009).

2 (ibid.).

3 (ibid.).

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

More statistics bear out the following sad stories:⁴

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

4 Cloete (2009).

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

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

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

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

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

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

7 CRC, Article 1.

8 CRC, Article 2(1).

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

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

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

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

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

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

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

9 CRC, Article 4.

10 Adkisson (1995:3).

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

12 Coomer (2009).

The Namibian children's rights protection system

The Constitution of the Republic of Namibia

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

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

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

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

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

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

13 Amoo & Skeffers (2008:17).

14 (ibid.).

15 Ruppel (2008b:208).

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

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

The Preamble further states that –

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

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

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

The Preamble asserts that –

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

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

¹⁶ Namibian Constitution, Article 10.

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

Moreover, Article 10 of the Constitution guarantees the following:

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

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

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

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

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

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

17 Articles 5, 8 and 10, respectively.

18 *Actio iniuriarum*.

19 No. 4 of 1992.

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

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

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

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

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

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

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

Article 15(2) further states the following:

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

22 Article 23(3), Namibian Constitution.

23 Article 4, Namibian Constitution.

24 *S v Acheson*, 1991 NLR 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Article 20(1) states that –

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

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

28 See Ruppel & Groenewaldt (2008).

29 (ibid.).

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

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

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

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

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

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

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

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

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

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

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

31 Farrell & Isaacs (2007).

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

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

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

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

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

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

Constitutional recognition of customary law

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

32 MWACW (1998).

33 Section 5.8.15, National Gender Policy.

34 Section 6.6, National Gender Policy.

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

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

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

Constitutional recognition of cultural rights

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

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

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

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

35 Hinz (2003).

36 (ibid.).

37 1994 (1) SA 407 (NmS).

38 No. 32 of 1992.

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

Impacts on children's rights

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

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

The perception of corporal punishment under customary law

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

39 Naldi (1995:96).

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

41 See also Bennett (1999:96ff).

42 Landford (2008:9–14).

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

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

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

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

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

43 See Bennett (1999:108f).

44 (ibid.).

45 (ibid.:93).

46 Article 66(1).

47 1994 NR 41 (HC).

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

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

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

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

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

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

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

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

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

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

51 Article 144, Namibian Constitution.

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

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

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

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

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

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

52 1994 NR 41 (HC).

53 (ibid.).

54 Article 19, CRC.

55 Article 19, Namibian Constitution.

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

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

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

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

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

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

56 Ruppel (2008c:23).

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

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

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

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

Notable omissions in the Constitution?

The right to inheritance

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

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

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

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

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

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

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

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

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

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

The right to health

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

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

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

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

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

62 1999 NR 190(SC).

63 (ibid.).

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

The statutory framework

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

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

The Children's Act

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

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

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

66 No. 33 of 1960.

67 (ibid).

68 No. 6 of 2006.

69 MGECW (2009b).

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

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

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

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

70 No. 30 of 1943.

71 No. 55 of 1956.

72 No. 32 of 1952.

73 No. 8 of 1959.

74 Tjaronda (2009).

75 Hubbard (2009).

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

77 No. 1 of 1990.

78 No. 7 of 2000.

79 No. 8 of 2000.

80 No. 4 of 2003.

81 No. 9 of 2003.

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

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

The Children's Status Act⁸⁵

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

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

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

82 No. 10 of 2003.

83 No. 6 of 2006.

84 No. 11 of 2007.

85 No. 6 of 2006.

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

87 (ibid.).

88 See www.santac.org.

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

The Combating of Domestic Violence Act⁹¹

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

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

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

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

89 CEDAW (2005).

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

91 No. 4 of 2003.

92 Parkinson & Cashmore (2008:2–3).

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

The Combating of Immoral Practices Amendment Act⁹³

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

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

The Combating of Rape Act⁹⁴

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

The Combating of Rape Act provides for –

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

93 No. 7 of 2000.

94 No. 8 of 2000.

95 Duddy (2009).

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

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

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

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

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

⁹⁶ No. 51 of 1977.

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

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

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

The Labour Act

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

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

97 Preamble, Labour Act.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Maintenance Act¹⁰³

The Maintenance Act provides for –

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

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

101 Preamble, OPAC.

102 No. 1 of 2002.

103 No. 9 of 2003.

104 No. 23 of 1963.

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

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

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

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

The Community Courts Act¹⁰⁵

This Act provides for –

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

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

¹⁰⁵ No. 10 of 2003.

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

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

The Recognition of Customary Marriages Bill

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

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

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

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

106 Hinz (2008b).

107 Friesen (1998:1).

108 (ibid.).

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

110 Ambunda & De Klerk (2008:69).

111 Friesen (1998).

112 See CEDAW (2005).

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

114 No. 1 of 1996.

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

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

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

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

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

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

- the parties to such marriages

115 See Namiseb (2008:107ff).

116 No. 25 of 1961.

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

118 See Hinz (2008a:95ff).

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

The Child Care and Protection Bill

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

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

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

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

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

119 No. 25 of 1961, as amended.

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

121 MGECW (2009c).

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

123 (ibid.).

124 Hubbard & Coomer (2009).

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

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

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

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

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

Health

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

125 Office of the President (2004).

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

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

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

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

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

Household food security

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

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

Water and sanitation

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

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

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

129 MAWF (1995a).

130 GRN (NDP1–NDP3).

131 MAWF (1995b).

132 NSFNC (1995).

133 MAWF (2008).

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

Education

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

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

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

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

134 No. 16 of 2001.

135 Cf. MBESC (2004).

136 Adkisson (1995:127).

137 Cf. MBESC & MHETEC (2003).

138 MBESC (2002).

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

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

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

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

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

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

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

139 MBESC (1998).

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

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

142 MBESC (1998).

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

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

145 Ministry of Education (2007).

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

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

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

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

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

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

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

146 See Eimann et al. (2005).

147 MRLGH & MBESC (1995).

148 MRLGH (1997).

149 (ibid.).

150 MRLGH (1995).

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

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

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

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

151 (ibid.).

152 The School Policy on Learner Pregnancy in Namibia 2001.

153 See Shejvali (2009).

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

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

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

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

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

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

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

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

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

156 MGEWCW (2009d).

157 (ibid:viii).

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

Conclusion

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

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

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

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

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

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

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

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

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

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

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

158 Coomer (2009).

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

References

- Adkisson, S (Ed.). 1995. *Children in Namibia: Reaching towards the rights of every child*. Windhoek: United Nations Children's Fund.
- Ambunda, L & S de Klerk. 2008. "Women and custom in Namibia – A research overview". In Ruppel, OC (Ed.). *Women and custom in Namibia: Cultural practice versus gender equality?*. Windhoek: Macmillan Namibia, pp 43–82.
- Amoo, SK & I Skeffers. 2008. "The rule of law in Namibia". In Horn, N & A Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia, pp 17–38.
- Bennett, TW. 1999. *Human rights and African customary law*. Cape Town: Juta & Co.
- Bennett, TW. 2004. *Customary law in South Africa*. Lansdowne: Juta & Co.
- CEDAW/Committee on the Elimination of Discrimination against Women. 2005. *Combined second and third periodic report. Namibia*. CEDAW/C/Nam/2–3. Available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/510/07/PDF/N0551007.pdf?OpenElement>; last accessed 5 November 2009.
- Chomba, MS. 2008. "The universality of human rights: Challenges for Namibia". In Horn, N & A Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek. Macmillan Namibia.
- Cloete, L. 2009. "Karas to tackle mother and child deaths". *The Namibian*, 18 February 2009.
- Committee on the Rights of the Child. 1994. *Concluding observations of the Committee on the Rights of the Child*. UN Doc. CRC/C/15/Add.14. Available at www1.umn.edu/humanrts/crc/NAMIBIA.htm; last accessed 10 October 2009.
- Coomer, R. 2009. "Protecting the next generation: Have your say on the Child Care and Protection Bill". *The Namibian*, 29 May 2009.
- Duddy, J-M. 2009. "Namibian children face murder, rape and abuse on a daily basis". *The Namibian*, 2 October 2009.
- Eimann, AM, LM Mostert & JU Hengari. 2005. *Early childhood care and development needs assessment*. Windhoek: City of Windhoek. Available at <http://www.windhoekcc.org.na/Repository/Community%20Development/Childhood%20&%20Development%20Report.pdf>; last accessed 12 October 2009.
- Farrell, G & S Isaacs. 2007. *Survey of ICT and education in Africa: A summary report, based on 53 country surveys*. Washington, DC: infoDev/World Bank. Available at www.infodev.org/en/Document.420.pdf; last accessed 14 October 2009.

- Friesen, T. 1998. "Reform of Namibia's customary marriages law". *Draft Issue Paper*. Windhoek: Centre for Applied Social Sciences.
- Hinz, MO. 2003. *Customary law in Namibia. Development and perspective* (Eighth Edition). Windhoek: Centre for Applied Social Sciences.
- Hinz, MO. 2008a. "Strengthening women's rights: The need to address the gap between customary and statutory law in Namibia". In Ruppel, OC (Ed.). *Women and custom in Namibia: Cultural practice versus gender equality?*. Windhoek: Macmillan Namibia, pp 93–106.
- Hinz, MO. 2008b. "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 Namibia, pp 149–176.
- Honey, Carmen. 2005. "Namibia one of few countries with national orphans policy". *The Namibian*, 11 February 2005. Available at http://www.namibian.com.na/index.php?id=28&tx_ttnews%5Btt_news%5D=14036&no_cache=1; last accessed 10 October 2009.
- Hubbard, D. 2009. "Namibia's Draft Child Care and Protection Bill: Process for public awareness and input". Available at <http://www.google.de/search?hl=de&ei=wTHkSuW7Aczt-Aa6lsXICQ&sa=X&oi=spell&resnum=0&ct=result&cd=1&ved=0CAUQBSgA&q=hubbard+children%27s+act+namibia&spell=1>; last accessed 20 October 2009.
- Landford, M. 2008. *Human Rights Report: South Africa*. Oslo: Norwegian Centre for Human Rights, pp 9–14. Available at <http://wo.uio.no/as/WebObjects/frida.woa/wo/0.Profil.29.25.2.3.15.1.11.3>; last accessed 11 October 2009.
- Marope, MT. 2005. "Namibia's human capital and knowledge development for economic growth with equity". *African Region Human Development Working Paper Series*, No. 84. Washington, DC: Human Development Centre, World Bank, pp 48–49. Available at <http://siteresources.worldbank.org/INTAFRICA/Resources/No84.pdf>; last accessed 14 October 2009.
- MAWF/Ministry of Agriculture, Water and Rural Development. 1995a. *National Agricultural Policy*. Windhoek: Republic of Namibia, available at http://www.mawf.gov.na/Documents/National%20Agricultural%20Policy_NAMIBIA_1995.pdf, last accessed 20 October 2009.
- MAWF/Ministry of Agriculture, Water and Forestry. 1995b. *National Food and Nutrition Policy*. Windhoek: Republic of Namibia.
- MAWF/Ministry of Agriculture, Water and Forestry. 2008. *Water Supply and Sanitation Policy*. Windhoek: Republic of Namibia. Available at <http://www.mawf.gov.na/Documents/wsaspolicy.pdf>, last accessed 20 October 2009.
- MBESC/Ministry of Basic Education, Sport and Culture. 1998. *National Policy Options for Educationally Marginalised Children*. Windhoek: Republic of Namibia.
- MBESC/Ministry of Basic Education, Sport and Culture. 2002. *Education for all (EFA). National Plan of Action 2002–2015*. Windhoek: Republic of Namibia.
- MBESC & MHETEC/Ministry of Basic Education, Sport and Culture & Ministry of Higher Education, Training and Employment Creation. 2003. *National Policy on HIV and AIDS*. Windhoek: Republic of Namibia.

- MBESC/Ministry of Basic Education, Sport and Culture. 2004. *National Report on the Development of Education in Namibia*. Windhoek: Republic of Namibia. Available at <http://www.nied.edu.na/publications/National%20Report%20of%20Education.pdf>; last accessed 14 October 2009.
- MGECW/Ministry of Gender Equality and Child Welfare. 2009a. *Booklet No. 1: The Draft Child Care and Protection Act: Issues for public debate*. Windhoek: Republic of Namibia.
- MGECW/Ministry of Gender Equality and Child Welfare. 2009b. *Booklet No. 2: The Draft Child Care and Protection Act: Issues for public debate*. Windhoek: Republic of Namibia.
- MGECW/Ministry of Gender Equality and Child Welfare. 2009c. *Draft Child Care and Protection Bill, April 2009*. Windhoek: Republic of Namibia.
- MGECW/Ministry of Gender Equality and Child Welfare. 2009d. *National Plan of Action 2006–2010 for Orphans and Vulnerable Children in Namibia. Annual Progress and Monitoring Report for 1 April 2007 to 31 March 2008*. Windhoek: Republic of Namibia.
- Ministry of Education. 2007. *Education and Training Sector Improvement Programme (ETSIP). Planning for a Learning Nation Programme Document: Phase I (2006–2011)*. Windhoek: Republic of Namibia. Available at http://www.nied.edu.na/images/etsip_%20programme%20%20document%20_%2023%20feb%202007.pdf; last accessed 20 October 2009.
- MRLGH/Ministry of Regional and Local Government and Housing. 1997. *A Decentralization Policy for the Republic of Namibia*. Windhoek: Republic of Namibia. Available at http://www.decentralisation.gov.na/elibrary/library_files/book_one.pdf; last accessed 17 October 2009.
- MRLGH & MBESC/Ministry of Regional and Local Government and Housing & Ministry of Basic Education, Sport and Culture. 1995. *National Early Childhood Development Policy in Namibia*. Windhoek: Republic of Namibia. Available at <http://www.ecdgroup.com/download/ac1necda.pdf>; last accessed 15 October 2009.
- MWACW/Ministry of Women Affairs and Child Welfare. 1998. *The National Gender Policy and National Gender Plan of Action on Gender*. Windhoek: Republic of Namibia.
- Naldi, J. 1995. *Constitutional rights in Namibia*. Cape Town: Juta & Co.
- Namiseb, T. 2008. "Women and law reform in Namibia". In Ruppel, OC (Ed.). *Women and custom in Namibia: Cultural practice versus gender equality?*. Windhoek: Macmillan Namibia, pp 107–112.
- NPC/National Planning Commission. 2003. *2001 Population and Housing Census: Basic analysis with highlights*. Windhoek: Central Bureau of Statistics, NPC.
- NSFNC/National Food Security and Nutrition Council 1995. *National Food Security and Nutrition Action Plan*. Windhoek: Republic of Namibia.
- Office of the President. 2004. *Namibian Vision 2030: Policy framework for long-term national development*. Windhoek: Republic of Namibia.

- Parkinson, P & J Cashmore. 2008. *The voice of a child in family law disputes*. Oxford: Oxford University Press.
- Penn, H. 2008. "Working on the Impossible: Early childhood policies in Namibia". *Childhood*, 15(3):379–395. Available at <http://chd.sagepub.com/content/vol15/issue3/>; last accessed 12 October 2009.
- Ruppel, OC. 2008a. "The Human Rights and Documentation Centre at UNAM". In Horn, N & A Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Namibia, pp 131–140.
- Ruppel, OC. 2008b. "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 Namibia, pp 206–228.
- Ruppel, OC (Ed.). 2008c. *Women and custom in Namibia: Cultural practice versus gender equality?*. Windhoek: Macmillan Namibia.
- Ruppel, OC & A Groenewaldt. 2008. *Conditions of police cells in Namibia*. Windhoek: Konrad Adenauer Foundation; available at http://www.kas.de/wf/doc/kas_14189-544-1-30.pdf; last accessed 7 October 2009.
- Ruppel, OC, K Mchombu & I Kandjii-Murangi. 2008. "Surveying the implications of violence against women: A perspective from academia". In Ruppel, OC (Ed.). *Women and custom in Namibia: Cultural practice versus gender equality?*. Windhoek: Macmillan Namibia, pp 119–130.
- Tjaronda, W. 2009. "Child law under revision". *New Era*, 20 April 2009.

The protection of children's rights under international law from a Namibian perspective

Oliver C Ruppel

I dedicate this article to all the children under the Namibian sun and stars and in particular to my lovely children Franziska Freyja Nicolette and Sophia Emma Antoinette Mandisa

Introduction

International provisions relating to the protection of children's rights exist within various legal systems. For the purpose of this chapter, these legal systems are subdivided into three levels, namely global, regional and sub-regional. Before turning to the protection of children's rights within these levels, however, the paper briefly introduces the application of international law in Namibia.

The focus within the protection of children's rights on a global level will be on the legal framework of the United Nations (UN). Being a member of the UN since 1990, Namibia is party to many UN Conventions and has shown a strong commitment towards the protection of children's rights. Although the UN legal framework offers broad protection of children's rights, legal instruments by other global institutions also play a key role in the field of children's rights in Namibia, and will therefore be outlined accordingly.

Besides the global level, children's rights are also laid down on the regional and sub-regional level. In this context, the systems to be discussed from a Namibian perspective are those of the African Union (AU) and the Southern African Development Community (SADC).

The application of international law in Namibia

There is no task more important than building a world in which all of our children can grow up to realize their full potential, in health, peace and dignity.¹

International law has developed rapidly over the past few decades, especially since the dawn of the UN, when rules and norms regulating activities carried on outside the legal boundaries of nations were developed. Numerous international agreements – bilateral, regional or multilateral in nature – have been concluded and international customary rules, as evidence of a general practice accepted as law, have been established. But how

1 Annan (2001).

do these sources of international law apply domestically? In this regard, two approaches can generally be followed.² The first, the monist approach, assumes that international laws are automatically incorporated into domestic law; the second, the dualist approach, follows the rule that international laws are not automatically incorporated into domestic law and are said to require an act of legal transformation into domestic law.

In Namibia, Article 144 of its Constitution explicitly incorporates international law and makes it part of the law of the land. Thus, public international law is part of the law of Namibia: it needs no transformation or subsequent legislative act to become so.³ However, as the Constitution is the supreme law of Namibia, international law has to be in conformity with the provisions of the Constitution in order to apply domestically. Where a treaty provision or other rule of international law is inconsistent with the Namibian Constitution, the latter will prevail.⁴

Article 144 also mentions two sources of international law that apply in Namibia: general rules of public international law, and international agreements binding upon Namibia. General rules of public international law include rules of customary international law supported and accepted by a representatively large number of states. The notion of *international agreement* primarily refers to *treaty* in the traditional sense, i.e. international agreements concluded between states in written form and governed by international law,⁵ but it also includes conventions, protocols, covenants, charters, statutes, acts, declarations, concords, exchanges of notes, agreed minutes, memoranda of understanding, and agreements.⁶ Notably, not only agreements between states, but also those with the participation of other subjects of international law, e.g. international organisations, are covered by the term *international agreement*. In general, international agreements are binding upon states if the consent to be party to a treaty is expressed by signature followed by ratification; or by accession, where the state is not a signatory to a treaty; or by declaration of succession to a treaty which was concluded before such a state existed as a subject of international law.

A treaty will be binding upon Namibia in terms of Article 144 of its Constitution if the relevant international and constitutional requirements have been met. A treaty must have entered into force in terms of the law of treaties, and the Namibian constitutional requirements must have been met for such treaty to be binding on Namibia. International agreements, therefore, will become Namibian law from when they come into force for Namibia.⁷ The conclusion of or accession to an international agreement is governed

2 Cf. Dugard (2005:47f.).

3 Erasmus (1991:94).

4 (ibid.).

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

6 Cf. the definition of *treaty* proposed by the International Law Commission; Article 2(a) of the Draft Articles on the Law of Treaties, with commentary, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/1_1_1966.pdf; last accessed 12 October 2009.

7 Erasmus (1991:102f).

by Articles 32(3)(e), 40(i) and 63(2)(e) of the Namibian Constitution. The Executive is responsible for conducting Namibia's international affairs, including entry into international agreements. The President, assisted by the Cabinet, is empowered to negotiate and sign international agreements, and to delegate such power. It is required by the Constitution that the National Assembly agree to the ratification of or accession to an international agreement. However, the Constitution does not require the promulgation of an international agreement in order for it to become part of the law of the land.⁸

The global level

Children's rights within the UN

One basic human rights principle laid down in the Universal Declaration of Human Rights is that all human beings are born free and equal in dignity and rights.⁹ However, specifically vulnerable groups such as women, indigenous people, and children have been assigned special protection by the UN legal framework.

The protection of children's rights under international treaty law can be traced back to the first Declaration of the Rights of the Child adopted by the League of Nations in 1924, which was a brief document containing only five principles by which member were invited to be guided in the work of child welfare.¹⁰ An extended version of this text was adopted by the General Assembly in 1948, which was followed by a revised version adopted by the General Assembly in 1959 as the UN Declaration on the Rights of the Child.¹¹ In 1978, however, a proposal for a new convention on children's rights was made by Poland,¹² which had consistently raised issues with regard to children's rights being binding.¹³ Poland's draft, with minor amendments, served as the basis for the 1989 Convention on the Rights of the Child (CRC). The reasons for an international change of heart towards the protection of children's rights were manifold,¹⁴ but all signatories fundamentally recognised that the 1959 Declaration on the Rights of the Child no longer reflected the needs of many of the world's children.¹⁵

Although legal instruments were developed that targeted the protection of children in particular, it has to be emphasised that basic human rights instruments already recognise these rights. The so-called International Bill of Human Rights,¹⁶ for example, contains a

8 Hinz & Ruppel (2008:8ff).

9 Article 1, Universal Declaration of Human Rights.

10 Fortin (2005:35).

11 For further details on the 1959 Declaration and its ten principles see Fortin (2005:35).

12 Poland submitted a draft resolution to be recommended for adoption by the UN Economic and Social Council. The resolution contained a draft text for the Convention on the Rights of the Child. Cf. Detrick (1999:14f.).

13 Cf. Van Bueren (1998:13).

14 Van Bueren lists seven principal reasons; see Van Bueren (1998:13f.).

15 (ibid.).

16 Three documents – the Universal Declaration of Human Rights, the International Covenant on

broad bundle of human rights also applicable to children, and many of its principles are reflected and substantiated in children-specific legislation. Children enjoy protection by way of general human rights provisions, and their relevance should not be underestimated. The Universal Declaration of Human Rights, as the most prominent and fundamental UN human rights document, provides in its Article 25 that childhood is entitled to special care and assistance. Furthermore, the UN International Covenant on Civil and Political Rights, a legally binding document which came into force in 1978, contains provisions specifically referring to children.¹⁷ The Human Rights Committee has emphasised that –¹⁸

... the rights provided for in Article 24 are not the only ones that the Convention recognizes for children and that, as individuals, children benefit from all of the civil rights enunciated in the Covenant.

The International Covenant on Economic, Social and Cultural Rights contains several child-specific provisions,¹⁹ with a focus on the right to education and protection from economic and social exploitation. Moreover, the Convention on the Elimination of All Forms of Discrimination against Women also contains child-protective provisions. For example, it encourages States Parties to specify a minimum age for marriage,²⁰ and it emphasises that the interests of children are paramount.²¹ Another important legal document also applicable to children is the Convention on the Rights of Persons with Disabilities, which establishes the principle of respect for the evolving capacities of children with disabilities. The same applies to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee established under the latter Convention has already expressed its concern about the general vulnerability of abandoned children who are at risk of torture and other cruel, inhuman or degrading treatment or punishment, especially children used as combatants.²² After all, it can be stated that children's rights are covered by a multitude of general human rights provisions. However, due to the physical and mental immaturity or dependent status of

Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights – are recognised as covering the core of universal human rights and are collectively labelled the *International Bill of Human Rights*.

17 Articles 14(1), 23(4) and 24.

18 Human Rights Committee (1989:para 2).

19 Articles 10(3) and 13.

20 Article 16(2).

21 Articles 5(b) and 16(1)(g).

22 In this context, the Committee referred specifically to children used as combatants by the armed groups operating on the territory of the Democratic Republic of Congo and urged the State Party to adopt and implement emergency legislative and administrative measures to protect children, especially abandoned children, from sexual violence and to facilitate their rehabilitation and reintegration. The Committee further recommended that the State Party take all possible steps to demobilise child soldiers and facilitate their rehabilitation and reintegration into society. Cf. Committee against Torture (2005).

children,²³ the legal instruments to be discussed in the next few paragraphs have been adopted to more specifically enhance children's rights.

The systems of the UN encompass four legally binding instruments tailored to protect children's rights, namely –

- the Convention on the Rights of the Child (CRC)
- the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (CRC–OPSC)
- the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC–OPAC), and
- the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime.

The following paragraphs will outline these legal instruments, before turning to some international soft law documents addressing issues of juvenile justice in particular.²⁴

Convention on the Rights of the Child

The most prominent UN manifestation to advance children's rights is the CRC. The Convention was adopted by Resolution 44/252 of 20 November 1989 at the Forty-fourth Session of the UN General Assembly, and entered into force on 2 September 1990, in accordance with Article 49(1) of the CRC. To date, the Convention has 193 parties.²⁵ Namibia ratified the CRC on 30 September 1990.

The CRC, which consists of 54 Articles, incorporates the full range of human rights – civil, cultural, economic, political and social – and creates the international foundation for the protection and promotion of human rights and fundamental freedoms of all persons under the age of 18.²⁶ The Convention represents widespread recognition that children should be fully prepared to live an individual life in society, and brought up in the spirit of peace, dignity, tolerance, freedom, equality and solidarity.

Although the Articles of the CRC are interrelated and should be considered together, the Committee on the Rights of the Child has accorded four provisions contained in the

23 Cf. Brett (2009:227).

24 For a detailed discussion of the juvenile justice system in Namibia, see the contribution by Stefan Schulz elsewhere in this volume.

25 As of October 2009, the Convention had not been ratified by Somalia or the United States; see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en; last accessed 27 October 2009.

26 The definition of *child* as being a person under the age of 18 is contained in Article 1 of the CRC. However, this principle may be inapplicable where, under the law applicable to the child, majority is attained earlier.

Convention, namely Articles 2, 3, 6 and 12, the status of general principles.²⁷ The CRC is, therefore, founded on the following principles, which build the foundation for all children's rights:

- **The right to equality:** No child may be discriminated against on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- **The best interest of the child²⁸** has to prevail: Whenever decisions are being taken which may have an impact on children, the best interest of the child has to be taken into account at all stages. This applies to the family as well as to state action.
- **The right to life and development:** Every Member State has to ensure, to the maximum extent possible, the survival and development of the child by, inter alia, providing access to health care and education, and by protecting the child from economic and social exploitation.
- **Respect for children's own views:** Children should be respected and taken seriously, and they should be involved in decision-making processes according to their age and maturity.

The CRC follows a holistic approach to children's rights, recognising that the rights anchored in the Convention are indivisible and interrelated, and that equal importance must be attached to each and every right contained therein.

However, since the rights derived from the basic principles outlined above are multifaceted, they can be clustered into eight categories,²⁹ namely –

- general measures of implementation
- definition of *child*
- general principles
- civil rights and freedoms
- family environment and alternative care
- basic health and welfare

27 See Fortin (2005:37).

28 The concept of *the best interest of the child* is considered to be the provision underpinning all other provisions, even though, theoretically, none of the four principles is considered to be more important than another. Cf. Fortin (2005:37).

29 This classification is used by the Committee on the Rights of the Child for the reporting by and questioning of States Parties; cf. Committee on the Rights of the Child (2005). It has to be noted, however, that the rights contained in the Convention have been categorised in a variety of ways. LeBlanc, for instance, has grouped the rights into “survival rights”, “membership rights”, “protection rights” and “empowerment rights” (LeBlanc 1995:65ff). Hammarberg developed a classification scheme applicable exclusively to the CRC, calling his scheme the “three P’s” of “provision” (the fulfilment of basic needs such as the rights to food, health care, and education), “protection” (the right to “be shielded from harmful acts or practices” such as commercial or sexual exploitation and involvement in warfare), and “participation” (the right “to be heard on decisions affecting one’s own life”); cf. Hammarberg (1990:99ff). On “the four P’s”, see also Van Bueren (1998:15).

- education, leisure and cultural activities, and
- special protection measures.

General measures of implementation refer to the CRC's Articles 4, 42 and 44(6). Inter alia, these cover the thematic issues of bringing domestic legislation and practice into full conformity with the principles and provisions of the Convention. This includes an obligation to make remedies available and accessible to children in cases where the rights recognised by the Convention have been violated. The Convention foresees the granting of international assistance or development aid for programmes geared at children where such cooperation is needed to properly implement the provisions of the CRC and thereby advance the social, economic and cultural rights of children. Raising awareness of the CRC is another core issue: States Parties are obliged to make the principles and provisions of the Convention widely known to both adults and children. A further obligation for States Parties is to make their reports widely available to the public. Appropriate measures in this regard may include the translation of the concluding observations of the Committee into official and minority languages, and their wide dissemination, including through the print and electronic media.³⁰

The second cluster refers to the **definition of child** according to Article 1 of the CRC, as domestic laws may differ from the general rule of the Charter, namely that children are all persons under the age of 18.

The group of **general principles** contained in the Convention makes reference to its Articles 2, 3, 6 and 12, and covers the issues of non-discrimination; the best interests of the child; the right to life, survival and development; and respect for the views of the child. Appropriate measures to implement these rights have to be taken by States Parties, e.g. by way of measures to protect children from xenophobia and other related forms of intolerance. Furthermore, States Parties are required to ensure that persons under the age of 18 are not subject to the death penalty; that the deaths of children are registered; and, where appropriate, that such deaths are investigated and reported. Moreover, States Parties are encouraged to take measures to prevent suicide among children and to monitor its incidence; to ensure the survival of children at all ages; and to make every effort to ensure the risks to which adolescents in particular may be exposed, such as sexually transmitted diseases or street violence, are minimised.

The fourth broad category of rights contained in the CRC refers to **civil rights and freedoms**, as laid down in its Articles 7, 8, 13–17 and 37(a). The rights referred to within this group include the right to a name and nationality; the right to the preservation of identity; the right to freedom of expression, thought, conscience and religion, association and of peaceful assembly; the right to the protection of privacy; the right to access to appropriate information; and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, including corporal punishment.

30 For further information, see Committee on the Rights of the Child (2002, 2003c).

The fifth group of rights under the CRC relate to **family environment and alternative care**, covering the Convention's Articles 5, 9–11, 18(1) and (2), 19–21, 25, 27(4) and 39. This cluster addresses the fields of parental guidance; parental responsibilities; separation from parents; family reunification; recovery of maintenance for the child; children deprived of a family environment; adoption; illicit transfer and non-return; and abuse and neglect including physical and psychological recovery and social reintegration.

The group of **basic health and welfare** summarises the Convention's Articles 6, 18(3), 23, 24, 26, and 27(1)–(3), namely the right to survival and development; the right to special protection of children with disabilities; the right to health and health services; the right to social security and child care services and facilities; and the right to an adequate standard of living. In this context, national efforts to combat HIV and AIDS and diseases such as malaria and tuberculosis, particularly among special groups of children at high risk, are of high relevance as well as measures to be taken to prohibit all forms of harmful traditional practices,³¹ such as female genital mutilation.³²

The following rights fall under the cluster of **education, leisure and cultural activities** referring to Articles 28, 29 and 31: the right to education, including vocational training and guidance; and the right to rest, leisure, recreation and cultural and artistic activities. Especially in countries where children do not or do not fully enjoy the right to education, either due to a lack of access or because they have left or been excluded from school, this group of rights is of high relevance.³³

The last group of rights contains **special protection measures** as laid down in Articles 22, 30, 32–36, 37(b)–(d), 38, 39 and 40. Special protection measures are provided for, among others, children in situations of emergency; refugee children; children in armed conflicts, including physical and psychological recovery and social reintegration; children in conflict with the law with regard to the administration of juvenile justice; children deprived of their liberty, including any form of detention, imprisonment or placement in custodial settings; children in situations of exploitation, including child labour; and children belonging to minority or indigenous groups.

The institution responsible for monitoring compliance with and implementation of the provisions of the CRC is the Committee on the Rights of the Child. Provision for this UN treaty body is made in Articles 43 and 44 of the CRC. The Committee is an independent body consisting of 18³⁴ international experts in the field of children's rights.

31 With regard to harmful traditional practices, it was the Committee on the Elimination of Discrimination against Women which expressed its concern that Namibia's Traditional Authorities Act, 2000 (No. 25 of 2000) may have a negative impact on women in cases where customary laws perpetuate the use of customs and cultural traditional practices that are harmful to and discriminate against women, Cf. Visser & Ruppel-Schlichting (2008:153).

32 For further information, see Committee on the Rights of the Child (2003a, 2003b).

33 For further information, see Committee on the Rights of the Child (2001).

34 Prior to the amendment to the CRC (UN General Assembly Resolution 50/155 of 21 December 1995) which entered into force on 18 November 2002, the Committee only consisted of ten experts.

The monitoring mechanism is a special reporting system as provided for in Article 44 of the CRC, according to which States Parties undertake to submit reports on the measures they have adopted which give effect to the rights recognised in the Convention and on the progress made on the enjoyment of those rights. States Parties are obliged to submit an initial report within two years after acceding to the Convention, and periodic reports every five years after that. After submission, the reports of the States Parties are reviewed by the Committee, which is entitled to request further information from its authors if necessary. In its 'concluding observations', the Committee addresses progress that has been made by the State Party concerned in implementing the Convention, identifies areas of concern or outright incompatibilities of national law, and makes recommendations on how to improve the implementation of the Convention's provisions.³⁵ One major problem in the CRC reporting process – as in other UN human rights treaties – is the delay in governments submitting their periodic reports in time. Currently, a total of 97 government reports are overdue in respect of the CRC, while there are 96 overdue on the two Optional Protocols.³⁶

States Parties may request technical assistance and advisory services from the UN Centre for Human Rights in preparing their reports. Where reports by States Parties are overdue, the Committee issues regular reminders. Where a State Party persists in not reporting to the Committee, the Committee may decide to consider the situation in the country in the absence of a report, on the basis of the information available.

However, individual complaints or cases to the Committee cannot be addressed and the CRC does not have its own enforcement mechanism. The fact that the CRC does not provide for specific enforcement mechanisms giving a right of individual petition similar to the systems of the European Convention on Human Rights or the African Charter on the Rights and Welfare of the Child is considered to be one of the CRC's major weaknesses.³⁷ However, the drafters of the CRC refrained from establishing enforcement procedures because they feared many countries, particularly developing countries, would be reluctant to ratify the Convention if such mechanisms were in place. Individual complaints (including those of children, if legally represented) or complaints by third States Parties are required to be brought before other UN legal bodies, e.g. –

- the Human Rights Committee, which hears complaints under the International Covenant on Civil and Political Rights
- the Committee to Eliminate Racial Discrimination, which hears complaints under the Convention on the Elimination of All Forms of Racial Discrimination
- the Committee against Torture, which deals with complaints under the

35 Scheinin (2009:605).

36 These figures include multiple overdue reports by the same state. Statistical data with regard to the seven major human rights treaties, including the CRC and its Optional Protocols, is available at <http://www.unhcr.ch/tbs/doc.nsf/newhvovertimebytreaty?OpenView&Start=1&Count=250&Collapse=3#3>; last accessed 19 October 2009.

37 Fortin (2005:48).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, or

- the Committee to End Discrimination against Women, which deals with complaints under the Convention on the Elimination of all Forms of Discrimination against Women.

In sum, it can be stated that, although the CRC is a legally binding instrument according to the principles of public international law, there is no supervisory body to compel States Parties to comply with the provisions of the Convention. Moreover, individual complaints cannot be considered by the Convention's treaty body, the Committee on the Rights of the Child, and there is no judicial organ established under the Convention to which violations of children's rights could be brought.³⁸ However, the Convention is an important instrument as it has heightened awareness of children's rights violations and, in many cases, has resulted in improved national law and policy in terms of the protection of children's rights.

As regards Namibia and the CRC, the country has been a State Party since 1990. Namibia issued its initial State Party Report³⁹ to the CRC in 1993. The respective concluding observations⁴⁰ were adopted by the Committee in 1994. In its responding report, the Committee welcomed Namibia's political commitment to improving the situation of children, pointing out that activities had been undertaken to promote greater public awareness of the rights of the child and that several initiatives had been realised to promote and protect these rights. Such initiatives included the Early Childhood Protection and Development Programme and the development of Youth Councils. However, the Committee also expressed its concern on a number of issues. For example, it saw the reasons for the identified deficiencies in the implementation of the Convention in a combination of the consequences of colonial administration, apartheid and war and the problems of poverty. In its concluding observations the Committee drew specific attention to the legacy of laws from the pre-Independence period which it considered to be contrary to the provisions of international instruments and the Namibian Constitution. It was observed that, at that stage, Namibia had not yet become a State Party to all the major international human rights instruments, and that much national legislation still needed to be reformed in order to bring it in line with the provisions of the CRC. Some of the issues that the Committee addressed critically included –

- the definition of *child*
- the extent of discrimination on the ground of gender as well as against children born outside marriage and children in especially difficult circumstances
- discrimination practised against children with disabilities

38 There are, however, ongoing campaigns by several agencies supporting a communications procedure under the CRC.

39 See CRC doc. CRC/C/3/Add.12 22/01/1993; available at <http://daccessdds.un.org/doc/UNDOC/GEN/G93/152/69/IMG/G9315269.pdf?OpenElement>; last accessed 15 October 2009.

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

- teenage pregnancies
- the high incidence of households headed by a single person
- the apparent lack of widespread understanding among parents of their joint parental responsibilities
- the quality of education
- the incidence of child labour, particularly on farms and in the informal sector
- the number of children dropping out of school, and
- the system of juvenile justice.

In order to improve the rights of children in Namibia, the Committee recommended, *inter alia*, that consideration be given to the possibility of Namibia becoming a party to all the major international human rights instruments, to integrate the CRC into the national legal framework and into national plans of action, and to adopt a new Children's Act.

Among the positive remarks the CRC made was that Namibia had instituted an Ombudsman, who had the mandate to deal with complaints about human rights violations, including those relating to children. The important role being played by community leaders was underlined by the Committee as well, particularly with respect to –⁴¹

... [overcoming] the negative influences of certain traditions and customs which may contribute to discrimination against the girl child, children suffering from disabilities and children born out of wedlock.

Unfortunately, Namibia has not yet issued any further State Party reports to the Committee. Taking into consideration the numerous efforts Namibia has made in terms of law, policy reform, and child-related initiatives and activities since the adoption of the Committee's last concluding observations, it can be expected that the situation with regard to compliance with the provisions of the CRC has improved considerably.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography

The above Optional Protocol, abbreviated as *CRC-OPSC*, was adopted by the UN in May 2000 and entered into force on 18 January 2002, in accordance with its Article 14(1). To date, the *CRC-OPSC* has 132 States Parties. Namibia is among these, having ratified the Protocol on 16 April 2002.

The *CRC-OPSC* consist of 17 Articles aiming to extend the measures that States Parties should undertake in order to guarantee the child protection from being sold, prostituted, or used for pornography. Although some voices questioned the need for the Protocol,⁴² it was adopted due to the concern with regard to the significant and increasing

41 (ibid.).

42 The lack of clarity as to the need for the Protocol was criticised by both the Committee on the Rights of the Child and non-governmental organisations (NGOs) working on these issues.

international traffic in children for the purposes stated in the Protocol.⁴³ One major aim of this document is to address the need for legislation to hold citizens accountable in cases of 'sex tourism' i.e. if sexual crimes are committed in countries other than those of the offender's nationality or residence. Such accountability can be established by either determining the extent of extraterritorial jurisdiction or by extraditing the offenders to be tried in the country in which the crime has been committed. The CRC–OPSC is monitored by the Committee on the Rights of the Child.

Namibia will address the issue of commercial sexual exploitation in the envisaged Child Care and Protection Act. The envisaged Act makes it a crime to use, procure, offer or employ a child for purposes of commercial sexual exploitation.⁴⁴

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

The above Optional Protocol, abbreviated as *CRC–OPAC*, was adopted in May 2000 and entered into force on 12 February 2002, in accordance with its Article 10(1). Today, the *CRC–OPAC* has 130 States Parties. Namibia is among this number, having ratified the Protocol on 16 April 2002. The *CRC–OPAC*, which is monitored by the Committee on the Rights of the Child, comprises 13 Articles aiming at strengthening the implementation of the CRC and increasing the protection of children during armed conflicts.

The motivation for this Protocol lay in a conflict that arose during the drafting process of the CRC. The CRC drafters had agreed on the age of 18 as regards the definition of *child*. However, the two Additional Protocols to the 1949 Geneva Conventions, which were adopted in 1977, set a minimum age of 15 years for recruitment by armed forces; some States Parties insisted on the possibility to recruit those under 18. Thus, the relevant provision contained in the CRC⁴⁵ needs to be seen as a compromise: while the CRC urges governments to take all feasible measures to ensure that children under 15 have no direct part in hostilities, and sets 15 years as the minimum age at which an individual can be voluntarily recruited into or enlist in the armed forces, the *CRC–OPAC* goes one step further by obliging States Parties to raise the minimum age for voluntary recruitment into the armed forces, however, without explicitly requiring a minimum age of 18. States Parties are reminded that children under 18 are entitled to special protection. The *CRC–OPAC* bans compulsory recruitment below the age of 18 and States Parties are compelled to take legal measures to prohibit independent armed groups from recruiting and using children under the age of 18 in conflicts.

They argued that the issues addressed in the Protocol were "adequately covered in the CRC itself, and time would be better spent on strengthening the interpretation and implementation of existing provisions than in another drafting exercise". Cf. Brett (2009:241).

43 Cf. Preamble, *CRC–OPSC*.

44 See GRN (2009:74).

45 Article 38, *CRC*.

According to Article 3 of the CRC–OPAC, States Parties are obliged to deposit a binding declaration upon ratification of the Protocol that sets forth the minimum age at which they will permit voluntary recruitment into their national armed forces, as well as a description of the safeguards that they have adopted to ensure that such recruitment is not forced or coerced. The respective declaration may only be withdrawn if it is substituted by a declaration prescribing a higher minimum voluntary recruitment age, not a lower one.

Pursuant to this provision, Namibia has declared that it does not practise conscription or any form of forced obligatory service. Voluntary recruitment to the Namibian Defence Force is permitted at the minimum age of 18. Candidates are required to prove their age by showing a certified copy of a legally recognised Namibian identity document as well as a birth certificate.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime

This Protocol was adopted on 15 November 2000 and entered into force on 25 December 2003 in accordance with its Article 17. To date, it has 124 States Parties, including Namibia, who ratified the Protocol on 16 August 2002.

Despite the existence of a variety of international instruments containing rules and practical measures to combat the exploitation of persons, especially women and children, there was still no universal instrument that addressed all aspects of trafficking in persons. The Protocol, therefore, intends to prevent and combat trafficking in persons, paying particular attention to women and children, to protect and assist the victims of such trafficking, and to promote cooperation among States Parties in order to meet those objectives.⁴⁶ The Protocol urges States Parties to adopt legislative and any other measures necessary to establish the trafficking in persons as a criminal offence. Namibia has addressed this obligation by enacting the Prevention of Organised Crime Act,⁴⁷ which still has to come into force. Furthermore, the Child Care and Protection Bill, which is currently in the process of being finalised, will address the issue of child trafficking. The envisaged Act makes child trafficking a criminal offence, and provides for extraterritorial jurisdiction to address trafficking by citizens or permanent residents of Namibia outside Namibia's borders.⁴⁸

The Beijing Rules

The so-called Beijing Rules are officially entitled *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*. The Beijing Rules were adopted by the

46 Article 2, Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

47 No. 29 of 2004.

48 See GRN (2009:65).

UN General Assembly on 29 November 1985, –⁴⁹

... recognizing that the young, owing to their early stage of human development, require particular care and assistance with regard to physical, mental and social development, and require legal protection in conditions of peace, freedom, dignity and security

One aim is to avoid treating young offenders in an over-aggressive and inhumane way.⁵⁰ The Beijing Rules are not of a binding nature per se; however, this is considered a major weakness.⁵¹ Nonetheless, this legal instrument provides a detailed framework for the operation of national juvenile justice systems. The broad fundamental principles contained in the Beijing Rules are aimed at promoting juvenile welfare to the greatest possible extent, minimising the necessity of intervention by the juvenile justice system and, in turn, reducing the harm that may be caused by any intervention that is required. The Beijing Rules are deliberately formulated in order to apply within different legal systems, regardless of the definition of *juvenile* under those systems. For example, for historical and cultural reasons, the minimum age for criminal responsibility differs widely among members of the UN. Indeed, so far, no lowest age limit for criminal responsibility has been agreed upon internationally. Nonetheless, what has been agreed on are the most important objectives of juvenile justice, as laid down in the Beijing Rules, namely –

- the promotion of the well-being of the juvenile
- the principle of proportionality between just desert in relation to the gravity of the offence
- the right to the presumption of innocence
- the right to be notified of the charges
- the right to remain silent
- the right to counsel
- the right to the presence of a parent or guardian
- the right to confront and cross-examine witnesses
- the right to appeal⁵²
- the right to privacy⁵³
- the right to be represented by a legal adviser,⁵⁴ and
- the prohibition of capital punishment.⁵⁵

In sum, one could say that the Beijing Rules display what an ideal juvenile justice system should aim to achieve at the different stages of a process involving children who have committed crimes.

49 Cf. Preamble, Beijing Rules.

50 Cf. Fortin (2005:35).

51 (ibid.:34).

52 Rule 7.1.

53 Rule 8.

54 Rule 15.

55 Rule 17.

The Riyadh Guidelines and the UN Rules for the Protection of Juveniles Deprived of their Liberty

The UN Guidelines for the Prevention of Juvenile Delinquency,⁵⁶ referred to as the *Riyadh Guidelines*, and the UN Rules for the Protection of Juveniles Deprived of their Liberty⁵⁷ are the main results of the Eighth UN Congress, held in Havana in 1990, on the Prevention of Crime and the Treatment of Offenders. The Riyadh Guidelines and the said Rules complement the Beijing Rules. The General Assembly called for the development of standards for the prevention of juvenile delinquency⁵⁸ in order to assist Member States to formulate and implement specialised programmes and policies, amongst other things. The Riyadh Guidelines have taken up this issue.

The Riyadh Guidelines constitute a comprehensive legal document promoting a proactive approach to preventing juvenile delinquency, and considering children to be fully-fledged participants in society. Like the two other UN instruments on juvenile justice, the Riyadh Guidelines are soft law, i.e. they are not legally binding on international, national and local legislative bodies. The Guidelines set forth fundamental principles, including provisions on the interpretation and recognition of the need for and importance of progressive delinquency prevention policies and the systematic study and elaboration of measures. The Guidelines address the issue of general prevention, emphasising that prevention plans should be instituted at every level of government. Further provisions of specific importance are those on legislation and juvenile justice administration, which encourage States Parties to enact and enforce specific laws and procedures to promote and protect the rights and well-being of all young persons. Such laws and procedures include –

- legislation to prevent the victimisation, abuse, exploitation and the use for criminal activities of children and young persons
- legislation and enforcement aimed at restricting and controlling access to and the accessibility of weapons of any sort to children and young persons, and
- legislation to protect children and young persons from drug abuse and drug traffickers.

The Guidelines also encourage governments to consider the establishment of an office of ombudsman⁵⁹ or similar independent organ that would ensure the status, rights and interests of young persons are upheld. The Ombudsman would supervise the implementation not only of the Riyadh Guidelines, but also of the Beijing Rules and the Rules for the Protection of Juveniles Deprived of their Liberty.

56 UN doc. A/RES/45/112.

57 UN doc. A/RES/45/113.

58 UN Resolution 40/35 of 29 November 1985.

59 On the institution of an Ombudsman for Children, see the contribution by Agata Rogalska-Piechota elsewhere in this volume.

The UN Rules for the Protection of Juveniles Deprived of their Liberty establish minimum standards for the protection of juveniles deprived of their liberty, consistent with human rights and fundamental freedoms, and with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society. The rules contain provisions with regard to juveniles under arrest or awaiting trial, as well as on the staffing and management of juvenile facilities. Within the context of the management of juvenile facilities, the rules contain provisions regulating, inter alia, the physical environment and accommodation requirements for juveniles deprived of their liberty,⁶⁰ the juvenile's right to education,⁶¹ the right to a suitable amount of time for daily free exercise,⁶² the right to practise his or her religious and spiritual life,⁶³ and the right to adequate medical care.⁶⁴ The Rules furthermore prohibit the physical restraint of or use of force against a juvenile deprived of his/her liberty, save in exceptional cases, and only where all other control methods have been exhausted and have failed, and only as explicitly authorised and specified by law.⁶⁵ According to the Rules, facilities in which juveniles are detained are subject to inspection, and every juvenile should have the opportunity of making requests or complaints to the director of the detention facility and to his or her authorised representative.⁶⁶

The Millennium Development Goals: Indicators for the national and international progress on children's rights?

The eight Millennium Development Goals (MDGs)⁶⁷ were adopted in 2000 to address the most serious challenges to global development. The MDGs are all, at least to some extent, related to the general situation and rights of children. However, MDG1 (Eradicate extreme poverty and hunger), MDG2 (Achieve universal primary education), MDG4 (Reduce child mortality), and MDG6 (Combat HIV and AIDS, malaria and other diseases) are considered to be of particular relevance for children. The progress made as regards children's rights, therefore, correlates to some extent with the situation of children in the context of the MDGs. Thus, at a Special Session of the UN General Assembly held in 2002, some 180 nations adopted a new agenda – entitled *A World Fit for Children* – for, and with, the world's children. The agenda contains 21 specific goals and targets to be reached within the next decade. These goals and targets can be

60 Rules 31–37.

61 Rules 38–46.

62 Rule 47.

63 Rule 48.

64 Rules 49–55.

65 Rules 63 and 64.

66 Rules 72ff.

67 The eight MDGs are as follows: 1. Eradicate extreme poverty and hunger; 2. Achieve universal primary education; 3. Promote gender equality and empower women; 4. Reduce child mortality; 5. Improve maternal health; 6. Combat HIV and AIDS, malaria and other diseases; 7. Ensure environmental sustainability; 8. Develop a global partnership for development.

subsumed under four categories, as follows:⁶⁸

- Promoting healthy lives
- Providing a quality education
- Combating HIV and AIDS, and
- Protecting against abuse, exploitation and violence.

Statistical data with regard to these issues⁶⁹ shows that considerable progress has been made with regard to the situation of children. In 2006, for the first time, the number of children dying before their fifth birthday fell below 10 million, to 9.7 million. Around 1960, an estimated 20 million children under the age of five were dying every year.⁷⁰ Yet, there are many countries that still have very high levels of child mortality, particularly in sub-Saharan Africa.

Taking available data on the situation of children as indicators for the progress made since the adoption of the CRC in 1989, it can be stated that, at least from a global perspective, the progress is considered to be positive. Child mortality and education will be analysed in the following table as token indicators in this respect. Table 1 demonstrates that considerable progress that has been made taking the issue of child mortality as indicator.

Table 1: Infant and under-5 mortality rates, 1990–2007

Geographic location	Under-5 mortality rate, 1990	Under-5 mortality rate, 2007	Infant mortality rate (under 1), 1990	Infant mortality rate (under 1), 2007
Namibia	87	68	57	47
Sub-Saharan Africa	186	148	109	89
World	93	68	64	47

Source: UNICEF, http://www.unicef.org/statistics/index_step1.php; last accessed 12 October 2009.

However, it can be observed in Namibia, as in Africa in general, that infant and under-five mortalities have begun to increase again. Although these mortality rates had been decreasing up to 2000,⁷¹ infant mortality increased from 38 deaths per 1,000 live births in 2000, to 46 deaths in 2006,⁷² while under-five mortalities were at 69 deaths per 1,000

68 UNICEF (2007:2).

69 UNICEF (2007).

70 UNICEF (2007:2).

71 Kamwi (2009).

72 These figures were revealed in a UNICEF report released in Windhoek on 28 January 2008; cf. Bause (2008).

live births.⁷³ The increase is mainly due to the combination of HIV and AIDS, malaria, pneumonia, diarrhoea, low birth weight and prematurity and inadequate nutrition. It is estimated by the Government of Namibia, that the MDG targets with regard to infant (2012 target for infant mortality rate deaths per 1,000 live births: 38) and child mortality (2012 target for under-five mortality rate deaths per 1,000 live births: 45) are unlikely to be achieved.⁷⁴

A general positive trend can be observed with regard to data available on education, as reflected in Table 2.

Table 2: School attendance, 2000–2006

Geographic location	Primary school enrolment ratio 2000–2006, net, male	Primary school enrolment ratio 2000–2006, net, female	Secondary school enrolment ratio 2000–2006, net, male	Secondary school enrolment ratio 2000–2006, net, female
Namibia	69.0	74.0	33.0	44.0
Sub-Saharan Africa	75.0	70.0	30.3	25.4
World	91.0	87.0	58.8	57.6

Source: UNICEF, http://www.unicef.org/statistics/index_step1.php; last accessed 12 October 2009.

While worldwide increases in enrolment and attendance can be seen to have reduced, from 115 million in 2002 to 93 million in 2005–2006, the number of children who are old enough to attend primary school but do not, some regions – including sub-Saharan Africa – have net enrolment/attendance ratios of less than 90%.⁷⁵ The respective figures for Namibia revealed by Namibia's reports regarding the MDGs reflect this situation to some extent as well:

Table 3: Education progress indicators, Namibia, 1992–2008

Progress indicator: Education	1992	2003	2008
Net primary school enrolment (%)	89.0	92.0	92.3
Survival rate Grade 5 (%)	75.0	94.0	93.0

73 GRN (2008a:XII).

74 (ibid.).

75 UNICEF (2007:2f).

Youth literacy rate, 15–24 years (%)	89.0	89.0	94.0
--------------------------------------	------	------	------

Source: GRN (2004, 2008a).

The Namibian government estimates that the 2012 targets for *Net primary school enrolment* (99.1%) and for *Youth literacy rate* (100%) are unlikely to be achieved, while the 2012 target *Survival rate Grade 5* (99.2%) seems feasible.⁷⁶

In sum, it can be stated that the situation of children and of children's rights, measured against performance in respect of the MDGs and the "World Fit for Children" agenda, has improved considerably. Yet, especially in sub-Saharan Africa, including Namibia, much more must be done. As underlined in *The State of the World's Children 2008*,⁷⁷ it is essential to put children's survival, health, development and rights first.

Children's rights under the International Labour Organisation

Human rights in general are at the core of the ILO's mandate. The Declaration on Fundamental Principles and Rights at Work adopted in 1998 states that Members of the ILO, even if they have not ratified the relevant Conventions, have an obligation arising from their very membership to respect, promote and realise the principles of –

- freedom of association and the effective recognition of the right to collective bargaining
- the elimination of all forms of forced or compulsory labour
- the effective abolition of child labour, and
- the elimination of discrimination in respect of employment and occupation.

These principles are reflected in eight⁷⁸ Conventions that are fundamental to human rights within and outside the ILO. The two most relevant of these Conventions on the protection of children's rights will be outlined below. As to reporting and monitoring of the ILO Conventions, Article 22 of the ILO Constitution provides that Members are obliged to submit periodic reports to the ILO.

The ILO Minimum Age Convention, 1973 (No.138)

According to the ILO's global figures, a total of 182 million children under 14 years of age work. The Minimum Age Convention is one of the eight fundamental human rights Conventions under the ILO umbrella, and has currently been ratified by 151 countries. The Convention, which was agreed in 1973, was upheld by the Committee on the Rights

76 GRN (2008a:XII).

77 UNICEF (2008a).

78 The eight fundamental human rights Conventions under the ILO relate to fields of freedom of association and collective bargaining (Conventions 87 and 98); the elimination of forced and compulsory labour (Conventions 29 and 105); the elimination of discrimination in respect of employment and occupation (Conventions 100 and 111); and the abolition of child labour (Conventions 138 and 182).

of the Child as an appropriate standard, providing principles which apply to all sectors of economic activity.

All signatories to the Convention are required to fix a minimum age for admission to employment, and have to undertake to pursue a national policy designed to ensure the effective abolition of child labour. Furthermore, Members are obliged to progressively raise the minimum age for admission to employment to a level that is suited to the fullest physical and mental development of young people.

Namibia ratified the Convention on 15 November 2000, and set the minimum age for admission to employment or work at the age of 14.

ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999 (No. 182)

This ILO Convention bans the worst forms of child labour, including –

- slavery, sale and debt bondage
- forced labour
- recruitment for armed forces, prostitution, drug trafficking or other illicit activities, or
- recruitment for other work which harms the health, safety or morals of children.

The Convention was adopted on 17 June 1999, and has enjoyed a fast pace of ratification. Currently, the Convention has been ratified by 171 Members. Namibia ratified the Convention on 15 November 2000.

Convention No. 182 was adopted in recognition of the fact that the effective elimination of child labour depends on economic factors and may, therefore, take time to be accomplished. Nonetheless, there are certain forms of child labour that cannot be tolerated. Therefore, the Convention calls for immediate action to secure the prohibition and elimination of the worst forms of child labour, irrespective of the level of development or economic situation of the country. These “worst forms” against which all persons under the age of 18 must be protected comprise –

- all forms of slavery or similar practices, such as sale and trafficking, debt bondage, serfdom, and forced or compulsory labour
- the use of children in armed conflicts
- the use of a child for prostitution or pornography
- the use of a child for illicit activities such as drug trafficking, and
- work likely to harm the health, safety or morals of children, as determined at the national level.

Namibia and the ILO Conventions

Namibia's obligations under the ILO Conventions are reflected by specific child-

related provisions in its new Labour Act.⁷⁹ Section 3 of the Act outlines the prohibition and restriction of child labour, and provides that children under the age of 14 are not permitted to be employed. Furthermore, Article 3 refers to the Constitution's Article 15 on children's rights, and sets down specific restrictions for children between 14 and 16 years of age in terms of working hours and the structure of premises where such children work. The Act further provides that it is an offence to employ, or require or permit, a child to work in any circumstances prohibited by the Act, and that a person who is convicted of such an offence is liable to a fine.

Apart from statutory law on child labour,⁸⁰ Namibia gives effect to its commitment under the ILO Conventions by means of special projects. In this context, with the assistance of the ILO's Programme Towards the Elimination of the Worst Forms of Child Labour, Namibia has developed a National Action Programme geared towards the Elimination of Child Labour⁸¹ to address the most intolerable forms of such labour. In order to reduce child labour and to eliminate all of its worst forms in Namibia, the National Action Programme provides information on child labour in Namibia and assesses the existing legislative and policy framework as well as the challenges facing an effective response to child labour.

Children's rights under the Hague Conference on Private International Law

The Hague Conference on Private International Law held its first meeting in 1893 and became a permanent inter-governmental organisation upon its Statute entering into force in 1955. To date, the Hague Conference has 69 members; Namibia is not among them. However, without having to a member of the organisation, it is possible to become a State Party to its Conventions. The Hague Conference has adopted various Conventions relevant to the international protection of children, including –

- the Hague Convention on the Protection of Children and Cooperation with Respect to Inter-Country Adoption
- the Hague Convention on the Civil Aspects of International Child Abduction, and
- the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children.

Namibia is not as yet a State Party to any of these Conventions.⁸²

79 No. 11 of 2007.

80 For a more detailed discussion of child labour in Namibia, see the contribution by Clever Mapaure elsewhere in this volume.

81 GRN (2008b).

82 So far, Namibia is a State Party to only one of the Hague Conference's Conventions, namely the 1961 Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, which Namibia ratified on 21 April 2000. Efforts are currently being made with regard to Namibia's membership of these Hague Conference Conventions.

The African regional level

Africa is considered to be the 'youngest' continent in the world, with nearly 50% of sub-Saharan Africa's citizens being under 18. Some 147 million children under five live in Africa. However, it is a sad reality that more than half of the world's deaths among children under five occur on the African continent.⁸³

On the situation of children in Africa, the Committee of Experts on the Rights and Welfare of the Child⁸⁴ made the following remark:⁸⁵

African children represent more than half of the continent's population and their vulnerability cannot be over-emphasised. Africa's children are most disadvantaged in many ways: their life chances are limited; they are exposed to violence; they are used as child soldiers; they are vulnerable to malnutrition and diseases, in particular the HIV/AIDS pandemic; they are deprived of education; their rights are violated; they are abused and exploited. While Africa's children are most vulnerable, addressing their vulnerabilities and rights [has] not been prioritised at national level. Governments continue to overlook children[s] issues when formulating national development policies and programmes and the Ministries responsible for implementing activities on children are not allocated sufficient budget.

Therefore, efforts to promote the welfare of the child have to be redoubled, inter alia by efficiently implementing the existing child-related legal instruments.

The history of codified human rights protection on the African regional level dates back to 1963, when the Organisation of African Unity (OAU), the predecessor of today's African Union (AU) was founded. The OAU Charter established as one of the organisation's objectives the promotion of international cooperation as regards the UN Charter and the Universal Declaration of Human Rights.⁸⁶

The AU's constitutive Act, adopted in 2000, reaffirmed Africa's commitment to promote and protect human rights. In accordance with this commitment, since the AU's establishment, several human rights instruments have been adopted.

A fundamental instrument on human rights protection, namely the African Charter on Human and Peoples' Rights, was adopted in 1981 and came into force in 1986. Under this Charter, the AU developed several legal and policy frameworks to promote and protect the rights and welfare of vulnerable groups such as persons with disabilities, the elderly, persons living with HIV and AIDS, refugees, and displaced persons and

83 UNICEF (2008b:49).

84 More details on this Committee will be given below.

85 Cf. ACERWC (2005a).

86 Article 2, OAU Charter.

children.⁸⁷ While these African general human rights instruments are also applicable to children, the most prominent legal instrument specifically targeting the protection of children's rights is the African Charter on the Rights and Welfare of the Child.

The African Charter on the Rights and Welfare of the Child

The year 1979 saw the Assembly of Heads of State and Government of the OAU⁸⁸ recognise the need to take appropriate measures to promote and protect the rights and welfare of the African child by adopting the Declaration on the Rights and Welfare of the African Child. Two decades later, in 1990,⁸⁹ the African Charter on the Rights and Welfare of the Child (ACRWC)⁹⁰ was adopted, and came into force in 1999 according to its Article 47(3). As of February 2009, 45 AU Member States had ratified the Charter. Namibia ratified the Charter in 2004, after having signed it in 1999.

The Charter contains 47 Articles, divided into four Chapters. Chapter 1 deals with the rights and welfare of the child; Chapter 2 establishes and organises the Committee on the Rights and Welfare of the Child; and Chapter 3 describes the Committee's mandate and procedure. Chapter 4 is dedicated to miscellaneous provisions.

The Charter aims to supplement the CRC⁹¹ and additionally addresses issues of particular importance to children in Africa. The Charter was adopted in view of the critical situation in which most African children find themselves in terms of their socio-economic, cultural, traditional and developmental circumstances, natural disasters, armed conflicts, exploitation and hunger. Thus, in its Preamble, the Charter points out that children require particular care and legal protection, and that they deserve freedom, dignity and security due to their physical and mental development.

Some of the compromises that have had a negative impact on the CRC could be addressed and remedied by way of the Charter. Thus, the Charter, clearly and without limitation, defines as a *child* any person under the age of 18;⁹² it completely outlaws the recruitment

87 Gawanas (2009:149ff).

88 At its Sixteenth Ordinary Session in Monrovia, Liberia, from 17 to 20 July 1979.

89 It has been argued that one reason for the timing of the adoption of this instrument shortly after the CRC's adoption was that African States Parties had been underrepresented in the drafting process of the CRC: only Algeria, Egypt, Morocco and Senegal had participated significantly in it. Cf. Keetharuth (2009:203); see also Viljoen (2007:263).

90 Hereinafter referred to as the *Charter*.

91 In its Preamble, the Charter states that OAU Member States agree on the Charter –
REAFFIRMING ADHERENCE to the principles of the rights and welfare of the child contained in ... other instruments of the Organization of African Unity and in the United Nations and in particular the United Nations Convention on the Rights of the Child; ...

92 See Article 2 of the Charter. In contrast, the CRC states that children are all persons under the age of 18 *unless* majority is attained earlier under the law applicable to the child.

and use of child soldiers;⁹³ it sets the minimum age for marriage at the age of 18;⁹⁴ and it includes internally displaced children with regard to the protection of child refugees.⁹⁵

Since the Charter aims to supplement the CRC, the Charter clearly contains no provisions that directly oppose the CRC. On the contrary, as pointed out earlier, the Charter presented an opportunity to address Africa-specific concerns in more detail, which it then did at several stages.⁹⁶

The first 31 Articles of the Charter are dedicated to the rights and welfare of the child. They also contain provisions as to state obligations and children's rights and responsibilities. The Charter contains fundamental children's rights which are also laid down in the CRC on the global level, such as non-discrimination,⁹⁷ the best interest of the child,⁹⁸ survival and development,⁹⁹ and respect for the views of the child.¹⁰⁰ However, the Charter also contains African specificities¹⁰¹ that were not addressed by the CRC. The issues of harmful cultural practices and protection against apartheid are only some of the regional specificities addressed by the Charter. Apart from the fundamental principles outlined above, the Charter can be subdivided into five clusters:¹⁰²

- Civil rights and freedoms¹⁰³
- Family environment and alternative care¹⁰⁴

93 While the CRC allows the use of child soldiers (Articles 38(1) and (2)), Article 22(2) of the Charter provides as follows:

States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain[,] in particular, from recruiting any child.

94 Article 21(2) of the Charter reads as follows:

Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

As Article 1 of the CRC gives preference to national law with regard to the definition of *child*, marriages under the age of 18 are not outlawed according to the CRC, although the CRC states as a general rule that children are all persons under the age of 18.

95 See Article 23(4) of the Charter in contrast to Article 22 of the CRC.

96 For a comparison of the CRC and the Charter, showing the main differences and highlighting how the Charter is often more explicit about issues distinctive to an African context, see Sheahan (2009:9ff).

97 Article 3 of the Charter.

98 Article 4 of the Charter.

99 Article 5 of the Charter.

100 Article 7 of the Charter.

101 For a list of omissions from the CRC, see Viljoen (2007:262).

102 The African Committee of Experts on the Rights and Welfare of the Child developed the following categorisation for States Parties' reporting. See ACERWC (2003).

103 The following rights are contained in the group *Civil and political rights*: the right to name, nationality, identity and registration at birth (Article 6); freedom of expression (Article 7); freedom of association and of peaceful assembly (Article 8); freedom of thought, conscience and religion (Article 9); protection of privacy (Article 10); and protection against child abuse and torture (Article 16).

104 The following issues are contained in the group *Family environment and alternative care*:

- Health and welfare¹⁰⁵
- Education, leisure and cultural activities,¹⁰⁶ and
- Special protection measures.¹⁰⁷

It is beyond the scope of this article to discuss all the aforementioned rights in detail.¹⁰⁸ However, the right to education, as provided for in Article 11 of the Charter, may serve as one vivid example demonstrating African uniqueness and progressiveness in many respects.

Education is beyond any doubt one of the most fundamental pillars of sustainable development.¹⁰⁹ The need for education, training and public awareness has been recognised as a key approach to sustainable development.¹¹⁰ The Charter lays particular emphasis on the right to education, giving it in great detail within seven sub-sections of the Charter – in far greater detail, in fact, than the CRC. Besides granting the right to education to every child in Africa, Article 11(2) states, inter alia, that the education

parental guidance (Article 20); parental responsibilities (Article 20(1)); separation from parents, separation caused by State Party, separation caused by internal displacement arising from armed conflict, civil strife, or natural disasters (Articles 19(2) and (3), and 25); family reunification and children deprived of a family environment (Article 25(2)(b)); maintenance of the child (Article 18(3)); adoption and periodic review of placement (Article 24); and abuse, neglect, and exploitation, including physical and psychological recovery and social integration (Articles 16 and 27).

105 The following issues are contained in the group *Health and welfare*: survival and development (Article 5); children with handicaps (Article 13); health and health services (Article 14); social security and child care services and facilities (Article 20(2)(a-c)); and care for orphans (Article 26).

106 This group covers the right to education, including vocational training and guidance (Article 11); and leisure, recreation and cultural activities (Article 12).

107 The following topics are summarised in the final cluster: Refugee, returnee and displaced children (Articles 23 and 25); children in armed conflicts, including specific measures for child protection and care (Article 22); the administration of juvenile justice (Article 17); children deprived of their liberty (Article 17(2)); reformation, family reintegration and social rehabilitation (Article 17(3)); children of imprisoned mothers (Article 30); children in situations of exploitation and abuse, such situations inter alia being economic exploitation, including child labour (Article 15), sexual exploitation and sexual abuse (Article 27), and sale, trafficking and abduction (Article 29); and child victims of harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child (Article 21).

108 For a more detailed discussion of the rights contained in the Charter, see Chirwa (2002); Olowu (2002); Viljoen (2000).

109 See UNESCO (2005:14). Education for Sustainable Development was first described by Chapter 36 of Agenda 21, the world's first action plan for sustainable development adopted at the UN Conference on Environment and Development (the Earth Summit), held in Rio de Janeiro on 14 June 1992.

110 Further paths to sustainable development include environmental protection, good legislation and governance, economic incentives, overcoming corruption, human rights and security, and creating infrastructure.

of the child is directed to the preservation and strengthening of positive African morals; traditional values and cultures; the preservation of national independence and territorial integrity; the promotion and achievements of African Unity and Solidarity; the development of respect for the environment and natural resources; the preparation of the child for responsible life in a free society, in the spirit of understanding tolerance, dialogue, mutual respect and friendship among all peoples ethnic, tribal and religious groups and the promotion of the child's understanding of primary health care.¹¹¹

Free and compulsory basic education, encouragement to develop secondary education, and making higher education accessible to all are only some of the mechanisms set forth by the Charter,¹¹² which are listed as examples to realise the right to education. Specific reference with regard to the right to education is made to vulnerable children in particular, such as female, disadvantaged,¹¹³ and handicapped children.¹¹⁴

In sharp contrast to the CRC, the Charter imposes duties on children. According to Article 31 of the Charter, children have responsibilities towards family and society depending on their evolving capacities. Inter alia, children have the duty to work for the cohesion of the family; to respect their parents, superiors and elders; and to preserve African cultural values. With this provision, the traditional view in international human rights law that States Parties bear primary responsibility as duty bearers is challenged – and this has not escaped criticism. It has been argued that the duties laid down in the Charter may be used to justify violations of children's rights and to legalise corporal punishment.¹¹⁵ However, it has to be considered that the duties are subject to limitations contained in the Charter. Therefore, Article 31 needs to be read in the context with all other rights contained in the Charter.

In sum, with regard to the material rights of children enshrined in the Charter, the instruments succeeds in complementing the CRC and in taking up issues that relate to African specificities. Therefore, the Charter is an important tool for protecting and promoting the rights of children in Africa. However, as is the case for legal instruments in general, the Charter would run the risk of running dry if effective implementation and enforcement mechanisms were not in place.

In its Chapters 2 and 3, the Charter establishes and organises the Committee of Experts on the Rights and Welfare of the Child (ACERWC).¹¹⁶ This Committee consists of 11 experts from

111 Article 11(2)(a)–(h).

112 See Article 11(3)(a)–(e).

113 Cf. Article 11(3)(e) and 11(6), particularly with regard to addressing the issue of the right to education and teenage pregnancies.

114 Article 13(2).

115 Chirwa (2002:169).

116 Hereinafter referred to as the *Committee*.

different Member States, elected by the Assembly of Heads of State of the AU.¹¹⁷ The Committee has been functional since 2001, and operates according to its Rules of Procedure formulated in 2002.¹¹⁸ According to Article 42 of the Charter, the functions of the Committee include –

- promoting and protecting the rights enshrined in the Charter
- monitoring the Charter's implementation and ensuring protection of the rights enshrined in it, and
- interpreting the provisions of the Charter at the request of a State Party, an institution of the AU, or any other person or institution.

Furthermore, the Committee is entitled to conduct investigations according to Article 45 of the Charter and Article 74 of the Rules of Procedure,¹¹⁹ it may give its views and recommendations to governments; and it is the organ responsible for the reporting process as foreseen in the Charter's Article 43. States Parties are obliged to submit an initial report on the measures they have adopted that give effect to the provisions of the Charter, and submit periodic reports every three years after that.¹²⁰ The preparation of such reports offers the opportunity for States Parties to conduct a comprehensive review of the various measures they have undertaken to monitor progress made in the enjoyment of children's rights, and to harmonise national law and policy. In 2003, the Committee developed Guidelines on how to prepare the initial reports submitted pursuant to Article 43.¹²¹ State Party reports are considered by the Committee according to the Procedures for the Consideration of State Party reports.¹²² These reports are treated as public documents and States Parties are encouraged to publicise their reports among all relevant actors on a national level. The first State Party reports received by the Committee¹²³ were considered by the Committee in the context of the 11th Session of the African Committee of Experts on the Rights and Welfare of the Child, held in Addis Ababa on 26 May 2008.¹²⁴

117 Currently, the Committee is composed of Ms Seynabou Ndiaye Diakhaté, Senegal (Chairperson); Ms Koffi Appoh Marie Chantal, Cote d'Ivoire (Deputy Chairperson); Ms Boipelo Lucia Seithlamo, Botswana (Rapporteur); Hon. Lady Justice Martha Koome, Kenya; Ms Mamosebi T Pholo, Lesotho; Mr Moussa Sissoko, Mali; Ms Dawlat Ibrahim Hasssan, Egypt; Mr Cyprien Adébayo Yanclo, Benin; Ms Agnès Kaboré, Burkina Faso; Mr Andrianirainy Rasamoely, Madagascar; Ms Mariam Uwais, Nigeria.

118 ACERWC (2002).

119 On how investigations are conducted see ACERWC (2006b).

120 Pursuant to this provision, the due date for Namibia to submit its initial report was 23 July 2006, with its first periodic report being due on 23 July 2009. However, as of January 2009, no initial report has been submitted as yet. See Sheahan (2009:86).

121 ACERWC (2003).

122 ACERWC (2005b).

123 States Parties reports have so far been received from the following countries: Burkina Faso, Egypt, Kenya, Mali, Mauritius, Niger, Nigeria, Rwanda, Tanzania and Uganda; see Sheahan (2009:24). However, as of December 2006, and for the first round of consideration of reports in 2008, only Egypt, Mauritius, Nigeria and Rwanda had submitted reports to the Committee; see ACERWC (2006a).

124 Cf. Gawanas (2008).

The reporting system as envisaged by the Charter, the Guidelines for States Parties' initial reports, and the Guidelines for the Consideration of State Party Reports all encounter similar weaknesses to those experienced with the CRC reporting system, particularly with regard to the issue of overdue reports. The only mechanism provided by the aforementioned legal instruments is to issue reminders (two reminders followed by a final reminder) to States Parties who fail to submit a report. Where no response is received from the State Party, —¹²⁵

... within a timeframe determined by the Committee, the Committee shall consider the situation, as it deems necessary[,] and shall include a reference to this effect in its report to the Assembly of Heads of State.

The problem of delay in governments submitting their periodic reports in time is also substantive under the CRC, and it seems that neither the Charter nor the CRC has been able to develop an effective mechanism to ensure that reports are submitted in time. However, even though there is no legally enforceable obligation in the classic sense, i.e. by linking non-submission to specific sanctions, persistent non-submission of reports will not throw a positive light on the commitment of States Parties with regard to the protection and promotion of children's rights.

One particular mechanism provided for in the Charter deserves special mention, as it is unique within the framework of the international law of the child. The Charter provides the possibility of addressing communications by individuals, including the victimised child and/or his/her parents or legal representatives, government agencies, or NGOs recognised by the AU, a Member State, or the UN. Such communications can relate to any matter covered by the Charter. For the consideration of communications provided for in Article 44 of the Charter, the Committee has formulated detailed Guidelines,¹²⁶ according to which –

- a communication may not be anonymous
- it has to be submitted in written form
- it has to relate to a signatory to the Charter.

The Committee decides on the admissibility of a communication, and takes into consideration whether —¹²⁷

- national remedies have been exhausted
- no other investigation, procedure or international regulation is dealing with the same issue at that particular time
- the communication was handed in within a reasonable time after the exhaustion of local remedies, and
- the communication is not exclusively based on information circulated by the media.

125 See section 33 of the Procedures for the Consideration of State Party Reports (ACERWC 2005b).

126 ACERWC (2006c).

127 (ibid.:Chapter 2, Article 1(III)).

Upon deciding that a communication is admissible, the Committee confidentially brings the matter to the attention of the State concerned, and requests an explanation in a written statement.¹²⁸

One feature within the procedure of handling communications has been subject to criticism, namely that the Committee is not permitted to make public any communication, document or information relating to a communication.¹²⁹ It has been argued that confidentiality "has been used by African States under the disguise of facilitating an amicable solution to control human rights monitoring mechanisms",¹³⁰ which may result in the inefficiency of the Committee. Of course, this is a legitimate concern. However, this directive may also be appropriate for protecting the child subject to the communication from eventual harm, e.g. due to high media involvement or eventual pressure from the alleged perpetrator.

Every two years, the Committee submits a report on its activities and on any communication made under the Charter to the Ordinary Session of the Assembly of Heads of State and Government. After the Assembly has considered such a report, it is published.¹³¹

From a theoretical point of view, it can be summarised, that the Committee has far-reaching powers to promote and protect children's rights. The legal basis has been created with the adoption of the Charter and the related procedural rules and guidelines. However, practice still tells a different story: even though the Charter entered into force in 1999 and initial reports are to be submitted within two years of the entry into force of the Charter for the State Party concerned, the Committee only began consideration of State Party reports in 2008. Although 45 countries have ratified the Charter, as of February 2009 only ten¹³² States Parties had submitted their initial reports to the Committee. So far, only one communication has been received by the Committee¹³³ and a decision has not yet been published. These problems are probably linked to constraints which affect the Committee's work, with the lack of funds and resources leading the way in terms of problems. After having struggled to function without a full-time Secretary for a long time, the Committee has only had one since August 2007. However, so far,

128 (ibid.:Chapter 2, Article 2(II)(4)).

129 (ibid.:Chapter 3, Article 1(2)).

130 Chirwa (2002:170).

131 See Article 45(3). Unfortunately, as of 14 October 2009, neither the reports by the Committee, nor the decisions of the Assembly on the reports of the Committee had been published on the (rather outdated) Committee's website. See <http://www.africa-union.org/child/home.htm>; last accessed 14 October 2009.

132 Burkina Faso, Egypt, Kenya, Mali, Mauritius, Niger, Nigeria, Rwanda, Tanzania and Uganda have so far submitted their initial reports; cf. Sheahan (2009:24).

133 The only communications received so far as one communication submitted against Uganda in 2005 by the Centre for Human Rights at the University of Pretoria, South Africa, for numerous violations on children's rights in the conflict-ridden northern part of the country; see Keetharuth (2009:208).

the Committee has been unable to secure the services of an own legal officer; the AU Legal Advisor currently assumes this role. However, it has to be considered, that the Committee, especially with regard to its reporting and complaint mechanism, is still at its infancy. Only the future will show how effectively children's rights have been enhanced by this treaty body.

The African Youth Charter

The Assembly of Heads of State and Government of the African Union declared 2009–2018 as the decade on youth development in Africa.¹³⁴ In this context, the African Youth Charter (AYC),¹³⁵ which entered into force on 8 August 2009, is a particularly relevant legal instrument for young people in Africa. The AYC was adopted on 2 July 2006,¹³⁶ recognising that –

... Africa's greatest resource is its youthful population and that[,] through their active and full participation, Africans can surmount the difficulties that lie ahead.

By September 2009, the AYC had been ratified by 17 and signed by 32 AU Member States. Namibia signed the AYC on 16 May 2008 and ratified it on 17 July that year.¹³⁷ The AYC creates a legally binding framework for governments to develop supportive policies, and it formulates specific rights, duties and responsibilities of particular relevance to young people in Africa. States Parties are encouraged to adopt such legislative or other measures that may be necessary to give effect to the AYC's provisions.¹³⁸

The Charter consists of a Preamble followed by 31 Articles, the latter being divided into two parts. Part 1 describes rights and duties, while Part 2 encompasses final provisions. The Charter is applicable to the youth or young people. Unlike other legal documents, in defining *the youth* or *young people* the AYC does not draw the decisive line at the age of majority, from which point on young people are treated the same as adults under the law. Instead, the Charter defines *the youth* or *young people* as every person between the ages of 15 and 35 years.¹³⁹ This definition seems to be very broad at first, and the question has been raised¹⁴⁰ whether it would be appropriate to define as *the youth* or *young people* those up to the age of 35, especially since the average life expectancy on the African

134 See Press Release No. 57/2009 of the African Union's Division of Communication and Information dated 18 February 2009; available at <http://www.ayconference.org/AU%20Press%20Release.pdf>; last accessed 10 October 2009.

135 Available at <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>; last accessed 10 October 2009.

136 For further background on the drafting process, see Mac-Ikemenjima (2006).

137 For a list of countries that have signed, ratified/acceded to the AYC, see <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>; last accessed 10 October 2009.

138 Article 1 on State Obligations.

139 In comparison, the World Bank and the UN, for example, define as *youth* all persons aged 15 to 24.

140 See Mac-Ikemenjima (2009).

continent is only 50.5 years¹⁴¹ and significantly lower in many sub-Saharan countries, and since political, social, cultural and other circumstances in the African context often force the assumption of 'adult' responsibilities at a tender age.¹⁴² However, protecting and supporting the youth and young people must be seen independently from issues of life expectancy or the age of assumption of adult responsibilities; indeed, the provisions of the AYC impressively demonstrate that it is appropriate to equip young people up to the age of 35 with the rights it contains.

Again, the right to education may serve as an example in this respect. This right is one of the focal issues of the AYC. Taking the average duration of primary, secondary and tertiary education, it seems appropriate to grant young people protection by the AYC as it encourages States Parties to create the framework to equip young people with the framework they need to develop their skills rather than treat them differently under the law from 'adults'.

Another example of the broad definition being justified is with regard to juvenile justice. Some may fear that special provisions could treat persons within the 15–35 age bracket who have infringed on the penal law as being different from 'adults'. However, although the AYC makes specific provisions as to law enforcement in Article 18, any privileges compared with the related treatment of adults are only granted to minors, who are defined as being all persons from within the age bracket of 15–18. All other provisions instead emphasise general human rights standards, and encourage States Parties to enhance the social reintegration process for young people – especially with regard to education during imprisonment.

Like the Charter, the AYC contains fundamental principles relating to the group of civil and political rights, such as non-discrimination (Article 2); freedom of movement (Article 3); freedom of expression and association (Articles 4 and 5); freedom of thought, conscience and religion (Article 6); and protection of private life and the family (Articles 7 and 8).

It cannot be said that some of the rights contained in the AYC are more important than others. However, the importance of Articles 13, 14, 15, and 16 need to be pointed out as being of major concern, particularly to young people of African descent.¹⁴³ These four Articles cover the issues of education, skills development, poverty eradication, socio-economic integration of the youth, sustainable livelihoods, employment, and health.

Another vital structural element of the AYC, running through it like a golden thread, is the issue of participation. Thus, Article 11 on youth participation provides, *inter alia*,

141 According to World Bank data. See <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,contentMDK:20266824~menuPK:538117~pagePK:146736~piPK:226340~theSitePK:258644,00.html>; last accessed 10 October 2009.

142 Kabumba (2009:1).

143 See Ubi (2007).

for participation of the youth in Parliament and for strengthening of platforms for youth participation in decision-making at local, national, regional, and continental levels of governance. In the context of States Parties' obligation to develop national youth policies (Article 12), the issue of strengthening youth participation in decision-making is addressed, like it is in many other provisions, such as those relating to education (Article 13), poverty eradication (Article 14), and sustainable development and protection of the environment¹⁴⁴ (Article 19).

The AYC further addresses issues related to health care, employment, security, leisure, recreation, culture, youth with disabilities, the girl child, youth in the diaspora, and the elimination of harmful social and cultural practices. Article 26 also formulates the responsibilities of the youth regarding their own development, and the development of society.

One question that needs to be addressed is the relationship between the AYC and the Charter, which is applicable to children – being defined in the latter as all persons under the age of 18. This eventually results in an overlap between the AYC and the Charter for persons between the ages of 15 to 18. As there is no rule on the relationship between the two documents, and taking the principle of the best interest of the child into account, it is assumed, that persons aged 15 to 18 years may choose which of the documents is more relevant for their specific needs. One factor, which might play a role in this respect is the availability of enforcement mechanisms under the respective instruments.

Mechanisms for enforcement and monitoring are not clearly formulated by the AYC. It is the African Union Commission, which has the duty to ensure that States Parties respect the commitments made and fulfil the duties outlined in the AYC. However, the AYC neither establishes a treaty body, nor does it oblige States Parties to submit reports. Nonetheless, it has been proposed that the African Commission encourage Member States to submit annual "State of the Youth" reports to it, which should eventually together constitute a continental report on the issue.¹⁴⁵

Moreover, the AYC does not explicitly provide for a specific complaint mechanism, which could raise concerns about the enforceability of rights contained the AYC.¹⁴⁶ Here it should be kept in mind that violations of African Union human rights instruments can be heard before its main judicial body. In future, this will be the African Court of Justice and Human Rights, established by the Protocol on the Statute of the African Court of Justice and Human Rights. This court is a result of the merger of the African Court on Human and Peoples' Rights – established by the Protocol to the African Charter

144 It should be noted that the protection of the environment linked to the category of third-generation human rights is explicitly addressed by all AU human rights documents, including the Charter. This is a progressive and future-oriented approach, for which the AU should be applauded. On third-generation rights and the environment, see Ruppel (2008).

145 Mac-Ikemenjima (2006:10).

146 See Kabumba (2009:4).

on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights – and the Court of Justice of the African Union established by the Constitutive Act of the African Union.¹⁴⁷ Once the new court becomes operative,¹⁴⁸ it has jurisdiction on, inter alia, the interpretation and application of the African Charter, the Charter on the Rights and Welfare of the Child, or any other legal instrument relating to human rights that has been ratified by the States Parties concerned.¹⁴⁹ During the transition phase until the merged court starts operating, it is still possible to file a case with the African Court on Human and Peoples' Rights under Article 3 of its statute,¹⁵⁰ or to bring a communication to the African Commission on Human and Peoples' Rights.¹⁵¹

In May 2009, just before the AYC came into force, a working group of 11 countries met to advance the popularisation, ratification and implementation of the AYC. The following conditions for the implementation of the AYC were outlined at that meeting:¹⁵²

- All Member States were required to ratify the Charter by the end of 2010, and have in place national youth policies and action plans that took into account and supported the implementation of the Charter, and
- All Member States were required to have instituted mechanisms for reporting their progress on implementing youth policies and programmes, and to have strengthened their respective representative bodies for youth.

The AYC is a vital, legally binding instrument containing a number of important human rights provisions advancing the rights of young people on the continent. If implementation of the AYC is ensured, it will be decisive in fully empowering and developing Africa's youth.

The Declaration and Plan of Action on Africa Fit for Children

In 2001, the Ministers of the AU Member States responsible for promoting and safeguarding the rights and welfare of children in their respective countries adopted the 2001 Declaration and Plan of Action of Africa Fit for Children. This Declaration and Plan of Action constituted the African Common Position submitted to the 2002 UN General Assembly Special Session on Children.

147 For a detailed discussion on the AU legal bodies, see Hansungule (2009).

148 Pursuant to its Article 9, the Protocol on the Statute of the African Court of Justice and Human Rights as well as the Statute itself will enter into force 30 days after the deposit of the instruments of ratification by 15 Member States. As of July 2009, only Libya had ratified the Protocol.

149 Article 28(c), Statute of the African Court of Justice and Human Rights.

150 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

151 See Hansungule (2009:259ff).

152 Report of the Workshop on the Member States–AUC Strategic Initiative on Youth Policies and the African Youth Charter, 26–27 May 2009. For this and further details on the implementation of the AYC, see Mac-Ikemenjima (2009:2).

The Plan of Action focuses on ten priorities, as follows:

- Overall framework
- Enhancing life chances
- Overcoming HIV and AIDS
- Realising the right to education
- Realising the right to protection
- Participation of youth and children
- Actions at all levels
- International partnership
- Follow-up actions and monitoring, and
- Call to action.

Recognising, however, that the situation of children in Africa remained critical due to socio-economic, cultural, political challenges, in 2007 the Ministers of the AU Member States responsible for promoting and safeguarding the rights and welfare of children in their respective countries signed a Call for Accelerated Action on the Implementation of the Plan of Action on Africa Fit for Children. In their Call, they reaffirmed the commitments they had made in the 2001 Plan of Action, and underlined the need to strengthen mechanisms for accountability to ensure more consistent and comprehensive progress during the five years to come.¹⁵³

The Call for Accelerated Action identifies priorities in each of the areas contained in the Plan of Action. Regarding the legislative and policy framework, for example, by the end of 2008, all AU Member States are envisaged to have ratified the Charter, and to have enacted appropriate or amend existing laws to bring them in line with the Charter by 2010. Furthermore, the acceleration of legal reform is envisaged in order to ensure all children are protected by comprehensive legislation in line with the African Charter and other international human rights standards.¹⁵⁴ On monitoring and evaluation, the Call for Accelerated Action requests Member States to, inter alia, submit biennial reports on how far they have progressed in implementing the Plan of Action and the Accelerated Call to the AU Organs through the African Union Commission. Furthermore, the AU Commission is requested to develop a framework for monitoring and evaluating the Call for Accelerated Action with appropriate baselines, targets and indicators for measuring progress at country level.¹⁵⁵ The Call for Accelerated Action also involves different stakeholders in the process. One specific example are regional economic communities (RECs), which are requested to –¹⁵⁶

- raise awareness on and promote the rights and welfare of the child
- work closely with Member States, the African Committee of Experts on the Rights

153 See AU (2007:1).

154 AU (2007:6).

155 AU (2007:9).

156 AU (2007:10).

- and Welfare of the Child and other stakeholders to implement the Declaration and Plan of Action on Children as well as other children's programmes, and
- develop regional child policies in collaboration with partners, and lead the agenda for children in the region.

It has, therefore, been recognised, that RECs can play a vital role regarding the protection and promotion of human rights in general, and children's rights in particular.¹⁵⁷

In sum, a number of significant achievements have been made in Africa in the promotion of children's rights. A comprehensive legal framework has been put in place to protect the rights of children and of the youth. This is the first step towards –¹⁵⁸

... building a world in which all of our children can grow up to realise their full potential, in health, peace and dignity.

However, from a more practical point of view, the relatively young system of the AU can still be improved upon. The importance of enforcement and reporting mechanisms cannot be overemphasised. In this respect, there is still a long way to go – barricaded with administrative and financial hurdles – on which the cooperation of all Member States, the international community and the engagement of civil society is essential.

The sub-regional level

The SADC Treaty

SADC¹⁵⁹ was established in Windhoek in 1992 as the successor to the Southern African Development Coordination Conference (SADCC), which was founded in 1980. SADC currently counts 15 states among its members, namely Angola, Botswana, the Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles,¹⁶⁰ South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

SADC was established by signature of its constitutive legal instrument, the SADC Treaty. SADC envisages –¹⁶¹

... a common future, a future in a regional community that will ensure economic well-being, improvement of the standards of living and quality of life, freedom and social justice[,] and peace and security for the peoples of Southern Africa. This shared vision is anchored on the common values and principles and the historical and cultural affinities that exist between the peoples of Southern Africa.

157 On the role of RECs in human rights protection, see Ruppel (2009a:275ff).

158 Annan (2001:Preface).

159 For more detail on SADC, see <http://www.sadc.int/>; last accessed 12 October 2008.

160 The Seychelles was a member of SADC from 1997 to 2004; it rejoined SADC in 2008.

161 See SADC's Vision, at <http://www.sadc.int/>; last accessed 12 October 2008.

To this end, SADC's objectives include –¹⁶²

- the achievement of development and economic growth
- the alleviation of poverty
- the enhancement of the standard and quality of life
- support of the socially disadvantaged through regional integration
- the evolution of common political values, systems and institutions
- the promotion and defence of peace and security, and
- achieving the sustainable utilisation of natural resources and effective protection of the environment.

From the above list of objectives, it might appear that the promotion and protection of human rights in general and children's rights in particular are not a top priority for SADC, as an organisation that furthers socio-economic cooperation and integration as well as cooperation as regards political issues and security among its 15 Member States. However, the protection of human rights plays an essential role in economic development as it has an impact on the investment climate, which in turn contributes to growth, productivity and employment creation – all being essential for a sustainable reduction in poverty.¹⁶³ Although SADC's vision does not refer explicitly to children's rights, all the principles contained in it are also relevant to the state of children in the SADC Region.

Many human-rights-related provisions can be found within SADC's legal framework, which – at least indirectly – apply to children. The SADC Treaty itself refers to human rights directly or indirectly at several stages. In its Preamble, the Treaty determines, *inter alia*, to ensure, through common action, the progress and well-being of the people of southern Africa, and it recognises the need to involve the people of the SADC Region centrally in the process of development and integration, particularly through guaranteeing democratic rights and observing human rights and the rule of law. The Preamble's contents are given effect within the subsequent provisions of the Treaty. Chapter 3, for example, which deals with principles, objectives, the common agenda and general undertakings, provides that SADC and its Member States are to act in accordance with the principles of human rights, democracy and the rule of law.¹⁶⁴ Moreover, the objectives of SADC¹⁶⁵ relate to human rights issues – which include children's rights issues in one way or another. For instance, the objective of alleviating and eventually eradicating poverty contributes towards ensuring, *inter alia*, a decent standard of living, adequate nutrition, health care and education – all of which are essential human and children's rights.¹⁶⁶ Other SADC objectives, such as the maintenance of democracy, peace, security and

162 These are some of the SADC objectives laid down in Article 5 of the SADC Treaty.

163 For more detail on the role of RECs in human rights protection, see Ruppel (2009a:277ff).

164 Article 4(c), SADC Treaty.

165 Article 5, SADC Treaty.

166 UNDP (2000:8).

stability, refer to human rights, as do the sustainable utilisation of natural resources and effective protection of the environment – known as third-generation human rights.¹⁶⁷

SADC Protocols

Besides the aforementioned provisions and objectives in the SADC Treaty, the SADC legal system offers human rights protection in many legal instruments as well. One category of such documents constitutes the SADC Protocols. The Protocols are instruments by means of which the SADC Treaty is implemented, and they have the same legal force as the Treaty itself. A Protocol legally binds its signatories after ratification. The Protocols which are of most relevance with regard to children's rights are –

- the SADC Protocol on Education and Training
- the SADC Protocol on Gender and Equality, and
- the SADC Protocol on Health.

The **Protocol on Education and Training** entered into force in 2000. Namibia signed the Protocol in 1997 and ratified it in 1998. The Protocol's objective is to formulate and implement comparable policies and systems of education and training in Member States. The Protocol provides identifies specific areas of cooperation, such as those relating to basic (primary and secondary), intermediate and higher education levels, as well as to research and development, and to lifelong learning. A Human Resource Development Sector Coordinating Unit was established under the Protocol, and is responsible for the Protocol's implementation.

The **Protocol on Gender and Development** was signed during the 28th SADC Summit in August 2008.¹⁶⁸ Recognising that the integration and mainstreaming of gender issues into the SADC legal framework is key to the sustainable development of the SADC Region, and taking into account globalisation, human trafficking of women and children, the feminisation of poverty, and violence against women, amongst other things, the Protocol in its 25 Articles expressively addresses issues such as –

- affirmative action
- access to justice
- marriage and family rights
- gender-based violence
- health
- HIV and AIDS, and
- peace-building and conflict resolution.

The Protocol provides that, by 2015, Member States are obliged to enshrine gender equality in their respective constitutions, and their constitutions are obliged to state that the provisions enshrining gender equality take precedence over any customary,

167 Ruppel (2008).

168 SADC (2008:Section 16).

religious and other laws in the country concerned.¹⁶⁹ The Protocol contains several provisions specifically geared to promoting children's rights.¹⁷⁰ Apart from provisions relating to legislation on marriage (Article 8), the most prominent provision is Article 11 on the girl and boy child. Member States are encouraged to adopt laws, policies and programmes to ensure the development and protection of children by eliminating all forms of discrimination in the family, in the community, in institutions and at state level, and by ensuring equal access to education and health care. Furthermore, it is provided that girls are entitled to enjoy the same rights as boys, and that children are entitled to be protected from harmful cultural attitudes and practices and from abuse. Equal access to information, education, services and facilities on sexual and reproductive health and rights are further issues addressed by the Protocol.

The implementation of the Protocol's provisions is the responsibility of the various SADC Member States,¹⁷¹ and specific provisions as to monitoring and evaluation are laid down in the Protocol.¹⁷² The SADC Tribunal is the judicial body that has jurisdiction over disputes relating to this Protocol.¹⁷³

The **Protocol on Health** entered into force in 2004 and was ratified by Namibia in 2000. The Protocol's general objective is to address the health problems and challenges facing Member States through effective regional collaboration and mutual support. One specific objective formulated in favour of the protection of children's rights is to develop common strategies to address the health needs of children and other vulnerable groups. With regard to childhood and adolescent health, in its Article 17 the Protocol obliges Member States to cooperate in improving the health status of children and adolescents, and to develop coherent and standardised policies with regard to child and adolescent health. Furthermore, Member States are required to encourage adolescents to delay engaging in early sexual activity which may result in unwanted teenage pregnancies. The Protocol established the Health Sector Coordinating Unit, which is responsible for the Protocol's implementation.

Other instruments

Apart from the Treaty and Protocols, SADC has other instruments at different levels. These are not binding, and do not require ratification by SADC Member States. The relevant instruments with respect to children's rights include the Charter of Fundamental and Social Rights in SADC, the Declaration on Agriculture and Food Security, and the Declaration on HIV and AIDS.

169 Article 4, SADC Protocol on Gender and Development.

170 The Protocol defines children as being all persons under the age of 18.

171 Article 14, SADC Protocol.

172 Article 17, SADC Protocol.

173 Article 18, SADC Protocol.

The 2003 **Charter of Fundamental and Social Rights in SADC**, although not legally binding, is an important human rights document that specifies the objectives laid down in Article 5 of the SADC Treaty for the employment and labour sector. The Charter enshrines the following rights, among others:

- The right to equality
- The right to a safe and healthy environment
- The right to remuneration, and
- The right to the protection of specific groups in society, such as children, the youth, the elderly, and persons with disabilities.

For the purpose of this publication, Article 7 on the protection of children and young people is of particular interest. In it, reference is made to the ILO Convention on the Minimum Age of Entry into Employment (No. 138) and Member States are requested to create an enabling environment consistent with this legal instrument. Provisions are furthermore made with respect to vocational training and to the remuneration of young people who are in gainful employment.

With the 2003 **Declaration on Agriculture and Food Security**, Heads of State and Government gave substantial means to some specific objectives laid down in Article 5 of the SADC Treaty, namely –

- the promotion of sustainable and equitable economic growth and socio-economic development to ensure poverty alleviation, with the ultimate objective of its eradication
- the achievement of sustainable utilisation of natural resources and effective protection of the environment, and
- mainstreaming of gender perspectives in the process of community- and nation-building.

It goes without saying that these principles are of utmost importance for the future of children living in the SADC Region. By this Declaration, SADC Member States committed themselves to promote agriculture as a pillar of strength in national and regional development strategies and programmes, in order to attain their short-, medium-, and long-term objectives on agriculture and food security. The Declaration is of specific importance for the child's right to food, and covers a broad range of human-rights-relevant issues such as the sustainable use and management of natural resources, the enhancement of gender equality and human health, and the mitigation of chronic diseases and HIV and AIDS.

Similarly, the 2003 **Declaration on HIV and AIDS** strives to realise the objectives set forth in the SADC Treaty to –

- promote sustainable and equitable economic growth and socio-economic development in order to ensure poverty alleviation
- combat HIV and AIDS and other deadly and communicable diseases, and
- mainstream gender in the process of community- and nation-building.

The Declaration describes specific areas as urgent priorities in terms of attention and action. These areas include –

- prevention
- social mobilisation
- improving care
- improving access to counselling and testing services
- improving treatment and support
- accelerating development
- mitigating the impact of HIV and AIDS
- intensifying resource mobilisation, and
- strengthening institutional, monitoring and evaluation mechanisms.

SADC has a broad range of cross-cutting programmes and activities pertinent to children's rights such as gender equality and development; poverty eradication; and combating HIV and AIDS. Among the most devastating effects of the HIV and AIDS pandemic as far as southern Africa is concerned is that it is orphaning generations of children. The crisis of orphans and other vulnerable children (OVC) is one of the biggest challenges for children's rights in the SADC Region, therefore. For this reason, the SADC Parliamentary Forum's¹⁷⁴ HIV and AIDS Programme has prioritised the OVC crisis in its agenda.¹⁷⁵

One further document relevant to children's Rights in the SADC Region was drawn up in 2009,¹⁷⁶ namely the **Draft Strategic Plan of Action on Combating Trafficking in Persons, especially Women and Children in the SADC Region**.¹⁷⁷ This Plan of Action clearly lays out methods and areas of cooperation in an effort to combat all areas of human trafficking, especially of women and children. Children in the SADC Region are prone to trafficking as a result of vulnerabilities created by war, endemic poverty, minimal access to health and education, gender inequality, and unemployment. These scourges affect children, particularly orphans, and the youth. The priority areas addressed by the Plan of Action include the following:

- legislation and policy measures, including the development of national policies and the enactment of legislation to combat trafficking in persons

174 The SADC Parliamentary Forum is a regional inter-parliamentary organisation established in 1997 under Article 9(2) of the SADC Treaty as an effort to further integrate parliaments into an even closer cooperation with the executive, and to enhance popular participation in SADC's regional integration efforts. The aim of these efforts is to facilitate the objectives of eradicating poverty and achieving sustainable development. SADC-PF's mandate is translated into a number of priority areas, including regional integration, democracy and governance, gender equality, human rights, capacity-building and inter-parliamentary cooperation, and HIV and AIDS.

175 For further details, see <http://www.sadcpf.org/hiv aids/page.php?pn=aboutus>; last accessed 12 October 2008.

176 See SADC (2009).

177 Available at <http://www.santac.org/eng/Conferences/2009-SADC-Ministerial-Conference-on-Combating-Trafficking-in-Persons>; last accessed 12 October 2008.

- training for skills enhancement and capacity-building regarding the investigation, prevention and prosecution of trafficking in persons, and the protection of the trafficked victims, especially women and children
- prevention and raising of public awareness, and
- victim support and witness protection.

The ten-year Regional Strategic Plan of Action was adopted by SADC Ministers responsible for combating trafficking in persons, submitted to the SADC Council of Ministers, and approved in August 2009.

Enforcement of children's rights on the sub-regional level

The programmes and provisions sketched above, other than those of the Treaty and the Protocols, are beyond any doubt important steps for practically improving the situation of children within SADC. However, given that, in the legal sense, only provisions of a binding nature can be enforced, the SADC Treaty and its Protocols are pivotal to enforcing children's rights within SADC. The judicial institution within SADC is the SADC Tribunal, which was established in 1992 by Article 9 of the SADC Treaty. The inauguration of the Tribunal and the swearing in of its members took place on 18 November 2005 in Windhoek, Namibia. The Council also designated the Seat of the Tribunal to be in Windhoek. The judicial body began hearing cases in 2007, but no case dealing specifically with children's rights has been received so far.

The Tribunal has the mandate to adjudicate disputes between states, and between natural and legal persons in SADC. Furthermore, the Tribunal has jurisdiction over all matters provided for in any other agreements that Member States may conclude among themselves or within the community, and that confer jurisdiction to the Tribunal.¹⁷⁸ In this context, the SADC Tribunal also has jurisdiction over any dispute arising from the interpretation or application of the Protocols relevant for the protection and promotion of children's rights. The Tribunal was primarily set up to resolve disputes arising from closer economic and political union, rather than human rights.¹⁷⁹ However, recent judgements by the Tribunal¹⁸⁰ impressively demonstrate that it can also be called upon to consider the human rights implications of economic policies and programmes.¹⁸¹

Conclusion

Overall, therefore, it can be concluded that Namibia has strongly committed herself to the protection of children's rights by incorporating a broad variety of international legal instruments into the domestic system. Namibia is a State Party to the most relevant legal

178 Article 15(2), Protocol on the Tribunal and Rules of Procedure thereof.

179 Viljoen (2007:503).

180 *Mike Campbell & Another (PVT) Limited v The Republic of Zimbabwe*, SADC (T) 2/2007.

181 For more details on the SADC Tribunal's human rights jurisdiction, see Ruppel & Bangamwabo (2008); Ruppel (2009b); Ruppel (2009c).

instruments dealing with the protection of children's rights on a global, regional and sub-regional level. These instruments contain a broad variety of material rights for children. Thus, the statutory side offers a comprehensive system of children's rights applicable in Namibia. However, from a procedural perspective, there is still room for improvement. This applies to reporting processes as well as to the question of complaints in case of children's rights violations.

The reporting mechanisms for States Parties under the CRC have a longer history than those on the regional and sub-regional level, so it is not surprising that reporting seems to be more effective under the CRC. One indication of this is the higher number of initial and periodic State Party reports submitted to the CRC Committee.

On the level of the AU, financial and administrative hurdles still hinder progress, but this will hopefully improve in near future. Since overdue reports are a particular problem under the CRC and the AU Charter, Member States should be encouraged persistently to submit their reports in time. Since deficiencies can only be addressed and resolved once they have been identified, the whole reporting system needs to be seen as imperative for enhancing the situation of children in Namibia and on the continent as a whole. Change will only come if the parties to the relevant legal instrument collaborate.

Another critical issue is the complaint mechanism under the respective instruments. While it is questionable that the CRC does not provide for the option of bringing individual complaints before its treaty body, the Committee on the Rights of the Child, it is laudable that under the AU Charter, individuals including the victimised child and/or his parents or legal representatives, governments or NGOs recognised by the AU, by a Member State, or the UN, can bring complaints to the ACERWC relating to any matter covered by the Charter. However, it seems that individuals are still reluctant to bring such communications to the ACERWC. This is most probably not due to the fact that violations of children's rights are always efficiently and satisfactorily addressed by national courts, but rather because the system of bringing communications to the ACERWC is not commonly known or not considered as a fruitful avenue for children or those who assist children in enforcing their rights to take.

Statistical data on the situation of children in Namibia and in Africa in general still reflect the sad reality that children belong to the most vulnerable groups and that, de facto, their rights remain at risk. A more active approach is required from the international community and all stakeholders, particularly from governments and civil society, to redouble their efforts in order to make the future a better place for today's children and their children's children.

References

- ACERWC/African Committee of Experts on the Rights and Welfare of the Child. 2002. *Rules of procedure*. Available at <http://www.africa-union.org/child/home.htm>; last accessed 27 October 2009.
- ACERWC/African Committee of Experts on the Rights and Welfare of the Child. 2003. *Guidelines for Initial Reports of States Parties*. Available at <http://www.africa-union.org/child/home.htm>; last accessed 27 October 2009.
- ACERWC/African Committee on the Rights and Welfare of the Child. 2005a. *Report of the African Committee of Experts on the Rights and Welfare of the Child*. Seventh Ordinary Session, 28 June–2 July 2005, Tripoli, Libya. Available at http://www.chr.up.ac.za/hr_docs/themes/theme06.html; last accessed 29 September 2009.
- ACERWC/African Committee of Experts on the Rights and Welfare of the Child. 2005b. *Procedures for the consideration of State Party Reports*. Text available in Sheahan, F. 2009. *Advancing children's rights: A guide for civil society organisations on how to engage with the African Committee of Experts on the Rights of the Child*. Nairobi: Save the Children Sweden & Plan.
- ACERWC/African Committee of Experts on the Rights and Welfare of the Child. 2006a. *Report of the Eighth Meeting held in Addis Ababa, Ethiopia from 27 November–1 December 2006*. Available at <http://www.africa-union.org/root/AU/Conferences/Past/2006/November/SA/child/REPORT.doc>; last accessed 27 October 2007.
- ACERWC/African Committee of Experts on the Rights and Welfare of the Child. 2006b. *Guidelines on the conduct of investigations*. Text available in Sheahan, F. 2009. *Advancing children's rights: A guide for civil society organisations on how to engage with the African Committee of Experts on the Rights of the Child*. Nairobi: Save the Children Sweden & Plan.
- ACERWC/African Committee of Experts on the Rights and Welfare of the Child. 2006c. *Guidelines for the consideration of communications*. Text available in Sheahan, F. 2009. *Advancing children's rights: A guide for civil society organisations on how to engage with the African Committee of Experts on the Rights of the Child*. Nairobi: Save the Children Sweden & Plan.
- Annan, KA. 2001. "Preface". *We the children: Meeting the promises of the World Summit for Children*. United Nations Secretary-General's Report. New York: United Nations Children's Fund.
- AU/African Union. 2007. *Call for accelerated action on the implementation of the Plan of Action Towards Africa Fit for Children (2008–2012)*. Available at <http://www.africa-union.org/root/au/Conferences/2007/November/sa/Children/meeting.htm>; last accessed 14 October 2009.
- Bause, T. 2008. "Nam children still dying from preventable diseases". *The Namibian*, 30 January 2008.

- Brett, R. 2009. "Rights of the child". In Krause, C & M Scheinin (Eds.). 2009. *International protection of human rights: A textbook*. Turku/Åbo: Institute for Human Rights, Åbo Akademi University, pp 227–246.
- Buck, T. 2005. *International child law*. London: Cavendish Publishing Limited.
- Chirwa, DM. 2002. "The merits and demerits of the African Charter on the Rights and Welfare of the Child". *International Journal of Children's Rights*, 10(2):157–177.
- Committee Against Torture. 2005. *Consideration of reports submitted by States Parties under Article 19 of the Convention: Conclusions and recommendations of the Committee against Torture – Democratic Republic of the Congo*. Available at <http://www.unhcr.org/refworld/pdfid/45c30b7cc.pdf>; last accessed 14 October 2009.
- Committee on the Rights of the Child. 1994. *Concluding observations of the Committee on the Rights of the Child: Namibia. 07/02/94. CRC/C/15/Add.14*. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.15.Add.14.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.15.Add.14.En?Opendocument); last accessed 14 October 2009.
- Committee on the Rights of the Child. 2001. *General Comment No. 1 on the aims of education*. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2001.1.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2001.1.En?OpenDocument); last accessed 19 October 2009.
- Committee on the Rights of the Child. 2002. *General Comment No. 2 on the role of independent national human rights institutions*. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2002.2.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2002.2.En?OpenDocument); last accessed 19 October 2009.
- Committee on the Rights of the Child. 2003a. *General Comment No. 3 on HIV/AIDS and the rights of the child*. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.3.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.3.En?OpenDocument); last accessed 19 October 2009.
- Committee on the Rights of the Child. 2003b. *General Comment No. 4 on adolescent health and development in the context of the Convention on the Rights of the Child*. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.4.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.4.En); last accessed 19 October 2009.
- Committee on the Rights of the Child. 2003c. *General Comment No. 5 on general measures of implementation of the Convention on the Rights of the Child*. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CRC.GC.2003.5.En](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CRC.GC.2003.5.En); last accessed 19 October 2009.
- Committee on the Rights of the Child. 2005. *General guidelines for periodic reports regarding the form and content of periodic reports to be submitted by States Parties under Article 44 (1)(b), adopted by the Committee, UN doc. CRC/C/58/Rev.1*. Available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CRC.C.58.Rev.1.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CRC.C.58.Rev.1.En?Opendocument); last accessed 19 October 2009.
- Detrick, S. 1999. *A commentary on the United Nations Convention on the Rights of the Child*. The Hague: Kluwer Law International.
- Dugard, J. 2005. *International law – A South African perspective* (Third Edition). Lansdowne: Juta.

- Erasmus, G. 1991. "The Namibian Constitution and the application of international law in Namibia". In Van Wyk, D, M Wiechers & R Hill (Eds). *Namibia – Constitutional and international law issues*. Pretoria: VerLoren van Themaat Centre for Public Law Studies, pp 81ff.
- Fortin, J. 2005. *Children's rights and the developing law* (Second Edition). Cambridge: Cambridge University Press.
- Gawanas, B. 2008. *Opening Speech of the 11th Session of the African Committee of Experts on the Rights and Welfare of the Child*[.] Addis Ababa, 26 May, 2008. Available at http://www.africa-union.org/root/au/Conferences/2008/may/sa/child/Commissioner_Gawanas_opening_Remarks_ACERWC_26_May_2008.doc; last accessed 10 October 2009..
- Gawanas, B. 2009. "The African Union: Concepts and implementation mechanisms relating to human rights". In Bösl, A & J Diescho (Eds). 2009. *Human rights in Africa*. Windhoek: Macmillan Education Namibia.
- GRN/Government of the Republic of Namibia. 2004. *Millennium Development Goals Report 2004 for Namibia*. Windhoek: National Planning Commission.
- GRN/Government of the Republic of Namibia. 2008a. *Second Millennium Development Goals Report 2008 for Namibia*. Windhoek: National Planning Commission.
- GRN/Government of the Republic of Namibia. 2008b. *Action Programme on the Elimination of Child Labour in Namibia*. Windhoek: Ministry of Labour and Social Welfare.
- GRN/Government of the Republic of Namibia. 2009. *Summary of the Draft Child Care and Protection Bill*. Windhoek: Ministry of Gender Equality and Child Welfare.
- Hammarberg, T. 1990. "The UN Convention on the Rights of the Child – and how to make it work". *Human Rights Quarterly*, 12(1):97–105.
- Hansungule, M. 2009. "African courts on human rights and the African Commission". In Bösl, A & J Diescho (Eds). 2009. *Human rights in Africa*. Windhoek: Macmillan Education Namibia.
- Hinz, MO & OC Ruppel. 2008. "Legal protection of biodiversity in Namibia". In Hinz, MO & OC Ruppel (Eds). 2008. *Biodiversity and the ancestors: Challenges to customary and environmental law*. Windhoek: Namibia Scientific Society.
- Human Rights Committee. 1989. *General Comment No. 17: Article 24 (Rights of the Child)*. Available at <http://www.unhchr.ch/tbs/doc.nsf/0/cc0f1f8c391478b7c12563ed004b35e3?Opendocument>; last accessed 10 October 2009.
- Kabumba, B. 2009. *The human rights content of the African Youth Charter: A preliminary assessment*. Available at <http://www.afriMAP.org/english/images/paper/AfriMAP-AYC-Kabumba-EN.pdf>; last accessed 12 October 2009.
- Kamwi, R. 2009. *Implementing the internationally agreed goals and commitments in regards to public health*. Statement at the Economic and Social Council in Geneva, 8 July 2009. Available at <http://www.un.org/ecosoc/julyhls/pdf09/Namibia.pdf>; last accessed 16 October 2009.

- Keetharuth, SB. 2009. "Major African legal instruments". In Boesl, A & J Diescho (Eds). 2009. *Human rights in Africa*. Windhoek: Macmillan Education Namibia.
- Kuper, J. 1997 *International law concerning child civilians in armed conflict*. Oxford: Oxford University Press.
- LeBlanc, L. 1995. *The Convention on the Rights of the Child: United Nations lawmaking on human rights*. Lincoln: University of Nebraska Press.
- Mac-Ikemenjima, D. 2006. *The long road to Banjul and beyond: Process of the African Youth Charter and the role of youth in its popularisation and ratification*. Available at http://www.uneca.org/adfv/docs/Process_African.pdf; last accessed 11 October 2009.
- Mac-Ikemenjima, D. 2009. *Beyond Banjul: It's time to implement the African Youth Charter*. Available at www.afriMAP.org/english/.../AfriMAP-AYC-MacIkemenjima-EN.pdf; last accessed 11 October 2009.
- Olowu, C. 2002. "Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child". *International Journal of Children's Rights*, 10(2):127–136.
- Ruppel, OC. 2008. "Third-generation human rights and the protection of the environment in Namibia". Horn, N & A Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Education Namibia, pp 101–120.
- Ruppel, OC. 2009a. "Regional Economic Communities and human rights in East and southern Africa". In Boesl, A & J Diescho (Eds). *Human rights in Africa – Legal perspectives on their protection and promotion*. Windhoek: Macmillan Education Namibia.
- Ruppel, OC. 2009b. "The Southern African Development Community (SADC) and its Tribunal: Reflexions on a regional economic communities' [sic] potential impact on human rights protection". *Verfassung und Recht in Übersee (VRÜ)*, 2:173–186.
- Ruppel, OC. 2009c. "The SADC Tribunal, regional integration and human rights: Major challenges, legal dimensions and some comparative aspects from the European legal order". *Recht in Afrika*, 2:203–229.
- Ruppel, OC & F-X Bangamwabo. 2008. "The SADC Tribunal: A legal analysis of its mandate and role in regional integration". In Bösl, A, W Breytenbach, T Hartzenberg, C McCarthy & K Schade (Eds). *Monitoring regional integration in southern Africa: Yearbook 8*. Stellenbosch: Trade Law Centre for Southern Africa.
- SADC/Southern African Development Community. 2008. *Final Communiqué of the 28th Summit of SADC Heads of State and Government held in Sandton, South Africa, 16 to 17 August 2008*. Available at http://www.iss.co.za/dynamic/administration/file_manager/file_links/SADCSUMCOMAUG08.PDF?link_id=4057&slink_id=6743&link_type=12&slink_type=13&tmpl_id=3; last accessed 12 October 2009.
- SADC/Southern African Development Community. 2009. *Communiqué issued at the SADC Ministerial Conference on the Development of Strategic Plan of Action*

- on Combating Trafficking in Persons, Especially Women and Children in the SADC Region*[.] held on 28 May 2009. Available at <http://www.sadc.int/index/browse/page/531>; last accessed 12 October 2009.
- Scheinin, M. 2009. "International mechanisms and procedures for monitoring". In Krause, C & M Scheinin (Eds). 2009. *International protection of human rights: A textbook*. Turku/Åbo: Institute for Human Rights, Åbo Akademi University, pp 601–620.
- Sheahan, F. 2009. *Advancing children's rights: A guide for civil society organisations on how to engage with the African Committee of Experts on the Rights of the Child*. Nairobi: Save the Children Sweden & Plan.
- Ubi, EN. 2007. "African Youth Charter: Prospects for the development of the African Youth". Paper presented at the Workshop on the Appropriation, Dissemination and Implementation of Regional Instruments and Endogenous Democratic Governance and Conflict Prevention Mechanisms in West Africa, held in Dakar & Saly, Senegal, 16–19 October 2007. Available at www.oecd.org/dataoecd/58/48/42259218.pdf; last accessed 16 October 2009.
- UNDP/United Nations Development Programme. 2000. *Human rights and development: Human Development Report 2000*. New York: United Nations Publications.
- UNESCO/United Nations Educational, Scientific and Cultural Organisation. 2005. *Draft International Implementation Scheme for the United Nations Decade of Education for Sustainable Development 2005–2014*. Paris: UNESCO.
- UNICEF/United Nations Children's Fund. 2001. *We the children: Meeting the promises of the World Summit for Children*. Report of the United Nations Secretary General. New York: UNICEF.
- UNICEF/United Nations Children's Fund. 2007. *Progress for children: A World Fit for Children – Statistical Review*, No. 6, December. New York: UNICEF Division of Communication.
- UNICEF/United Nations Children's Fund. 2008a. *The state of the world's children 2008*. New York: UNICEF.
- UNICEF/United Nations Children's Fund. 2008b. *The state of Africa's children 2008*. New York: UNICEF.
- Van Bueren, G. 1998. *The international law on the rights of the child*. The Hague: Kluwer Law International.
- Viljoen, F. 2000. "The African Charter on the Rights and Welfare of the Child". In Davel, CJ (Ed.). 2000. *Introduction to child law in South Africa*. Lansdowne: Juta.
- Viljoen, F. 2007. *International human rights law in Africa*. Oxford: Oxford University Press.
- Visser, W & KG Ruppel-Schlichting. 2008. "Women and custom in Namibia – The legal setting". In Ruppel, OC (Ed.). 2008. *Women and custom in Namibia – Cultural practice versus gender equality?*. Windhoek: Macmillan Education Namibia.

A major decision: Considering the age of majority in Namibia

Rachel Coomer and Dianne Hubbard

There is always one moment in childhood when the door opens and lets the future in.

Graham Greene (1904–1991), British novelist

We have many names for what we perceive as the different stages of life. In Namibia, people refer to *children*, *adolescents*, *learners*, *the youth*, *majors*, *minors*, *adults* and *elders* – amongst other terms.

Looking only at government, we have the Ministry of Gender Equality and Child Welfare which takes responsibility for children aged 0–18, continuing up to 21 if they are still in school.¹ The Ministry of Youth, National Service, Sport and Culture which defines *youth* as persons aged 15–35.² Our National Policy on Orphans and Vulnerable Children defines an *orphan* as “a child who has lost one or both parents because of death and is under the age of 18 years” and a *vulnerable child* as “a child who needs care and protection”.³ Our National Policy for Reproductive Health defines *adolescent* as a person aged 10–19, and *youth* as persons aged 19–30.⁴

The Namibian Constitution has no definition of *child*, but refers in individual provisions to “children” of up to age 14 or 16.⁵ Across Africa, constitutional provisions refer to children in a variety of ways, using terms such as *minors*, *young persons*, *youth* and *infants*.⁶

So who exactly is a *child*? And at what age should a child become a *major*?

1 Personal communications with Ministry officials.

2 This definition is based on the African Youth Charter ratified by Namibia in February 2008. It came into force in August 2009. See African Union Press Release 142/2009; available at <http://209.85.229.132/u/UAAU?q=cache:RkZuJq8vxHoJ:www.africa-union.org/root/UA/Actualites/2009/juillet/PR%2520142%2520AFRICAN%2520YOUTH%2520CHARTER%2520%2520%2520%252007%252009.doc+african+youth+charter&cd=3&hl=en&ct=clnk&ie=UTF-8>; last accessed 20 September 2009.

3 MWACW (2004).

4 MHSS (2001:para. 2.4).

5 See Articles 15 and 20.

6 Sloth-Nielsen (2008:57).

Majors and minors

The concepts of *minor* and *major* relate to the legal capacity of a person. A person who is a *major* is legally an adult. A major has full legal capacity. This means that people who have reached the age of majority can enter into contracts, bring court cases, and perform other legal acts independently. A *minor* can do many of these things only with assistance from his or her parent or legal guardian.

Some statutes have overridden the common law on minors, by giving minors certain independent legal powers. For example, a person who has reached the age of 16 can make a will,⁷ open and operate a bank account,⁸ and consent to sexual activity.⁹ A person who has reached the age of 18 can vote,¹⁰ drive,¹¹ buy cigarettes and alcohol,¹² gamble,¹³ work in any type of job,¹⁴ obtain a firearm licence,¹⁵ and give independent consent to medical treatment.¹⁶ Compulsory education ends at age 16,¹⁷ while an 18-year-old can be tried and punished for a crime as an adult.¹⁸

But only a person who has reached age 21 can independently bring or defend a court case,¹⁹ enter into fully enforceable contracts,²⁰ enter into a civil marriage without

7 Wills Act, 1953 (No. 7 of 1953).

8 Banking Institutions Act, 1998 (No. 2 of 1998), section 67; Building Societies Act, 1986 (No. 2 of 1986), section 62.

9 Combating of Immoral Practices Act, 1980 (No. 21 of 1980), section 14 (as amended by Act No. 7 of 2000), as read together with the Combating of Rape Act, 2000 (No. 8 of 2000).

10 Namibian Constitution, Article 17.

11 See Road Traffic and Transport Act, 1999 (No. 22 of 1999), section 34. The ages for driving particular types of vehicles are set by regulation.

12 Liquor Act, 1998 (No. 6 of 1998), section 71(1)(s).

13 Casinos and Gambling Houses Act, 1994 (No. 32 of 1994), section 47; Lotteries Act, 1992 (No. 15 of 1992), section 27.

14 Namibian Constitution, Article 15, read together with the Labour Act, 2007 (No. 11 of 2007), section 3.

15 Arms and Ammunition Act, 1996 (No. 7 of 1996), section 3.

16 Children's Act, 1960 (No. 33 of 1960), section 20(8A).

17 Namibian Constitution, Article 20, read together with the Education Act, 2001 (No. 16 of 2001), section 63. There is also a maximum age for school enrolment. Regulations issued in terms of the Education Act provide that persons over the age of 21 may not be admitted to any grade in a state school unless they were enrolled in a state school the previous year and promoted to the next grade. They must otherwise enrol in a state adult education programme or at a private educational institution. Regulations made under the Education Act, Government Notice No. 186 of 28 October 2002 (*Government Gazette* 2841), Regulation 23(5).

18 The special provisions for "juveniles" in the Criminal Procedure Act, 1977 (No. 51 of 1977) and the Prisons Act, 1998 (No. 17 of 1998) apply to persons below the age of 18.

19 A minor has capacity to litigate without the assistance of a parent or guardian in a few specific situations. See Jordaan & Davel (2005:92).

20 A minor can enter into agreements without assistance from a parent or guardian if the minor obtains only rights and no obligations. See (ibid.:64).

parental consent,²¹ sell or mortgage land,²² or administer money or property which they have inherited.²³ Majority also involves some corresponding responsibilities with less advantageous implications; for example, lowering the age of majority would lower the age at which civil claims in respect of minors would prescribe.²⁴ And, of course, the key aspect in many people's minds – an aspect which some might view as protective, while others might view it as a disability – is that minors are still, in principle, subject to parental rights and powers.²⁵

The proposed Child Care and Protection Bill

During the course of 2009, the age of majority has been under discussion across Namibia, as part of a broader discussion about child protection and child rights. The Ministry of Gender Equality and Child Welfare is in the process of finalising a Child Care and Protection Bill, which is intended to replace the Children's Act²⁶ inherited from South Africa at Independence.²⁷ As the Chief Justice of Namibia pointed out in a closing speech at a workshop held to discuss the draft law, the Children's Act is a product of the apartheid government in South Africa and –²⁸

... needless to say, it was therefore not designed with specific reference to the social and cultural attitudes and values of our people.

The first draft of this proposed legislation was prepared in 1994 on behalf of the Ministry of Health and Social Services. Responsibility for the draft subsequently passed to the Ministry of Women Affairs and Child Welfare, which came into existence in 1999. During the last 15 years, the draft has undergone numerous revisions and adaptations, with the most recent version of the proposed statute having been finalised in 2008.

The proposed legislation is a long and complex law which covers many aspects of child care and protection, including children's courts, procedures for removing endangered

21 Marriage Act, 1961 (No. 25 of 1961), sections 24–27. Minors under the age of 18 also need state consent to enter into a civil marriage.

22 Administration of Estates Act, 1965 (No. 66 of 1965), section 80.

23 (ibid.:sections 86ff).

24 In terms of section 3 of the Prescription Act, 1969 (No. 68 of 1969), prescription of a minor's claim takes place within three years after the date on which the minor attained majority, depending on when the cause of action arose; no cause of action can prescribe before the lapse of one year from the date on which the claimant became a major.

25 See SALC (1998).

26 No. 33 of 1960.

27 This South African law was made applicable to what was then South West Africa by the Children's Amendment Act, 1973 (No. 74 of 1973), which came into force on 1 January 1977, by virtue of RSA Proclamation 264 of 17 December 1976 (*South African Government Gazette* 5360).

28 Hon. Justice Peter Shivute, Chief Justice of Namibia; "Address at the Closing Session of the Specialist Workshop on the Child Care and Protection Bill", 19 August 2009.

children from their homes, foster care, adoption, child trafficking, child-headed households, the age of consent for medical treatment, proposals for the implementation of a Child Welfare and Advisory Council, and a Children's Ombudsman.

In order to ensure that the proposed legislation would be appropriate for Namibia, in 2009 the Ministry, with technical assistance from the Legal Assistance Centre and support from the United Nations Children's Fund (UNICEF), launched the most thorough consultation process Namibia has ever seen on a proposed piece of legislation. Individual topics in the draft were discussed and debated by adults and children alike at regional and national meetings, on radio and television, and through more 'modern' media such as the short messaging service (SMS) and the Internet social network, Facebook.²⁹ Information about the Bill has also been disseminated through newspaper and magazine articles, booklets inserted into national newspapers, and e-mail and website postings. The information was provided by the Ministry in five languages (Afrikaans, English, *Khoekhoegowab*, *Oshiwambo*, and *Rukwangali*), with the hope that media outlets, particularly local radio stations, would translate the information for broadcasts in additional languages. Given Namibia's low population density, it was vital that as many means as possible were used to ensure that people, both rural and urban, have been able to access information for discussion.

This intensive consultation process was designed to get input from members of the public, service providers and other key stakeholders to ensure that the law would be suitable for Namibia and feasible to implement in practice, and to raise public awareness of the forthcoming law and increase public understanding of children's rights in Namibia.

The draft legislation defines a *child* as "a person who has not attained the age of 18 years";³⁰ yet, unlike an earlier version, it leaves the age of majority unchanged at 21.³¹ As several workshop participants have asked in discussion around the draft legislation, "what happens to a child between the ages of 18 and 21?"³²

29 Facebook is a popular Internet site devoted to social networking. People who participate in Facebook can join discussion groups on topics which interest them. As of 20 September 2009, the discussion group on the Child Care and Protection Bill ("Protecting Children's Rights in Namibia") had 276 members, many of whom were Namibian teens. Active participation in discussion about topics in the Bill has been significantly lower; as of 20 September 2009, there were 33 posts on various discussion topics by a total of 29 people.

30 Ministry of Gender Equality and Child Welfare, Draft Child Care and Protection Bill, 2009, section 1.

31 The age of majority is currently governed by the Age of Majority Act, 1972 (No. 57 of 1972). In terms of this law, which was inherited from South Africa, all persons in Namibia, both male and female, "attain the age of majority when they attain the age of 21 years". This is why 21st birthday parties are often marked with special celebrations. A minor can also attain majority status by concluding a valid civil marriage, or by means of a court order declaring him or her to be a major. For a discussion of the historical aspects of the age of majority, see James (1960); Chanook (2001); Burman (1988).

32 For example, participants at a workshop in Keetmanshoop were worried about the fact that,

This question has led to lively debates on the appropriate age for Namibian children to be treated as adults.

International perspectives on the age of majority

Most countries in the world set the age of majority at 18.³³ However, there are variations, with the age of majority ranging from a low of 14 (for example, in Albania³⁴) to a high of 21 (as in Namibia and Lesotho³⁵). The fact that the age of majority varies by up to seven years shows that this issue is not just about the age a child becomes competent to perform certain legal acts, but also about when a person is considered mature enough to be viewed as an adult according to the cultures of various countries.

The trend towards setting the age of majority at 18 is partly a result of the United Nations Convention on the Rights of the Child, which has been ratified by every country in the world except Somalia and the United States of America.³⁶ Namibia was one of the first countries in the world to ratify the Convention, and the Convention was one of the first international treaties ratified in an independent Namibia.³⁷

In Article 1, the Convention defines a *child* as a person under the age of 18:

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

under the current draft law, foster care would end at the age of 18, while the age of majority remained at 21, thus leaving children in limbo for three years (Keetmanshoop regional meeting, 28–30 April 2009). Women’s Action for Development (WAD), while hesitant to support the lowering of majority to 18 years, similarly expressed concern about the ‘grey area’ between age 18 and 21, when a person was no longer a *child*, but remained a *minor* – with all the legal limitations attached to minority (written submissions by WAD on the Child Care and Protection Bill, 8 September 2009).

33 Article 1 of Council of Europe Resolution (72)29 recommended that the governments of member states lower the age of majority to below 21 years and, if they deemed it advisable, to fix that age at 18 years, provided that states could retain a higher age of capacity for the performance of certain limited and specified acts in fields where they believed that a higher degree of maturity was required. In the Inter-American Human Rights System, there is no specific definition of *child*. See Inter-American Commission on Human Rights (2008).

34 www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaAlbania.pdf; last accessed 19 September 2009.

35 www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaLesotho.pdf; last accessed 19 September 2009.

36 UNICEF [n.d.]. The UNICEF website reports as follows: “Somalia is currently unable to proceed to ratification as it has no recognized government. By signing the Convention, the United States has signalled its intention to ratify – but has yet to do so” (www.unicef.org/crc/index_30229.html; last accessed 20 September 2009).

37 Namibia ratified the Convention on 30 September 1990, after becoming independent on 21 March 1990.

The Convention does not absolutely require that States Parties lower ages of majority which are higher than 18, since its definition of *child* applies *for the purposes of the Convention*.³⁸ However, the Committee which monitors the Convention encourages countries to harmonise the definition of *child* and the age of majority if they are not already the same, including in countries where the age of majority is higher than 18.³⁹

For example, in 1994, after considering Namibia's first report under the Convention, the Committee noted with concern "the contradictions to be found in national legislation with respect to the definition of the child".⁴⁰

Several other countries have recently been criticised by the Committee for having an age of majority which is higher than 18. For example, Egypt was specifically criticised for having a discrepancy between the definition of *child* in children's legislation and a higher age of majority in other laws:⁴¹

The Committee recommends that the State Party harmonise its legislation in order to avoid the situation where there are effectively two categories of minors: those under 18 years and those between 18 and 20 years of age.

Similarly, in the case of Lesotho, the Committee noted its concern about the contrast between the definition of *child* as a person under 18 years of age and the age of majority set at 21, and recommended that —⁴²

... the State party review, and amend as appropriate, existing legislation in order to harmonize the age of majority and the overall definition of the child.

The main motivation for harmonising the ages is apparently to ensure that children do not lose any of their special legal protections before they acquire complete adult rights.

The International Covenant on Civil and Political Rights does not include a definition of *child* or set any age limits, and the Committee which oversees this Covenant has stated

38 See UNICEF (2007:4); emphasis added.

39 (ibid.:3).

40 CRC/C/15/Add.14, 7 February 1994.

41 CRC/C/15/Add.145, 21 February 2001, paragraphs 27–28.

42 CRC/C/15/Add.147, 21 February 2001, paragraphs 23–24. Other examples include the Committee's concluding comments in respect of Monaco (CRC/C/15/Add.158, 9 July 2001), paragraphs 18–19: "The Committee notes the high age of majority, 21 years, in the State party ... The Committee recommends that the State party proceed with efforts to set the age of majority at 18") and the Comoros (CRC/C/15/Add.141, 23 October 2000, paragraphs 21–22: "The lack of a uniform and clear definition of the age of majority in the Comoran legislation is a matter of concern ... The Committee recommends that the State party continue its efforts to harmonize existing provisions concerning the age of majority to establish one clear age at which the child legally becomes an adult ...").

that the age at which a child attains majority is to be “determined by each State Party in the light of the relevant social and cultural conditions”.⁴³

Article 2 in the African Charter on the Rights and Welfare of the Child also defines a *child* as a person below age 18:

For the purposes of this Charter, a child means every human being below the age of 18 years.

As with the UN Convention on the Rights of the Child, this definition of *child* is only for the purposes of the Charter. It has been noted, however, that the African Charter’s definition of *child* is “stronger” than that in the UN Convention, because it does not allow for any exceptions where national law sets a lower age of majority.⁴⁴

Evolving capacities

Despite defining *child* as a person under 18, the UN Convention on the Rights of the Child recognises that children need varying levels of direction and guidance in accordance with their “evolving capacities”.⁴⁵ A young participant in consultations around Namibia’s Child Care and Protection Bill articulated this principle very clearly by stating that —⁴⁶

... minors gradually acquire more and more legal rights as they mature. It seems as though law makers are trying to prepare minors for adulthood.

The Committee which monitors the Convention on the Rights of the Child requests States Parties to provide information on the ages at which persons in the country acquire decision-making powers over a wide range of issues, including independent consent to medical treatment and surgery, marriage, sexual activity, adoption, and the consumption

43 Human Rights Committee (2006: 183–185, paragraph 4):

The right to special measures of protection belongs to every child because of his status as a minor. Nevertheless, the Covenant does not indicate the age at which he attains his majority. This is to be determined by each State Party in the light of the relevant social and cultural conditions. In this respect, States Parties should indicate in their reports the age at which the child attains his majority in civil matters and assumes criminal responsibility. States Parties should also indicate the age at which a child is legally entitled to work and the age at which s/he is treated as an adult under labour law. States Parties should further indicate the age at which a child is considered adult for the purposes of Article 10, paragraphs 2 and 3. However, the Committee notes that the age for the above purposes should not be set unreasonably low, and that, in any case, a State Party cannot absolve itself from its obligations under the Covenant regarding persons under the age of 18, notwithstanding that they have reached the age of majority under domestic law.

44 See, for example, Mindzie (2007).

45 See Articles 5 and 14.

46 Workshop discussions published by the Legal Assistance Centre in the *YouthPaper*, an insert in *The Namibian* newspaper, on 16 June 2009; comment from a 21-year-old youth leader from the organisation Physically Active Youth.

of alcohol. States must also provide information on the age for criminal responsibility, conscription into the armed forces, and participation in hostilities, as well as the age for capacity to inherit and administer property, give testimony in court, and choose a religion independently. States Parties are also obliged to report on the ages for protective legislation on employment and deprivation of liberty by arrest or detention.⁴⁷ Other issues which have been raised include the ages at which persons can vote, stand for office, acquire a passport independently, join a religious community for life, or have unfettered access to films and other media.⁴⁸

However, a UNICEF handbook on the implementation of the Convention points out that the Committee's request for information on minimum legal ages does not imply that the Convention requires a specific or uniform age for each of these capacities:⁴⁹

... In general, minimum ages that are protective should be set as high as possible (for example protecting children from hazardous labour, criminalization, custodial sentences or involvement in armed conflict). Minimum ages that relate to the child gaining autonomy and to the need for the State to respect the child's civil rights and evolving capacities, demand a more flexible system, sensitive to the needs of the individual child.

Some "minimum age" issues relate both to increased autonomy and to protection. For example, the child's right to seek legal and medical counselling and to lodge complaints without parental consent, and to give testimony in court, may be crucial to protection from violence within the family. It is not in the child's interests that any minimum age should be defined for such purposes.

The Convention provides a framework of principles; it does not provide direction on the specific age, or ages, at which children should acquire such rights. Under article 12, children capable of forming views have the right to express their views freely in all matters affecting them. Their views must be given "due weight in accordance with the age and maturity of the child" ...

Some States, in addition to setting in legislation certain ages for the acquisition of particular rights, include in their law a flexible concept of the child's evolving capacities so that children acquire rights to make decisions for themselves on certain matters once they have acquired "sufficient understanding". The advantage of such formulas is that they avoid rigid age barriers; the disadvantage is that they leave judgments on when children have acquired sufficient understanding to adults, who may not respect the concept of evolving capacities.

Harmonisation of ages for various capacities requires that they be sensibly coordinated, without necessarily being identical.⁵⁰ For example, as the Committee has pointed out,

47 CRC (1996: paragraph 24).

48 UNICEF (2007:6).

49 (ibid.:5).

50 This is an important point which is often misunderstood or oversimplified. For example, a study of child law and policy by the African Child Policy Forum in 19 countries appeals for "a definitive age for children to guide decision-making in all issues affecting children" (2007:28–29). The report goes on to state the following (ibid.):

There are inconsistencies in legal definitions of minimum ages, such as for sexual consent, marriage, completion of basic education and eligibility for employment, which must be addressed in majority of the countries reviewed.

the age at which compulsory education ends should coincide with the age for access to full-time employment. It is also important to ensure that there is no sex discrimination in the setting of ages.⁵¹

Because of the principle of evolving capacities, it is also possible and sometimes logical for certain legal protections to extend beyond the age of majority. For example, in the United States of America, many states set the age of majority at 18, while persons may drink alcohol only at age 21.⁵² In Scotland, young people have full legal capacity at 16 years, but the court may ratify or set aside transactions made by persons between the ages of 16 and 18 if they are “prejudicial”, measured by what an adult acting with “reasonable prudence” in the same set of circumstances would have done.⁵³ In South Africa, although the age of majority is now 18, children who have been placed in alternate care by means of a court order may remain in such care under some circumstances until the end of the year in which they turn 21.⁵⁴ Namibia’s Maintenance Act⁵⁵ provides another example of how such extensions of rights could work; maintenance orders normally terminate when a child reaches age 18, but continue to age 21 —⁵⁶

... if the child is attending an educational institution for the purpose of acquiring a course which would enable him or her to maintain himself or herself.

Some people who have commented on the age of majority question in Namibia have pointed to what they perceive as inconsistencies in Namibia’s current age framework. For example, as a 21-year-old stated, —⁵⁷

51 States Parties are asked to specify in their periodic reports any differences between girls and boys in respect of the definition of *child* under their domestic laws and regulations; CRC (2005: paragraph 19).

52 Further information and a review of American laws and policies on drinking are available at www.alcoholpolicy.niaaa.nih.gov/index.asp?SEC={E0F4FCC5-F475-4CC4-81EF-9CB6A10A902A}&Type=B_BASIC; last accessed 20 September 2009.

53 Age of Legal Capacity (Scotland) Act 1991; available at www.uk-legislation.hmso.gov.uk/acts/acts1991/Ukpga_19910050_en_1; last accessed 21 September 2009. This law also gives children under age 16 the legal capacity to enter into transactions “commonly” entered into by persons of that age, such as buying sweets or railway tickets, but not for unusual contracts such as the purchase of a bicycle or computer. For a summary of the law’s effect, see Bell and Jones (2002:34).

54 Children’s Amendment Act, 2007 (No. 41 of 2007), section 176.

55 No. 9 of 2003.

56 Section 26(1)–(2). *Child* is not defined in the Act; so as the provision now stands, if the age of majority were lowered, the section would appear to allow for an application for extension of a maintenance order to be made only if the application was made before the child’s 18th birthday.

57 Workshop discussions published by the Legal Assistance Centre (LAC) in the *YouthPaper*, an insert in *The Namibian* newspaper, on 16 June 2009; comment from 21-year-old youth leader from the organisation Physically Active Youth.

[P]ersonally I think that it [the age of majority] should be lowered to age 18 now. There actually is not much difference between what an 18-year-old can do and what a 21-year-old can do right now. If an 18-year-old can buy alcohol, own a gun, gamble and even be locked up in prison with adults, why deny them the right to the age of majority?

An 18-year-old had this to say:⁵⁸

I don't think 18-year-olds should be locked up in a police cell with adults. If an 18-year-old is still considered a minor under the law, how can they be combined in one cell with adults? Adults can take advantage of these minors and rape can take place. Later, it would scar you and could end up making you go mental. I think they should keep minors and adults in different cells.

One young person thought that the Namibian age of 16 for sexual consent might be too low,⁵⁹ while some adults suggested that the age at which children could consume alcohol, buy guns, and gamble should be increased to 21.⁶⁰

The Committee which oversees the Convention urges States Parties to review all laws defining *childhood* in any way, to ensure that they are harmonious.⁶¹ UNICEF has described the underlying principles eloquently:⁶²

The Convention on the Rights of the Child sets out the rights that must be realized for children to develop their full potential ... It reflects a new vision of the child. Children are neither the property of their parents nor are they helpless objects of charity. They are human beings and are the subject of their own rights. The Convention offers a vision of the child as an individual and as a member of a family and community, with rights and responsibilities appropriate to his or her age and stage of development.

Some recent developments in other countries

In a 2002 review of South African legislation on children, the South African Law Reform Commission recommended that the country should define *child* as a person below age 18, and set the age of majority at 18 years as well, with a proviso that parental responsibility and/or state support in respect of such a person may be extended beyond age 18 in special circumstances (e.g. a disabled child or a child still receiving education).⁶³

58 Workshop discussions published by the LAC in the *YouthPaper* on 16 June 2009; comment by 18-year-old learner, Ella Du Plessis Secondary School.

59 Workshop discussions published by the LAC in the *YouthPaper* on 16 June 2009; comment from a 21-year-old youth leader from the organisation Physically Active Youth.

60 National Child Care and Protection Bill workshop held from 8 to 12 June 2009, Windhoek; information from discussions on 10 June 2009.

61 UNICEF (2007:4).

62 Convention on the Rights of the Child: Protecting and realizing children's rights; available at www.unicef.org/crc/index_protecting.html; last accessed 18 September 2009.

63 SALC (2002).

The basis for this recommendation was that “it would better accord with social reality if the age of majority were reduced to 18 years”, and that the age of 21 was “paternalistic” and –⁶⁴

... over[-]inclusive, as it sweeps in many minors who are in fact possessed of the necessary competence to make assessments of what qualifies as their best interests.

Accordingly, South Africa’s Children’s Act⁶⁵ repealed the Age of Majority Act⁶⁶ in South Africa with effect from 1 July 2007, and provided that “[a] child, whether male or female, becomes a major upon reaching the age of 18 years”.⁶⁷ The provision recommended by the South African Law Reform Commission for extending parental responsibility and state support was not included in the final law.

The South African Government’s motivation for the change was –⁶⁸

... that the changed socio-economic and political circumstances in South Africa justify the advancement of the age of majority to 18 years.

It also cited the African Charter on the Rights and Welfare of the Child and the South African Constitution, which includes a section on children’s rights that defines *child* for the purposes of this section as “a person under the age of 18 years”.⁶⁹ Furthermore, it noted the following:⁷⁰

Regarding the age of majority, there has been a grey area in relation to the age of adulthood since 1972 when the Age of Majority Act of 1972 stipulated the age of 21 as the age of majority. “Child” has always been defined as a person under the age of 18. Between 18 and 21 you’re neither a child nor an adult. The Children’s Act, 2005 clarifies that grey area and brings [it] in line with section 28 (3) of the Constitution. Now any person under 18, unless married or emancipated by order of Court, is a child and any person over 18 is an adult.

The change in South Africa has been controversial. Even during consultation meetings around Namibia’s Child Care and Protection Bill, to which experts from South Africa were invited, the experts argued among themselves whether or not the change was right for South Africa. An Assistant Commissioner of Child Welfare felt that it was a mistake to lower the age of majority on the grounds that 18-year-olds were still children in terms of their maturity; many 18-year-olds in South Africa were still in school; and children of that age might still need care within the child protection system. She also expressed concern that lowering the age of majority had complicated access to maintenance for

64 SALC (1998).

65 No. 38 of 2005.

66 No. 57 of 1972.

67 Section 17.

68 Department of Social Development (2007).

69 South African Constitution, Article 28.

70 Department of Social Development (2007).

those above age 18 who were not yet self-supporting.⁷¹ On the other hand, a Senior Lecturer from the University of the Western Cape disagreed, stating that the lowering of the age of majority reflected an important realisation of rights, and that the practical problems which had been experienced could have been addressed by better transition provisions.

Argentina is currently in the process of lowering its age of majority from 21 to 18. The motivation given for this move is as follows:⁷²

The Convention on the Rights of the Child defines a child as being under 18. According to our current legislation, 21 is the age of majority and young people aged 18–21 are considered 'minor adults' who have the capacity to undertake certain actions (for example to vote or go to war) but they cannot marry without parental permission or leave a will.

Japan has recently been deliberating the possibility of lowering the page of majority from 20 to 18. A government subcommittee recommended this change on the grounds that lowering the legal age of adulthood would allow young people to participate in society at an earlier stage, and give them heightened awareness as adults. It would also legally enable 18- and 19-year-olds to make their own decisions about using money. The subcommittee thought that, if young people started taking on the responsibilities of adulthood earlier, their sense of obligation to society would blossom more quickly. Lowering the legal age of adulthood would demonstrate the state's determination for youth "to play the central role in forming the future of this country", the report said, concluding that this would "invigorate Japanese society".⁷³ However, it was also noted that there might be a need to provide young adults with extra protection against consumer fraud. A government opinion poll administered to some 5,000 people found that nearly 70% of respondents were opposed to this move. The most common reasons given for this view were that 18- and 19-year-olds were still economically dependent on their parents, and that people under 20 were not viewed as being sufficient capable of making appropriate judgments or taking responsibility for themselves. At the time of writing, Japan's age of majority remained 20, as the government thought that it would be appropriate to put consumer protection measures into place first.

71 Such majors who seek maintenance would have to bring an action for maintenance themselves (or cede it to someone else, such as a parent or caretaker) and show that they should continue to be entitled to maintenance.

72 Press release entitled "Argentina: Plan to lower age of majority", 28 August 2009; available at www.crin.org/resources/infodetail.asp?id=20761; last accessed 20 September 2009.

73 The information in this paragraph is drawn from Shimbun (2009); Enyo (2009); Kyodo News (2008); and *Weekly Japan Update* (2008). At the time of writing, Article 3 of the Japanese Civil Code still stated that the age of majority was 20. See www.interpol.int/Public/Children/SexualAbuse/NationalLaws/CsaJapan.pdf; last accessed 21 September 2009.

The Namibian debate

Both children and adults in Namibia have differing views on the appropriate age of majority, with most respondents in both groups feeling that the age of majority should remain at 21.

During one workshop, the LAC organised a panel discussion with three young people aged 16, 18 and 21, respectively, to represent the key ages under Namibian law for acquiring various legal capacities. These young people spoke about whether they were content with the rights they possessed, and about whether they believed that the age of majority should be reduced to 18.

The 16-year-old stated that she was generally happy with the limited rights she had at her age, and said she did not feel ready for the rights and responsibilities of adulthood.⁷⁴

Imagine if I were to be given all rights. Mentally I wouldn't be ready to handle all of them. My life would be clashing at all corners. The basic rights that I'm allowed are more than enough to help me develop positively into adulthood ... Two years from now I will be 18 years. At [that] age I will be allowed to do more things. For example, I will be allowed to drive a car and drink alcohol. In some countries 16-year-olds are allowed to drive and consume alcohol. But with driving a car and drinking alcohol comes a lot of risk. I feel the rights of an 18-year-old in Namibia are perfectly suited for their mental capacity. However, I am against the lowering of the age of majority from 21 years to 18 years. A person at the age of 18 is still a teenager. They are still very dependent on their parents and guardians. A person at the age of 21 is independent and responsible. Therefore[,] I feel the age of majority should be held at 21 years.

The 18-year-old similarly expressed satisfaction with his existing level of capacity. For instance, he found it fair that 18-year-olds could have any job and drive, although he worried that 18-year-olds might become distracted from their studies because of their ability to frequent clubs. He also noted that some people were not ready for certain rights even though they were entitled to them, saying that he personally did not feel ready to vote even though he was eligible to do so:⁷⁵

I don't think the age of majority should be brought down to 18 because too many wrong choices would be made and many 18-year-olds are not mature enough to be responsible for their actions.

The 21-year-old noted that he generally approved of the way in which rights were acquired as minors matured. He agreed that 16- and 17-year-olds should not have the full rights of adulthood, since youth at that age were impressionable, but asserted that the age of majority should be reduced to 18 since there was already little difference between

74 Workshop discussions published by the LAC in the *YouthPaper* on 16 June 2009; comment from 16-year-old learner at Dawid Bezuidenhout High School.

75 (ibid.); comment from 18-year-old learner at Jan Jonker Afrikaner High School.

what 18- and 21-year-olds could do. He noted that rural youth may have a different level of sophistication than urban youth, but felt that rural youth would support the idea of lowering the age of majority if they were educated on what it meant.⁷⁶

On Facebook, an 18-year-old Namibian learner lobbied for lowering the age of majority as follows:⁷⁷

I think the age of majority in Namibia creates problems. Many teens finish school at age 18 and also get their drivers' licences then. This means increased freedom as well as possibly moving out of their parents' house to go to university. So, teens essentially take on much of the responsibility and freedom associated with adulthood, except that they still need their parents' permission to sign a contract. This becomes a logistical problem if the teen is living far from home, but it also doesn't make sense to me that teens essentially become adults in all but name at 18.

Further support to change the age of majority came from a Namibian student studying in South Africa:⁷⁸

I am a 19-year-old student at the University of Cape Town in South Africa. When at university, I am, according to South African law, a major; I can perform any legal act without my parents' knowledge or consent and am entirely independent. However, as soon as I return home for the holidays I have to have my parents' permission and 'help' with any contract or other legal proceeding I want to engage in. This seems ridiculous as I certainly do not become less mature as I pass through passport control at the border.

An input from an adult read as follows:⁷⁹

In Namibia, as soon as you turn 18 and complete school, you are regarded as an adult. You maybe start working, get your own place and be[come] your own boss. There are no restrictions to what can or cannot be done when you provide for yourself. Nobody stands in your way whether you are voting, consuming alcohol or having sex. Parents will only regard their kids ready when they turn 21 (it is tradition) although the kid has been providing for himself. The age of majority should be 18; there is enough time for trial and error to experiment and hopefully [those] 3 years between 18–21 will be an eye-opener for kids to start reacting seriously and [maturely] for the rest of the years ahead. [The age of majority should be] 18 years.

At a recent Windhoek workshop conducted with 15 children aged between 13 and 19, the children felt that lowering the age of majority might give 18- to 20-year-olds more responsibility in terms of handling their own legal affairs and money matters. However,

76 (ibid.); comment from 21-year-old youth leader, Physically Active Youth.

77 Comment posted on Facebook discussion group hosted by the LAC, "Protecting children's rights in Namibia", 22 April 2009 (spelling and punctuation corrected).

78 Comment submitted to the LAC by e-mail (spelling and punctuation corrected).

79 Comment posted on Facebook discussion group hosted by the LAC, "Protecting children's rights in Namibia", 13 May 2009 (spelling and punctuation corrected).

overall, only 8 of the 15 children felt that the age of majority should be lowered.⁸⁰ At a second workshop, conducted with 15 other children in the same age group, some of the participants felt that the age of majority should stay at 21 –⁸¹

... because at 21 you can take better care of yourself when you leave home. Eighteen-year-olds just think of parties, drinking and having fun. At 21 your maturity is better developed and you have more life experience.

In contrast, others felt the age of majority should be lowered to 18 because –⁸²

... children who stay with their parents till 21 are just lazy. The key given at 21 is just a tradition, there is really nothing to it. If you can support yourself financially at 18 than you don't need your parents' support. At first maybe an 18 year old will waste but then later will realize their responsibility.

Many people who have commented on the age of majority question have puzzled over how to deal with children who are in vastly different life situations. For example, at one of the regional consultations on the Child Care and Protection Bill, an adult participant argued that when a child left home to study at the University of Namibia, he or she was still considered to be a child; on the other hand, a child who did not go on to further studies was expected to behave like an adult and join the working world. As the participant asked, “Why is a child who goes to university a child, but a child who stays at home has to become an adult?”⁸³

At another meeting, a 16-year-old gave a poignant example of a similar practical concern.⁸⁴

I think people should be permitted the right to work at any type of job they want at 16. My mom is a domestic worker. I have passed my first term [of Grade 12], but do not have any money for tertiary education. Imagine the crisis I'm in. I've looked for jobs everywhere to support my further education. But they have all turned me down because of my age.

A social worker also emphasised the different life situations of different individuals: ⁸⁵

Let me lead you into life in the rural areas. Children live with their parents right until they get married; only then do they move out to their husband's place, that is, for the ladies. And for the men, they are actually given a space within the household to start their family. In such a

80 Workshop conducted by Yolande Engelbrecht, LAC, 8 August 2009.

81 Workshop conducted by Yolande Engelbrecht, LAC, 15 August 2009.

82 (ibid.)

83 Rundu regional consultation, 12–14 May 2009.

84 Panel discussion at workshop on the age of majority hosted by the Ministry of Gender Equality and Child Welfare and the LAC, Windhoek, 10 June 2009, as transcribed by the LAC; comment from 16-year-old learner, Dawid Bezuidenhout High School.

85 Comment posted on Facebook discussion group hosted by the LAC, “Protecting children's rights in Namibia”, 25 June 2009.

case, the parents are the ones who cater for the everyday needs of the individual. Reducing the age of majority to 18, hence, in this context, will really not [make] much of a difference. As a social worker, I have found 29-year-old women who have children out of wedlock coming to my office to complain that their parents are not taking good care of them. This just shows that it is the norm for the parents to take care of them even though they have reached [the] age of majority [but] are not mature enough to actually make decisions for themselves that will benefit them. Not to generalise, but in such a case it would be risky to ... reduce the age of majority to 18 because they are not mature enough to handle most [of the] responsibility that will come with it. But then again, not all children are like that.

At a national workshop, an official from the Ministry of Education commented as follows:⁸⁶

Often, both parents have to work and there is no time to control children or to impose the type of strictures they would like to impose. In the meantime, the children's peers are 'educating' the children, but on other things. Oldest daughters often raise younger children. We need to realise these things. The law needs to empower children to take care of themselves.

This same speaker felt that the age of 21 was more appropriate for privileged children who completed secondary school at age 18, and could have finished three years of tertiary education by the time they turned 21.⁸⁷

Yet, according to 2007 Education Management Information System (EMIS) data from the Ministry of Education, comparatively few children managed to reach Grade 12: the number of children still in school at Grade 12 was only 24% of the number enrolled in school in Grade 1.⁸⁸ Furthermore, the vast majority of Namibian children between the ages of 18 and 21 were no longer in school.⁸⁹ Thus, it is likely that many children in this age group will be in a position where they need to make independent decisions, a right that is currently unavailable to them.

Some people have cited practical concerns. For example, one girl submitted that the government should lower the age of majority so that minors could handle money or property that they had inherited, while another girl emphasised that traditional customs should follow the civil law so that young girls could not be married off to older men by their parents.⁹⁰ A social worker with the Motor Vehicle Accident Fund pointed to

86 National Child Care and Protection Bill workshop held from 8–12 June 2009, Windhoek; information from discussions on 10 June 2009.

87 (ibid.).

88 In 2007, the raw figures for total enrolment were as follows: Grade 1 – 68,861 and Grade 12 – 16,737; Ministry of Education (2008:Table 29).

89 According to the 2001 census, there were 116,194 persons aged 18–20 in Namibia (NPC 2003:1). In 2007, there were 44,564 children in this age group at school, which is about 38% of the census figure (Ministry of Education 2008:Table 25). Allowing for the differences in years between these two sources, it is likely that almost two-thirds of Namibians in this age group are no longer attending school.

90 Workshop discussions published by the LAC in the YouthPaper on 16 June 2009; comment

problems that minors currently had in accessing money after a parent had died, and suggested a need to emancipate children for this purpose in some cases.⁹¹ On the other hand, some parents phoned in to radio chat shows during the consultation process to express fears that they would be unable to control 18-year-olds if the age of majority were lowered.⁹²

Voicing a view similar to that expressed by some in other consultations, a social worker in favour of setting majority at age 18 stated the following:⁹³

Times have changed, so the laws should change as well. The age of majority should be lowered.

Several people who gave input into the question favoured an approach with as much flexibility as possible. For example, some suggested keeping the age of majority at 21 whilst allowing younger children more specific rights, if necessary. Others favoured lowering the age of majority to 18, and yet still setting a higher age for a few things. The example regarding the drinking age in the USA illustrates this option. Another possibility might be to set the age of majority at 18, with a range of exceptions for children who are still in school, so that they can continue to receive state grants or parental maintenance or remain in alternative care.⁹⁴

Conclusion

The decision on the age of majority will not be an easy one. For every comment supporting the need of keep the age of majority at 21, another person supports the need to lower it to 18.

Because there is no clear consensus, Namibia may chose to keep the age of majority at 21. But if this is the case, it will be important to ensure that existing legislation does not leave children between the ages of 18 and 21 in a legal limbo, lacking the protections afforded to ‘children’ as well as the autonomy of adults. If the age of majority is not lowered, it would be necessary in the Child Care and Protection Bill to increase the definition of *child* up to the age of 21 – for at least some key purposes, if not across the board.⁹⁵

from 18-year-old learner, Jan Jonker Afrikaner High School.

91 National Child Care and Protection Bill workshop held from 8–12 June 2009, Windhoek; information from discussions on 10 June 2009. Emancipation refers to the process whereby children under the age of majority who are at least age 18 can apply to the High Court to be declared majors before reaching the age of 21; Age of Majority Act, section 2–3.

92 Radio chat shows monitored by the LAC, March–September 2009.

93 National Child Care and Protection Bill workshop held from 8–12 June 2009, Windhoek; information from discussions on 10 June 2009

94 (ibid.).

95 For example, section 1 of the current Children’s Act defines child as “a person, whether infant or not, who is under the age of 18 years”, but specifies that for certain purposes that

The debate about the prospect of changing the age of majority is exciting in itself, because it promotes discussion and reflection about the meaning of childhood and the rights and responsibilities which go along with increasing maturity.⁹⁶ The topic has inspired discussions on the need to both protect and empower children.

Regardless of which age of majority is chosen, many of the concerns raised can be addressed through careful tailoring of the forthcoming Child Care and Protection Act – and regardless of which age is chosen, the debate has sparked interest in the concept of *maturity* – which may have as much impact on society as the law itself. As a saying by an unknown author puts it, “Childhood is short, maturity is forever”.

References

- Bell, Robert & Gill Jones. 2002. *Youth policies in the UK: A chronological map* (Second Edition). Staffordshire: Keele University, School of Social Relations. Available at www.keele.ac.uk/depts/so/youthchron/CivilFamilyLaw/9197civfamlaw.htm; last accessed 21 September 2009.
- Burman, Sandra. 1988. “Defining children”. In Boonzaier, E & J Sharp (Eds). *South African keywords: The uses and abuses of political concepts*. Cape Town: David Philip Publishers.
- Chanook, Martin. 2001. *The making of South African legal culture: 1902–1936: Fear, favour and prejudice*. Cambridge: Cambridge University Press.
- CRC/Committee on the Rights of the Child. 1996. *General guidelines for periodic reports: 20/11/96, CRC/C/58*, 20 November 1996. Geneva: CRC.
- CRC/Committee on the Rights of the Child. 2005. *General guidelines regarding the form and content of periodic reports: 29/11/2005, CRC/C/58/rev.1*, 3 June 2005. Geneva: CRC.
- Department of Social Development. 2007. *Clarity on clauses in the Children's Act, Act No. 38 of 2005*. Available at www.info.gov.za/speeches/2007/07070615151001.htm; last accessed 18 September 2009.
- Enyo, Mitsusada. 2009. “Panel says lower age of majority to 18”. *The Asahi Shimbun*, 31 July 2009; available at www.asahi.com/english/Herald-asahi/TKY200907310074.html; last accessed 21 September 2009.
- Human Rights Committee. 2006. “General Comment No. 17: Rights of the child (Art. 24), 1989”. In United Nations. *Compilation of general comments and general*

this category will include “a person who is over the age of 18 years but under the age of 21 years”. The specified purposes are alternative care and adoption.

96 As a concrete example, prior to this debate, it appears that most members of the public had never heard of the possibility of the emancipation of a minor; but during the consultation process, the Ministry received SMS input discussing the issue of emancipation, as follows (sent on 12 and 13 June 2009 from separate numbers, and reproduced without corrections):

[SMS 1] Am for lowering the age of majority ... or even if possible can apply 4 emancipation if proven thereof by parents or guardians.

[SMS 2] I do agree with the possible alternative [emancipation] this will help us as a Nation especially the willing minors 2 b declard majors.

- recommendations adopted by human rights treaty bodies*. HRI/GEN/1/Rev.8, 8 May 2006. New York: UN.
- Inter-American Commission on Human Rights. 2008. *The rights of the child in the Inter-American Human Rights System* (Second Edition). OEA/Ser.L/V/II.133, Doc. 34, 29 October 2008, paragraphs 31–36. Available at www.cidh.org/countryrep/Infancia2eng/Infancia2Toc.eng.htm; last accessed 18 September 2009.
- James, TE. 1960. “The age of majority”. *The American Journal of Legal History*, 4(1):22–33. Available at www.jstor.org; last accessed 21 September 2009.
- Jordaan, RA & CJ Davel. 2005. *Law of persons*. Cape Town: Juta.
- Kyodo News. 2008. “70% oppose lowering age of adulthood to 18”. *Japan Times*, 19 September 2008; available at <http://search.japantimes.co.jp/cgi-bin/nn20080919f5.html>; last accessed 21 September 2009.
- Weekly Japan Update*, 26 September 2008; “Majority opposes lowering Japan’s legal adult age”. Available at www.japanupdate.com/?id=8987; last accessed 21 September 2009.
- MHSS/Ministry of Health and Social Services. 2001. *National Policy for Reproductive Health*. Windhoek: MHSS.
- Mindzie, Mireille Affa’a. 2007. “Regional protection of child rights in Africa”. *Pambazuka News*, issue 328, 13 November. Available at www.pambazuka.org/en/category/comment/44416; last accessed 18 September 2009.
- Ministry of Education. 2008. *Education Management Information System: Education Statistics 2007*. Windhoek: Ministry of Education.
- MWACW/Ministry of Women Affairs and Child Welfare. 2004. *National Policy on Orphans and Vulnerable Children*. Windhoek: MWACW.
- NPC/National Planning Commission. 2003. *2001 Namibia Population and Housing Census, Final report*. Windhoek: NPC.
- SALC/South African Law Commission. 2002. *Discussion Paper 103, Project 110: Review of the Child Care Act*. Pretoria: SALC.
- SALC/South African Law Commission. 1998. *Issue Paper 13, Project 110: The review of the Child Care Act: First Issue Paper*. Pretoria: SALC.
- Shimbun, Mainichi. 2009. “Age of majority in Japan”. *Japanese law blog: Current information about Japanese law*, 31 July 2009. Available at <http://japaneselaw.blogspot.com/2009/07/age-of-majority-in-japan.html>; last accessed 21 September 2009.
- Sloth-Nielsen, Julia. 2008. “Domestication of children’s rights in national legal systems in African context: Progress and prospects”. In Sloth-Nielsen, Julia (Ed.). *Children’s rights in Africa*. Hampshire: Ashgate.
- The African Child Policy Forum. 2007. *In the best interests of the child: Harmonising laws in Eastern and Southern Africa*. Addis Ababa: The African Child Policy Forum.
- UNICEF/United Nations Children’s Fund. [n.d.]. “Convention on the Rights of the Child: Frequently asked questions”. Available at www.unicef.org/crc/index_30229.html; last accessed 20 September 2009.
- UNICEF/United Nations Children’s Fund. 2007. *Implementation handbook for the Convention on the Rights of the Child*. Geneva: UNICEF.

Work in progress: The Child Care and Protection Act in Namibia

Lena N Kangandjela and Clever Mapaure

Feelings of worth can flourish only in an atmosphere where individual differences are appreciated, mistakes are tolerated, communication is open, and rules are flexible – the kind of atmosphere that is found in a nurturing family.

Virginia Satir

Introduction

In any caring society the importance of child welfare cannot be overemphasised, because the future welfare of the entire community, its growth and development, depends on the health and well-being of its children. Children need to be regarded as valuable national assets because the future well-being of the nation depends on how its children grow up and develop. Since Independence, Namibia has ratified several key international legal instruments aimed at promoting and protecting the rights of children. However, despite considerable achievements over the past 19 years, the Children's Act¹ that regulates the welfare of children is not yet in line with recent international, regional and national developments and challenges. The outdated Act is currently under review in order to tailor it to suit children's needs, as stipulated in the following international laws:

- United Nations Convention on the Rights of the Child (CRC), 1990²
- African Charter on the Rights and Welfare of the Child, 1990³
- International Labour Organisation (ILO) Convention on the Prohibition and Immediate Elimination of the Worst Forms of Child Labour, 1999⁴
- Protocol to the Convention Against Transnational Organised Crime, to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000,⁵ and
- Convention on the Rights of Persons with Disabilities, 2006.⁶

1 No. 33 of 1960.

2 Ratified on 30 September 1990.

3 Ratified on 26 August 2004.

4 Ratified on 15 November 2000.

5 Signed on 13 December 2000.

6 Ratified on 4 December 2007.

Coomer⁷ has indicated that there is data to support the need for strong legislation regarding the care and protection of children in Namibia. She has stated that, in order for Namibia to reach the Millennium Development Goals, Vision 2030 and Namibia's full potential, more needs to be done to care for and protect the country's children.

The constitutional imperative

The Namibian Constitution captures certain rights provided for in the CRC. The Constitution also places a number of obligations on the state to safeguard the rights of all people in Namibia. Apart from the right to vote, all children are entitled to enjoy the rights provided for and entrenched in Chapter 3 of the Constitution. Article 15 therein spells out some salient rights of children which are in line with those provided for in the CRC, as follows:

- (1) Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.
- (2) Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of this Sub-Article⁸ children shall be persons under the age of sixteen (16) years.
- (3) No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament. Nothing in this Sub-Article shall be construed as derogating in any way from Sub-Article (2) hereof.
- (4) Any arrangement or scheme employed on any farm or other undertaking, the object or effect of which is to compel the minor children of an employee to work for or in the interest of the employer of such employee, shall for the purposes of Article 9 hereof be deemed to constitute an arrangement or scheme to compel the performance of forced labour.
- (5) No law authorising preventive detention shall permit children under the age of sixteen (16) years to be detained.

These rights⁹ are protected in terms of Article 5, which states that all fundamental rights and freedoms in the Constitution –

... shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

The inclusion of this right in the Constitution is not surprising since the growing acceptance of the idea that children as a group are entitled to rights is in keeping with

7 Coomer (2009).

8 Sub-Article 2.

9 Article 15, Namibian Constitution.

the global expansion of human rights discourse following World War II.¹⁰ The immediate post-WWII international human rights declarations articulated the idea that all humans possess certain moral-political claims on their governments and societies, irrespective of their “race, colour, sex, language, religion, national or other social origin” or other social distinctions.¹¹

Some authors have noted, however, that the phrase *children’s rights* lacks precision and has been described as “a slogan in search of definition”.¹² The issue of children’s rights is certainly complex and raises philosophical, moral and legal as well as social concerns. Part of this complexity derives from the fact that the term *rights* has been associated with a diversity of meaning as a consequence of the considerable attention it has received and continues to enjoy from political philosophers.¹³ But, in part, the complexity also reflects the wide variety of rights claimed for children. John Holt argues the case for an extensive list of rights on behalf of children.¹⁴ This includes the right to vote, work, own property, travel, choose one’s guardian, receive a guaranteed income, assume legal and financial responsibilities, control one’s learning, use drugs, and drive.¹⁵ Farson advocates a similar list in *Birthrights*.¹⁶ Pinchbeck and Hewitt make less ambitious claims in this regard, stressing a child’s right “to adequate food, clothing, medical care, appropriate education and training, protection against exploitation, cruelty and neglect”.¹⁷ Considering this he variety of rights being claimed, the envisaged Child Care and Protection Bill seems to be simplifying some of these philosophical approaches to rights.

This article will try to explore the extent to which the proposed legislation will contribute towards advancing the rights of children in Namibia.

Background to the proposed legislation

The Ministry of Gender Equality and Child Welfare (MGECW) is in the process of reviewing the envisaged Child Care and Protection Bill in an effort to address the challenges and issues that are being faced by most Namibian children. The Ministry of Justice completed a new working draft of the proposed Bill in 2008. Because of the extended lapse of time since the last public consultations around a previous draft back in 2001, and the many developments in the situation of Namibian children during the intervening period, a new round of public and stakeholder consultations was recently proposed.¹⁸

10 Stasiulis (2004:3).

11 (ibid.).

12 Rodham (1973:487).

13 Franklin (1986:33).

14 Holt (1996:114–205).

15 (ibid.).

16 Farson (1974).

17 Pinchbeck & Hewitt (1976:347; quoted by Franklin 1986:11); see also Farson (1974:325–328).

18 Hubbard (2009).

The draft legislation provides some general principles to guide its implementation as well as all government actions and decisions affecting an individual child or children in general. The proposed law also provides that all matters affecting children are required to follow the following six basic principles:¹⁹

- Consistency with the fundamental rights and freedoms as set out in the Constitution, the best interest of the child, and the rights and principles set out in the proposed Act itself
- Respect for the child's dignity
- Fair and equitable treatment of the child
- Protection of the child from unfair discrimination on any ground, including health status or disability, or against the child on the ground of a family member of the child
- Recognition of the child's need to develop and to engage in play and other recreational activities appropriate to its age, and
- Response to the special needs of a child with a disability.

There were numerous unresolved areas of the draft legislation that require specialist as well as public input to ensure that it is suitable for the current environment in Namibia. It was felt that a multimedia project would be beneficial for several reasons:

- Broad consultations would smooth the passage of the Bill through Parliament, and eliminate the need for costly Parliamentary committee hearings
- Public and stakeholder involvement in the law reform process would help to raise awareness of the legal issues and create a sense of ownership, and
- Widespread consultations would help prepare service providers for effective implementation of the new law.

It was against this background that the MGECW and the Legal Assistance Centre (LAC) held a very strong public awareness campaign on the draft legislation. During the campaign, several communication methods were used, including print materials, radio, and television, with special efforts made to involve children to get their input. Regarding printed material, the LAC and the MGECW prepared a summary of the proposed law in the form of 23 one-page fact sheets and produced them in English and indigenous languages.²⁰ These fact sheets were compiled into booklets which were inserted into local newspapers in three languages. Short message service (sms), the Internet – including the MGECW and LAC websites as well as Facebook – were used in the process as well. The constraints included feedback from communities that live in remote rural areas.

The MGECW also hosted a three-day workshop, which was attended by key international experts whose objective was to compare and contrast the Namibian draft legislation with the South African Children's Act,²¹ amended and complemented by the Children's

19 MGECW (2009a).

20 (ibid).

21 No. 38 of 2005.

Amendment Act.²² The other objective of the workshop was to provide an opportunity for skills exchange between international resource persons and Namibian professionals who work on children's issues in various institutions in the country.²³

South Africa has been quite influential in Namibia's law reform in general, and in the area of child law, the involvement of South Africa was prompted by the fact that both countries had used the same (1960) Children's Act, and that they shared a legal and social background. In addition, the members of the consultancy team had worked on children's legislation in various African countries and so could offer a wealth of experience about best practice. On this note, it was appropriate for the two countries to share their experiences with the Namibian Technical Working Group on the proposed law, so that the Namibian people could avoid the challenges in the proposed legislation.²⁴ Important to note is the involvement of the consultants who provided an opportunity for skills exchange between the international resource people and Namibian professionals who work with children.

The MGECW created a network with most of the service providers and key stakeholders in Namibia, and has consulted them on various thematic topics covered in the draft law in order to ensure that the proposals for law reform are appropriate and feasible to implement.

The MGECW also conducted a workshop concerning the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption 1993 (the *Hague Convention*). A technical expert from the Hague Secretariat attended the workshop and gave advice on the Convention, pledging to continue giving technical support to Namibia. The MGECW, with its stakeholders, is planning to lobby for the ratification of the Hague Convention to strengthen the sections on adoption and other related issues in the draft legislation.²⁵

The LAC, who are currently facilitating the process for the MGECW, are collating all comments made so far in order to make the draft law as pertinent to the Namibian situation as possible. The legal drafters from the Ministry of Justice are to meet with the technical committee to finalise some of the technical issues, after which they will prepare the Bill for tabling in Parliament in early 2010. The process will be slightly delayed because of elections.²⁶ The Ministry is also faced with another task – that of drafting Regulations to the Child Care and Protection Act. This is expected to take place as soon as the Bill

22 No. 41 of 2007.

23 See <http://www.lac.org.na/projects/grap/Pdf/press-ccpaccommittee.pdf>; last accessed 1 November 2009.

24 See <http://www.lac.org.na/news/pressreleases/pressr-ccpa-children'srights.html>; last accessed 6 November 2009.

25 Interview with Celeste Feris, Social Worker Child Welfare, Ministry of Gender Equality and Child Welfare, 20 October 2009.

26 (ibid.).

is passed by Parliament. Once the new legislation has been enacted, it will replace the outdated Children's Act,²⁷ as mentioned above, in order to provide a solid foundation for the care and protection of children in Namibia.

The draft legislation covers a wide range of key topics, including the age of majority and issues to do with court procedures for children. Once the legislation is enacted, it will update practices that have changed since 1960. The following paragraphs discuss some important issues dealt with in the draft legislation.

In its preamble, the proposed law states that it was drafted to give effect to certain children's rights as contained in the Namibian Constitution and to set out principles relating to child welfare, as well as to provide for the establishment of institutions for children, such as a Child Welfare Advisory Council, a Children's Ombudsperson, and the appointment of social workers. Also of great importance is the intended establishment of children's courts, the provision and facilitation of early intervention services, and provision for child protection and foster care, children's homes and shelters, and other places of safety and care, as well as educational and vocational training centres, besides providing for the issuing of contribution orders.²⁸ Furthermore, the draft law intends to cover areas that have been controversial in some jurisdictions, like the adoption of children, and to provide for inter-country adoption. Thus, the proposed legislation aims at giving effect to a number of international conventions ratified by Namibia, namely –

- the CRC,²⁹ and
- the Protocol to the Convention Against Transnational Organised Crime, to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000.³⁰

In this light, the proposed law creates new offences relating to child abuse and neglect, the unlawful removal or detention of a child within Namibia, and the unlawful removal of children from Namibia.

27 (ibid.).

28 A *contribution order*, according to the draft Child Care and Protection Bill, –

... is a children's court order which requires a parent or some other person who is legally responsible for maintaining a child to contribute to the costs incurred by the state in assisting a child in need of protection or for holding such a child in alternative care.

It is similar to a maintenance order. The proposed law provides for a contribution order for contributions to three categories of costs: (a) maintaining a child in a place of safety, a children's home or an educational and vocational centre, (b) treatment, rehabilitation, counselling or other interventions provided to a child who has been temporarily removed from his/her usual home by a court order, and (c) short-term emergency contributions towards maintenance, treatment or other costs resulting from the special needs of "a child in urgent need".

29 Ratified on 30 September 1990.

30 Signed on 13 December 2000.

It is important to mention that the MGECW, the LAC, the United Nations Children's Fund (UNICEF), and Namibia's Permanent Task Force on Orphans and Vulnerable Children agreed on a process to refine the draft legislation and take it forward. The process is presently guided by a small Technical Working Group chaired by the Permanent Secretary of the MGECW. The team includes representatives from the MGECW, UNICEF, the LAC, the Attorney General's office (which must certify the draft legislation's constitutionality), the legal drafters, and several senior social workers. UNICEF is providing around N\$3 million to fund this process in the hope that it will be possible to draw on Namibia's experience to develop a 'best practice' guide for the Southern African Development Community (SADC) Region.

The Technical Working Group's objectives are to –³¹

- draw on the experiences of other African countries, such as South Africa, who have recently reformed child laws
- raise public awareness of children's rights and obtain public input on the draft legislation, and
- consult service providers and other stakeholders to ensure that the proposed law reform can be implemented in practice.

Issues covered by the proposed Child Care and Protection Bill

It is important to note that the process of reviewing the legislation is under way and the comments below touch only on the draft legislation that has been made public. The authors understand that the draft being commented on below is still in the process of continuous review, and that some concepts may be different when a revised version is made public. Hence, it is impossible to comment on the draft law while it is still confidential. The context reminds us that the law should be seen as a dynamic and evolving phenomenon; and when new developments arise in Namibian child law, updates are absolutely necessary.

The comments below concentrate on general issues rather than technicalities of the draft law. However, scholarly and/or jurisprudential analysis of some of the underlying concepts will be included where warranted.³²

The child

The concept of *childhood* which emerged with the advent of the 17th century and informs the contemporary account stressed childhood as a time of innocence and weakness for a

31 Hubbard (2009).

32 The authors' examination of the draft legislation draws on a summary prepared for the Ministry of Gender Equality and Child Welfare by the Legal Assistance Centre and circulated to stakeholders to solicit comment. MGECW (2009a).

child.³³ This perception of childhood bestowed upon adults “the duty ... to safeguard the former and strengthen the latter”.³⁴ Hence, many changes in children's lives can be dated to the 17th century.

It is imperative, therefore, that before the rights of children are enunciated in any piece of legislation, the term *child* be defined. The definition in the proposed Bill is simplistic and easy to digest in so far as it incorporates the same provisions of the CRC.³⁵ According to Franklin, the attempt to answer the question *What is a child?* involves extraordinary complexities³⁶ and simple definitions such as the one in the proposed Bill prove elusive. A little probing dispels certainty and prompts further questions. Franklin also asks whether Western accounts of childhood require reconsideration when confronted with the realities of life in Africa, for example, where economic necessity creates an expectation that children should work from an early age.³⁷ Franklin adds that, given the variety of the experience of childhood, we should be doubtful about the prospect of alighting upon some simple formula which will capture this diversity.³⁸

“... childhood is a fairly recent invention ... Childhood is a European invention of the last 400 years”. Before then, “as soon as the child could live without the constant solicitude of his mother, his nanny, or his cradle rocker, he belonged to an adult society.” – Holt observes that this isolation of childhood as a special phase in life is part of a more general tendency of modern societies to become concerned with age divisions.

Childhood could, thus, be understood to be an artificial period which “has divided that curve of life, that wholeness, into two parts, one called childhood, the other adulthood or maturity”.³⁹ This means that childhood is not a single universal experience of any fixed duration: it is, rather, a historically shifting, cultural construction.⁴⁰

The existing division between the two age-states is not only arbitrary, but also incoherent.⁴¹ Children are treated in a negative way as ‘non-adults’. Childhood spans a wide age range from early infancy to 18 years, and within this broad span is an enormously varied range of needs, abilities and potentials.⁴²

Franklin notes that the most significant changes in young people's lives which occur with the development of childhood involve the curtailment of their sexual relations,

33 Franklin (1986:7).

34 Aries (1972:329).

35 See Article 2 of the Convention.

36 Franklin (1986).

37 (ibid.).

38 (ibid.:8; footnotes omitted).

39 Holt (1996:21).

40 Franklin (1986:8).

41 (ibid.).

42 (ibid.).

their removal from the world of work, and their increased involvement in education and schooling.⁴³ Furthermore, as regards our understanding of the development and changing character of childhood, the works by Aries, Plumb, Firestone and others are important.⁴⁴ We should nonetheless be wary of accepting their findings uncritically, since, as Freeman observes, the evidence offered by history can be selective and “history is written predominantly by upper class male adults”.⁴⁵ What is significant about the historical study of childhood is that, while commonplace beliefs currently view childhood as a fixed and immutable state, the suggestion that it has assumed, and could again assume, a radically different form challenges that commonplace view and indicates the potential for change. Conceptions of *childhood* and *adulthood* are continually shifting – and the draft law indicates some of these twists and turns. The areas covered below show the aspirations and determination of Namibian state institutions in respect of reforming child law in the country, and creating a culture of children’s rights.

Child Welfare Advisory Council

The draft law provides for the establishment of a Child Welfare Advisory Council, whose functions include designing and proposing programmes for prevention, protection or care that will advance children’s best interests, as well as monitoring the implementation of the Child Care and Protection Act and any other related laws.⁴⁶

Children’s Ombudsperson

Initially, the proposed Bill provided for a Children’s Ombudsperson who would be appointed by the Minister of Gender Equality and Child Welfare. No qualifications, criteria or terms of office were specified, although it appeared that the Ombudsperson would be a member of the Public Service. This Children’s Ombudsman was, according to the draft law, charged with two primary duties:

- To investigate complaints arising under the Child Care and Protection Act, and
- To monitor the implementation of the CRC and other international instruments relating to child welfare which are binding on Namibia.

Current consultations have led to a new idea about this office. It is expected that the Children’s Ombudsperson under the Bill yet to be made public will not be a separate office from the (national) Ombudsman, an office created by the Constitution.⁴⁷ Instead, the Children’s Ombudsperson may be made part of the Office of the (national) Ombudsman, specialising on the protection of children and reporting to the latter.

43 (ibid.:10).

44 Aries (1996); Firestone (1972); Plumb (1973).

45 Freeman (1983:12); Tucker (1977:16).

46 MGECW (2009a).

47 See Articles 89–94, Namibian Constitution.

Parenting plans

This provision caters for procedures to help parents and other caregivers to reach an agreement on issues pertaining to the exercise of custody, access and maintenance, as a way of preventing future disputes.⁴⁸ Under the Bill that is being commented on – the one which was made public – parenting plans are obliged to serve the best interest of the child. Parties to the parenting plan need to get help from a lawyer, social worker or psychologist, or they have to ask social workers or other suitably qualified person to mediate if they are struggling to reach an agreement.

Children's courts

Children's courts under the proposed Child Care and Protection Bill would operate in much the same way as they do now under the Children's Act, with a few innovations.

According to the draft legislation, children's courts are, among other functions, charged with overseeing the well-being of children, examining the qualifications of applicants for adoption, and granting adoption orders.

As Devel and Skelton submit, in the context of South Africa, this difficulty arises from the fact that the High Court, which has the widest jurisdiction over matters pertaining to children, is not easily accessible.⁴⁹ Furthermore, –⁵⁰

[n]ot only are High Court proceedings very expensive, but their location, divided along provincial lines, makes bringing matters before them very problematic, particularly for children in rural areas across the vast geographical space that South Africa occupies. Although the Legal Aid Board theoretically could assist children financially in accessing the superior courts, the fact of the matter is that children mostly require assistance when their parents, guardians or care-givers are the cause of the issue under determination. In these instances the persons who would ordinarily be the vehicle through which the child's matter is brought to the attention of the courts, or an application for legal aid is made, are the very reason why the child needs assistance, and do not act on behalf of the child in accessing legal representation or access to court. The result is that children are disempowered in accessing judicial determinations.

The children's courts would be ideal for providing such access in every magisterial district. In addition, the costs involved are much lower than those occasioned by the superior courts. The increase in jurisdiction would be welcomed, therefore.

The issue of disputes between parents and young children is not well addressed in the draft legislation. However, in recent years, considerable public attention has been focused on the legislative provision of various state child welfare systems, whereby a court could

48 MGECW (2009a).

49 Devel & Skelton (2007).

50 (ibid.).

find that “a substantial and presently irreconcilable difference” existed between a young person and his or her parents.⁵¹ Where such differences arise, the government believes greater emphasis has to be placed on seeking to conciliate or mediate between family members with the aim of assisting parents and young people in reaching an agreement, without recourse to the court and adversary proceedings.

Prevention and early intervention services

Prevention and early intervention services are those that are designed to protect the child and reduce the risk of violence or other harm within the family environment. For example, if there are family members who abuse alcohol or drugs, helping them with these problems would help protect the child. Identifying children who are at risk and targeting these families for early intervention could help prevent child abuse and neglect. The interventions could also help prevent the child from developing emotional or behavioral problems in the future.

In terms of the draft law, *prevention services* are those provided to families with children “in order to strengthen and build their capacity and self-reliance to address problems that may or are bound to occur in the family environment”. *Early intervention services* are those provided to families “where there are children identified as being vulnerable to or at risk of harm or removal into alternative care”.

Children in need of care and protection

All children need care and protection, of course, but this concept in law means that a child is in need of assistance which is not being provided in the home environment. *Care* is associated with nurturing, while *protection* is associated with safety issues. Various laws use one term or the other to encompass both aspects of a child’s well-being. It is necessary to balance –

- the child’s right to know and be cared for by his/her own family and the family’s corresponding right to maintain its relationship with the child, against
- the child’s need for protection from any significant risk of neglect or abuse.

The draft legislation defines a *child in need of protection* as one who –

- is abandoned or orphaned, and insufficient provision has been made for its care
- is engaged in behaviour that is, or is likely to be, harmful, and the parent or guardian or caregiver is unable or unwilling to control that behaviour
- lives or works on the streets or begs for a living
- lives in or is exposed to circumstances which may seriously harm its physical, mental or social welfare
- is in a state of physical or mental neglect
- may be at risk if returned to the custody of the parent, guardian or the person in whose care the child is, as there is reason to believe that such child will live in or

51 (ibid.).

be exposed to circumstances which may seriously harm his/her physical, mental or social welfare, or

- is being, or is likely to be maltreated or abused by a person having the care, custody, control or charge of the child.

National Child Protection Register

The draft legislation proposes a National Child Protection Register to list all perpetrators of child abuse in an effort to ensure that they do not work with children in the future. This register resembles the sex offender registers used in some countries. Some countries use a different form of 'child protection register' or 'child abuse register', which focuses on recording reports of suspected abuse to facilitate the monitoring of children at risk and the compilation of statistical data about child abuse. Other countries, such as South Africa, use both types of registers.

Foster care

Foster care law is extraordinarily complex. Much of it is embedded in customary law or unwritten as customary law. In terms of the draft law, a child is in *foster care* if s/he has been placed in the care of a person who is not the parent or guardian of that child in terms of an order from the children's court. A foster parent may be a family member. The draft law stipulates new procedures as regards the placement of children under the care of persons who, temporarily or for longer periods of time, act in the place of parents.

In terms of the draft law that was made public, a children's court may place a child in foster care with a family member who is not its parent or guardian. However, before the court does so, it is obliged to follow the children's court processes stated in Chapter 7 of the proposed legislation to the extent that the provisions of that Chapter are applicable to a particular case.⁵² In terms of the draft law, prospective foster parents have to apply to the MGECW to be recognised as a foster parent through a social worker. The social worker is required to examine the applicants' circumstances and report on them to the Minister of Gender Equality and Child Welfare. Children can be placed in foster care only after they have been found by the court to be in need of protection, on the basis of a second social worker's report.

It should be mentioned that the opinion of social workers should not be taken as decisive regarding what the children's court or any other court may order in this regard. This is because, as Ralph says, –⁵³

... family assessment as employed generally by counsellors is steeped in the traditions of Western psychology, with its emphasis upon the individual and based upon modern Anglo-European notions of social and family organisations. The prominence of psychological theory

52 Clause 84(3) of the draft legislation.

53 Ralph (1998:2).

and clinical practice based upon the study of small family groups and individual needs runs counter, however, to an effective understanding of the collectivist nature of Aboriginal family life.

The above position holds true as we consider that the majority of Namibians live according to traditional values and customary laws. The laws of traditional communities and traditional community perspectives are based upon a collectivist view of family and social life, which sees the upbringing of children being the responsibility of the whole community. According to this view, children come to trust in the capacity and commitment of a multitude of people to care for them and nurture them through childhood and into adulthood.⁵⁴

From this perspective, any disruption caused to a child's primary attachment, for example, is outweighed by the benefits arising from the child's exposure to a broader and deeper network of family and kin to whom the child will eventually form strong attachments.⁵⁵ The implicit expectation is that children will grow up with a maximum exposure to their cultural heritage and take their place within a traditional society. These views are required to be taken into account. They could also have a specific component directly related to the child's traditional heritage. Like in most traditional communities, a traditionally raised child is able to adapt to different cultures because s/he is already able to adapt to both traditional and non-traditional cultures. That is, s/he has learnt to cope with the differences between Western culture and African traditional culture.

Facilities which care for children and contribution orders

The new Act will provide for various forms of alternative care for children who have been abandoned or are not safe in their usual homes. Such facilities may also be utilised as alternatives to police cells and prisons for young offenders. This section of the draft legislation discusses other forms of alternative care, namely places of safety, children's homes and educational and vocational centres. In addition to these forms of alternative care, the proposed Bill also provides for the registration of "places of care" (which would include crèches, day care centres, and private pre-schools and kindergartens) and shelters.

Adoption

Namibia approves a relatively small number of adoptions each year, with an average of about 80 adoptions registered annually over the last five years. In comparison, as of February 2009, there were almost 14,000 children in foster care.⁵⁶ In 2004, the High Court of Namibia ruled in the *Detmold* case⁵⁷ that it was unconstitutional to have a blanket rule

54 (ibid.).

55 (ibid.).

56 MGECW (2009a:58).

57 *Detmold v Minister of Health and Social Services*, 2004 NR 175.

preventing foreigners from adopting Namibian children, because such adoptions might sometimes provide the best family environment for a child. Government did not oppose this case, but recommended that procedures for inter-country adoption be included in the forthcoming Child Care and Protection Act.⁵⁸

It is against the above-mentioned recommendation from government that Namibia decided to include provisions on rules, procedures and safeguards for the adoption of children by Namibians and foreigners. The draft legislation begins by laying out a framework for domestic adoption, with an additional framework on inter-country adoption under the Hague Convention. Namibia has not yet adopted the Hague Convention, but would probably do so as soon as the necessary legislation is in place.⁵⁹

The obligations which arise from the Hague Convention regarding inter-country adoption are well enunciated in the South African Constitutional Court decision relating to *Minister of Welfare and Population Development v Fitzpatrick*.⁶⁰

One of the objectives of the Hague Convention is to establish safeguards to ensure that inter-country adoption takes place in the best interest of the child and with respect for the child's fundamental rights as recognised in international law.⁶¹ Despite the Hague Convention not yet having been ratified by Namibia and, thus, not being part of Namibian law under Article 144 of the Constitution, its provisions are already reflected in the draft legislation. However, the part of the proposed Act that refers to this Hague Convention would only come into force if Namibia ratified it. It is important to note is that the fundamental principles which underlie the Hague Convention are drawn from the CRC,⁶² particularly Article 21, which Namibia has ratified.

Article 21 of the CRC provides important protections for children. In accordance with the principle of subsidiarity,⁶³ Article 21 provides that inter-country adoption may be considered as an alternative means of child care if the child cannot be cared for suitably in terms of domestic measures. Subsidiarity requires that priority be given to placing the child with his or her family of origin, and that domestic measures be given preference over

58 MGECW (2009a:58).

59 (ibid.).

60 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC). The South African Constitutional Court declared section 18(4) of that country's Child Care Act, 1983 (No. 74 of 1983) unconstitutional, because it expressly prohibited the adoption of South African children by non-South Africans. No inter-country adoption had taken place prior to this decision.

61 See the objects of the Hague Convention as encapsulated in Article 1.

62 CRC.

63 Goldstone J in *Minister of Welfare and Population Development v Fitzpatrick*, 2000 (3) SA 422 (CC) (at para. 23 footnote 13) described *subsidiarity* as "the principle that inter-country adoption should be considered strictly as an alternative to the placement of a child with adoptive parents who reside in the child's country of birth"; see also *AD v DW* [2007] SCA 87 (RSA).

inter-country adoption.⁶⁴ Despite the principle of subsidiarity not having been expressly provided for in domestic legislation, our courts are obliged, in terms of Article 15 of the Constitution, to take this into account when assessing the best interest of the child, as it is a well-established principle of international law.⁶⁵ The principle of subsidiarity is also enshrined in Article 24(b) of the African Charter, but in somewhat stronger terms, that is, inter-country adoption should only be considered as “the last resort”.⁶⁶ Although no express provision is made for the principle of subsidiarity in our law, courts would nevertheless be obliged to take the principle into account when assessing the “best interest of the child”, as enshrined in Article 15(1) of the Constitution, but also in international law.

Child trafficking

The proposed legislation makes the trafficking of children a crime, and provides for extraterritorial jurisdiction to address trafficking by citizens or permanent residents of Namibia outside the country’s borders. It also provides mechanisms to address trafficking by companies and organisations, by making them liable for involvement in trafficking by their employees and agents.⁶⁷ This is done under the doctrine of piercing the corporate veil. In *Cape Pacific Ltd v Lubner Controlling Investments Pty Ltd*,⁶⁸ the Appellate Division of the Supreme Court of South Africa (as it then was) expounded on the doctrine of piercing the corporate veil in the following words:⁶⁹

64 Fact Sheet No. 36 on Inter-country Adoptions, International Social Service General Secretariat, International Reference Centre for the Rights of Children Deprived of their Family; available at http://www.iss-ssi.org/Resource_Centre/New_Documents/documents/FactSheetNo36ENG.pdf; last accessed 9 September 2009.

65 *Minister for Welfare and Population Development v Fitzpatrick*, 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) (at para. 32 footnote 33). Goldstone J states in para. 32 that one of the concerns that underlies “the principle of subsidiarity are met by the requirement in s 40 of the [Child Care] Act that courts are to take into consideration the religious and cultural background of the child, on the one hand, and the adoptive parents, on the other”. In terms of s 39(1)(b) a court is obliged, when interpreting the Bill of Rights, to consider international law.

66 Article 24 reads, in the relevant part, as follows:
States Parties which recognize the system of adoption shall ensure that the best interest of the child shall be the paramount consideration and they shall:

(a) ...

(b) recognize that inter-country adoption in those States who have ratified or adhered to the International Convention on the Rights of the Child or this Charter, may, as the last resort, be considered as an alternative means of a child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.

67 See also the position in South Africa, as expounded on in the *Fitzpatrick* case, para. 31.

68 1995 (4) SA 790 (AD).

69 (ibid:822).

But where fraud, dishonesty or other improper conduct ... is found to be present, other considerations will come into play. The need to preserve the separate corporate identity would in circumstances have to be balanced [against] policy considerations which arise in favour of piercing the corporate veil ... and a court will then be entitled to look into substance rather than form in order to arrive at the true facts, and if there has been a misuse of the corporate personality, to disregard it and attribute liability where it should lie.

The rationale for piercing can be seen in the dictum by Goldin J in *RP Crees (Pvt) Ltd v Woodpecker Industries (Pvt) Ltd*,⁷⁰ where the court said that “the lifting of the corporate veil is possible” and may be necessary so as to prove who determines or who is responsible for the corporation’s activities and decisions.⁷¹

Chapter 11 of the draft law regulates the position regarding inter-country adoption. In terms of this Chapter, a person habitually resident in a foreign country who wishes to adopt a child habitually resident in Namibia is required to apply to the competent authority of the country concerned, which authority is tasked with submitting a report to the Namibian Minister. No inter-country adoption is permitted to take place without the latter’s approval. If the central authorities of both countries agree to such adoption, then the application is processed by the children’s court.⁷²

This procedure is in line with the Hague Convention, which highlights the international concern focused on child trafficking. The objects of that Convention, according to Article 1, are –

- (a) to establish safeguards to ensure that inter-country adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognised in international law;
- (b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- (c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.

In terms of the draft law regarding the behaviour related to the facilitation of trafficking, a person “may” (not *shall*) not knowingly leasing or subleasing or allowing any room, house, building or establishment to be used for the purpose of harbouring a child who is a victim of trafficking; and “may” not advertise, publish, print, broadcast, distribute or cause the advertisement, publication, printing, broadcast or distribution of information that suggests or alludes to trafficking by any means, including the use of the Internet or other information technology.

70 1975 (4) SA 485 (R) at 491.

71 *RP Crees (Pvt) Ltd v Woodpecker Industries (Pvt) Ltd*, 1975 (4) SA 485 (R), at 487 E–G. This view is supported in a judgement by Margo J in *Gering v Gering & Another*, 1974 (3) SA 358 (W) at 361.

72 MGECW (2009b).

The use of the modal verb *may* could be problematic: it leaves an option open, i.e. a person could be permitted to perform the specified actions under certain circumstances. The proposed legislation does not create clarity on which situations a person is strictly prohibited from performing any such actions. It is not clear why the drafters decided to express this imprecisely because a loophole now seems to have been created.

In comparison with the South African legal position, the problems surrounding the verification of background information from foreign applicants for adoption are dealt with unequivocally: a social worker unable to verify facts relating to the foreign applicant's background would be required to bring such application to the attention of the children's court.⁷³ Consequently, if the children's court is not satisfied with the verification of any information relevant to the adoption, the application would necessarily have to be denied. This is in the event where the court is unable to satisfy itself on certain matters,⁷⁴ and, in terms of section 18 of the South African Children's Act, the court would be obliged to refuse the order.

A related concern in South Africa is that, without bilateral agreements between South Africa and the applicable foreign state, effective post-adoption monitoring would not be possible in respect of inter-country adoptions. This problem exists even with section 18(4)(f) of the South African Children's Act,⁷⁵ when South African adoptive parents emigrate. Furthermore, it could take many years to negotiate bilateral agreements with all of the relevant foreign governments. The absence of such agreements alone may present similar problems, which the Namibian legislature should look into.

Consent to medical treatment, testing and emergency operations

It is clear that children need special protection because of their tender age and physique, mental immaturity, and incapacity to look after themselves. Recognising this, the proposed law provides for an age at which a child can consent to medical treatment.

The proposed law introduces a new general rule in terms of which a child may consent to medical treatment. This means that Namibian law will now recognise the 'mature minor rule', which entails that minors can consent to medical treatment. This implies, that if the medical practitioner believes the minor can give informed consent to the treatment and it is in the minor's best interest not to notify his or her parents, the medical practitioner concerned can proceed with the treatment.

The exception is that a child cannot consent if s/he is below 14 years of age, and if s/he is not of sufficient maturity and is mentally incapacitated to understand the benefits, risks, and social and other implications of the treatment.⁷⁶ In situations requiring emergency

73 See *Fitzpatrick*, para. 33.

74 See *Fitzpatrick*, para. 30.

75 No. 38 of 2005.

76 MGECW (2009a).

medical treatment for a child, the draft legislation gives power to the superintendent of a hospital (or the person in charge of the hospital in the absence of the superintendent) to “consent to the medical treatment of or a surgical operation on a child”.⁷⁷ The proposed law also provides for conditions to this power, saying that the power can be exercised if –⁷⁸

- the treatment or operation is necessary to preserve the life of the child or to save the child from serious or lasting physical injury or disability, and
- the need for the treatment or operation is so urgent that it cannot be delayed for the purpose of obtaining consent.

A further difficult question for which the draft legislation does not provide an answer concerns consent to abortion: the proposed Bill is silent on this. The legal drafters must have had the Abortion and Sterilisation Act⁷⁹ in mind when they omitted this, but the draft law should mention this or at least refer to the said Act, especially considering the issue of abortion where a minor is impregnated without having planned for the pregnancy. It is recommended that the draft legislation include a clause to the effect that an unmarried minor female needs to obtain the consent of one parent or her guardian for abortion. If she is unable to obtain consent from a parent/guardian or chooses not to ask for consent from a parent/guardian, she may petition the High Court to obtain consent since the High Court is the upper guardian of all minors in terms of the common law.

The current age of consent to medical treatment and operations is 18. Public discussions have been ongoing in terms of finding out exactly what the age of consent to medical treatment should be. Young people were also involved in this discussion through radio programmes and Facebook. In order to consent, the child would have to be a certain age and have sufficient maturity and mental capacity to understand the benefits, risks, and social and other implications of the treatment. The same holds true for a child undergoing a surgical operation, but in this case, the child's parent/guardian is obliged to give consent as well. The age had not yet been decided at the time this article was compiled.

There is no standard by means of which to measure the level of maturity or understanding of a child, so it is an intricate matter to ascertain with certainty whether or not a child is mature and understands the surgical procedures s/he will be subjected to. The draft law should cover this loophole.

The proposed legislation also covers the issue of HIV testing for children. It provides that a child may not be tested for HIV unless it is in his/her best interest for the test to be done. In this light, there are two basic areas covered:

- The general circumstances under which a child may be tested for HIV and AIDS, and
- Provisions concerning consent.

77 (ibid.:70).

78 (ibid.:70).

79 No. 2 of 1975.

The overall ‘best interest of the child’ standard is to prevail generally as regards when it is appropriate to subject a child to an HIV test. There are, however exceptions, to this, and here Namibia borrows from the South African Children’s Act. These exceptions are where a healthcare worker may have come into contact with the body fluids of a potentially HIV-positive child, or where any other person may have done so – but, in the latter instance, prior authorisation needs to be sought from a court, presumably a children’s court.⁸⁰

General application of the ‘best interest’ principle

It should be noted at this point that the ‘best interest’ rule is the yardstick guiding the application of the draft legislation in its entirety; but in this context, and particularly in areas concerning child adoption and custody, it should be emphasised that this principle has been the subject of extensive consideration in academic, operational and other circles. Legal documents relating to the protection of children include this principle, as incorporated in the documents of the United Nations High Commissioner for Refugees (UNHCR);⁸¹ but how to apply the principle in practice often remains challenging for the UNHCR and its partners. In addition, limited guidance is available on how to operationalise the principle.

The interpretation and application of the ‘best interest’ principle is obliged to conform with the CRC and other international legal norms, as well as with the guidance provided by the Committee on the Rights of the Child in its 2005 General Comment No. 6, which deals with the treatment of unaccompanied and separated children outside their country of origin. The CRC neither offers a precise definition, nor explicitly outlines common factors of the best interest of the child, but stipulates the following.⁸²

In addition to these four principles, the CRC provides for a number of fundamental rights which include, inter alia, the need for protection from abuse, exploitation and neglect, and the importance of the physical and intellectual development of the child. It gives particular attention to the role of the family in providing care to the child, to the special protection needs of children deprived of their family environment and those of asylum-seeking and refugee children.

It should be mentioned here that the principle arising from Article 3 of the CRC, namely that the best interest of the child has to be a primary consideration, needs to be applied in a systematic manner for any action by the UNHCR that affects children under its auspices. It applies to actions affecting children in general or to specific groups of children, as well as to those affecting individual children of concern.

80 Devel & Skelton (2007:7–38).

81 UNHCR (2008:16).

82 (ibid.).

Corporal punishment

The draft legislation would require any person who has control of a child, including the child's parents, to respect the child's right to physical integrity. This would include foster parents, primary caretakers and other caregivers. According to the MGECW summary report on the draft law,⁸³ it is absolutely forbidden for anyone to administer corporal punishment to a child at any place of safety, place of care (which covers crèches, day care centres, etc.) shelter, children's home or educational and vocational centre.⁸⁴

The proposed law also states that any law which allows corporal punishment of a child by a court, including a traditional court, is no longer valid. This rule covers statutes, common law and customary law.⁸⁵

In addition, it should be noted that the proposed legislation covers certain controversial areas in Namibian law regarding corporal punishment. The controversy arises over whether the prohibition of corporal punishment by the Supreme Court in the case of *Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State*⁸⁶ extended to chastisement by traditional authorities, and whether it included chastisement by parents. Although it could be argued that any form of corporal punishment is in contravention of Article 8 of the Constitution, it was not conceivable that the law also forbade parents from disciplining their children by way of corporal punishment.

The blanket prohibition by the proposed law shows that Parliament has statutorily given effect to the findings of the Supreme Court that –⁸⁷

... there is less agreement with regard to the desirability or otherwise of the imposition of corporal punishment, judicially or quasi-judicially ordered to be meted out to juveniles, that is on young persons under the age of 21 years. Even less agreement exists in respect of the desirability or otherwise of corporal punishment in schools. It seems to me that once one has arrived at the conclusion that corporal punishment per se is impairing the dignity of the recipient or subjects him to degrading treatment or even to cruel or inhuman treatment or punishment, it does not in principle matter to what extent such corporal punishment is made subject to restrictions and limiting parameters, even of a substantial kind – even if very moderately applied and subject to very strict controls, the fact remains that any type of corporal punishment results in some impairment of dignity and degrading treatment.

Thus, the draft legislation embodies the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and Constitution, as well as the emerging consensus of values in the civilised international

83 MGECW (2009a).

84 (ibid)

85 (ibid.).

86 1991 (3) SA 76 (NmSc).

87 See *Ex parte: Attorney-General, In Re: Corporal Punishment by Organs of State*, 1991 (3) SA 76 (NmSc).

community against torture and inhuman and degrading treatment – in this case in the context of children.⁸⁸

Other child protection measures

The draft law provides for protective measures for children in particularly vulnerable situations such as child-headed households,⁸⁹ the worst forms of child labour, child safety at places of entertainment, and crimes related to child abuse and neglect. The issue of child-headed households is an important one in Namibia, where some children have been orphaned due to the high prevalence of HIV. In terms of the proposed legislation, the Minister of Gender Equality and Child Welfare may recognise a household as being *child-headed* if the children's parent or caregiver is terminally ill or has died; if no adult family member is available to provide care for the children in the household; and if a child has assumed the role of caregiver in respect of a sister or brother in the household. The draft law does not define *child-headed household*, but, drawing on the definition of *child* therein, *child-headed household* can be defined as one which is led by a child under the age of 18. This child takes on the responsibilities usually assumed by parents, including providing care to other children. Children as young as 12 head some households in Namibia.

The main event that leads to the establishment of a child-headed household is the death of both parents. However, in some cases, one parent or even both parents are still alive. Other events include parental illness or disability. In some cases, one or both parents have left the family home for some reason. Although there are many documents about teenage pregnancy, this does not appear to have been identified as a factor in causing the establishment of child-headed households.

Circumstances leading to child-headed families differ, but it is conceivable that, in most cases when both parents die, the eldest minor child may take over as the head of the household – thus creating a child-headed household. On other cases, the child-headed household is not established immediately at the time of parental death. Often, the children are cared for initially by a relative, often a grandparent. Only another event, such as the death of that caregiver in turn, can result in a child-headed household being established.

Conclusions

The draft legislation – which is still under review and will still usher in more amendments before reaching Parliament – shows a reform process that will lead to the enactment of the Child Care and Protection Act, which in itself will be a tremendous move for Namibia, and it can be used as one of the best practices in the Southern African Development

88 UNHCR (2008:20).

89 The term *child-headed households* may change in the draft legislation under review and yet to be made public.

Community – if not Africa. This law will provide greater protection and prevention for, and will promote the well-being of, children in Namibia because it encompasses all relevant international instruments that the country has ratified, as well as those that it is considering, like the 1993 Hague Convention. Namibia can be applauded for initiating for such law reform.

Opponents of children's rights believe that young people need to be protected from the adult-centric world, including the decisions and responsibilities of that world.⁹⁰ In the adult society, childhood is idealised as a time of innocence, a time free of responsibility and conflict, and a time dominated by play.⁹¹ The majority of opposition stems from concerns related to national sovereignty, state rights, and the parent–child relationship.⁹² Financial constraints and the “undercurrent of traditional values in opposition to children's rights” are cited as well.⁹³ Notably, the concept of *children's rights* has received little attention in the United States – which is, however, in the process of ratifying the CRC.

Nonetheless, in terms of the draft legislation, the state will be responsible for taking all available measures to ensure children's rights are respected, protected and fulfilled. With the draft legislation and the ratification of Conventions giving effect to the rights of children, Namibia will need to constantly review her laws relating to children. This involves assessing national social services; legal, health and educational systems; and the levels of funding made available for these services and systems. Under international law, governments are obliged to take all necessary steps to ensure that the minimum standards set by the CRC are met. States Parties need to help families protect children's rights and create an environment where children can grow and reach their potential. Indeed, Article 41 of the Convention points out that, when a country already has higher legal standards than those seen in the Convention, the higher standards always prevail.

References

- Amnesty International USA. 2009. *Frequently asked questions about children's rights*. Available at http://www.amnestyusa.org/children/crn_faq.html; last accessed 29 September 2009.
- Aries, P. 1996. *Centuries of childhood*. New York: Vintage Books.
- Coomer, R. 2009. “Protecting the next generation: Have your say on the Child Care and Protection Bill”. *The Namibian*, 29 May.
- Covell, K & RB Howe. 2001. *The challenge of children's rights for Canada*. Waterloo: Wilfrid Laurier University Press.
- DeLamater, JD. 2003. *Handbook of social psychology*. New York: Kluwer Academic & Plenum Publishers.

90 DeLamater (2003:150).

91 Lansdown (1994:33–34).

92 Amnesty International USA (2009).

93 Covell & Howe (2001:158).

- Devel, CJ & AM Skelton. 2007. *Commentary on the Children's Act: Revision Service 1*. Cape Town: Juta & Co. Ltd.
- Farson, RE. 1974. *Birthrights: A Bill of Rights for children*. London/New York: Macmillan.
- Firestone, S. 1972. "Down with childhood". In Firestone, S (Ed.). *The dialectics of sex: The case for a feminist revolution*. New York: Bantam Books.
- Flatham, R. 1976. *The practice of rights*. Cambridge: Cambridge University Press.
- Franklin, B. 1986. *The rights of children*. New York: Basil Blackwell Ltd.
- Freeman, MDA. 1983. *The rights and wrongs of children*. London: Frances Printer.
- Holt, JC. 1996. *Escape from childhood*. Harmondsworth: Penguin.
- Hubbard, D. 2009. *Namibia's Draft Child Care and Protection Bill: Process for public awareness and input*. Windhoek: Legal Assistance Centre.
- International Social Service General Secretariat. 2009. *International Reference Centre for the Rights of Children Deprived of their Family. Fact Sheet No. 36 on Intercountry Adoptions*. Available at http://www.iss-ssi.org/Resource_Centre/New_Documents/documents/FactSheetNo36ENG.pdf; last accessed 23 June 2009.
- Lansdown, G. 1994. "Children's rights". In Mayall, B (Ed.). *Children's childhood: Observed and experienced*. London: The Falmer Press.
- MGECW/Ministry of Gender Equality and Child Welfare. 2009a. *Draft Child Care and Protection Bill: Summary*. Windhoek: MGECW.
- MGECW/Ministry of Gender Equality and Child Welfare. 2009b. *The Draft Child Care and Protection Act: Issues for public debate*. Windhoek: MGECW.
- Plumb, JH. 1973. *In the light of history*. Boston: Houghton Mifflin.
- Ralph, 1998. "The best interests of the Aboriginal child in family law proceedings". *Australian Journal of Family Law*, 2(2):140–149.
- Rodham, H. 1973. "Children under the law". *Harvard Educational Review*, 43(4):487–514.
- Pinchbeck, I & M Hewitt. *Children in English society*, Vol. 2. London: Routledge & Kegan Paul.
- Satir, V. 2009. "A quote on family, flourish, atmosphere, individual, difference, mistakes, toleration, and flexible". Available at http://www.gaia.com/quotes/virginia_satir_1; last accessed 12 September 2009.
- Starr, RH. 1975. "Children's rights: Countering the opposition". Unpublished paper presented at the 83rd Annual Meeting of the American Psychological Association in Chicago, Illinois, 30 August–3 September 1975.
- Stasiulis, D. 2004. "The active child citizen: Lessons from Canadian policy and the Children's Movement". *Polis Revue Camerounaise De Science Politique*, 12, Numero, Special 2004–2005. Available at <http://www.polis.sciencespobordeaux.fr/vol12ns/stasiulis.pdf>; last accessed 18 September 2009.
- Tucker, N. 1977. *What is a child?*. London: Open Books.
- UNHCR/United Nations High Commissioner for Refugees. 2008. *UNHCR Guidelines on determining the best interests of the child*. Available at <http://www.unhcr.org/refworld/docid/48480c342.html>; last accessed 17 September 2009.

The best interest of the child

Yvonne Dausab

Approximately 60 per cent of people in Namibia are under the age of 25. Nearly 40 per cent of the population are under the age of 15. The fact that children make up such a large proportion of the population is reason enough to support the need for robust legislation on the care and protection of children ...¹

Introduction

Traditionally, children were only supposed to be seen and not heard; as a result, their views and interests often did not matter. These and other entrenched beliefs about the place and position of children in our societies have left them vulnerable, making them susceptible to physical, psychological, emotional and sexual abuse. But it is not their fault. They have done nothing wrong. The state of affairs in which children find themselves warrants their protection. Besides the right to protection, children in Namibia are entitled to all the other rights provided for them in the Constitution as well as other international human rights instruments.² Approaching the promotion and protection of children's rights from this angle serves to support existing legislation and the Constitution in adequately catering for the needs of our children.

It is evident that the plethora of legislative and other measures of protection that exist lack effectiveness when it comes to the monitoring and implementation of children's rights. Furthermore, the laws on children that currently exist are either completely silent on specifically providing for the principle on the best interest of the child, or where this principle can be inferred, it is not adequate. Still, this norm is used as a yardstick against

1 Rachel Coomer, cited in *The Namibian*, 9 October 2009; "Protecting the next generation: Have your say on the child care and protection bill". Available at <http://www.namibian.com.na/columns/full-story/archive/2009/may/article/protecting-t..2006/>; last accessed 7 October 2009.

2 Notably, they are entitled to the right to life, human dignity, freedom from slavery and forced labour, equality, and freedom from discrimination. In the Namibian Constitution privacy (article 13), family (article 14), and education (article 20), and the fundamental freedoms (article 21). Also see Naldi (1995:75–85) for a discussion on these rights. In regard to discrimination, see unreported judgement of *Lotta Frans v Inge Paschke & Others* 1548/2005, per Damaseb, JP, holding that the common law rule that discriminated against "illegitimate children" as far as intestate inheritance was concerned was unconstitutional as the differentiation amounted to discrimination.

which a wide range of issues from maintenance, custody, control and guardianship, rights of access, and all other ancillary matters are measured.

This contribution seeks to address the principle of the best interest of the child, which overarches all the above rights, freedoms and norms. However, no detailed reference will be made to exactly how this principle touches on the issues that affect children, since the other authors in the current volume do so adequately elsewhere herein. However, in an effort to elucidate the said principle, cursory reference will be made to some case law to illustrate its application, and to the international, regional and national human rights normative framework within which the principle applies.

Defining *child* and conceptualising the ‘best interest’ principle

A *child*, as a human being, is recognised by law as a legal subject. In other words, in the eyes of the law, a person³ acquires certain rights, duties and capacities at birth.⁴ This is so despite the child's legal capacity being limited during the initial stages of its life.⁵ This limitation has to do with the ability to perform certain acts within the purview of the law. These include the ability to –⁶

- have or possess legal rights and duties
- perform juristic acts
- incur civil or criminal responsibility for wrongdoing, and
- be a party to litigation, i.e. to have *locus standi* in *judicio*.

It is also a limitation in the further sense that the child is not entirely excluded from participating in the processes made available through the law, and can partake, depending on the nature of the matter, through a guardian, and so forth.⁷ It makes sense, therefore, that only those that are able to deal with the consequences of their actions are allowed to acquire the necessary powers, rights and duties to interact in this manner. How does the law, then, define *child*?

In terms of the applicable legislation on children in Namibia, namely the Children's Act,⁸ the Children's Status Act,⁹ and the Child Care Protection Bill of 2008, a *child* is generally defined as –¹⁰

3 Boberg (1977:3) states that “every human being is a person in law”.

4 Barnard et al. (1990:8; cited in Cronje 1990).

5 Children go through various stages of development: newborn, infancy, early childhood, adolescence, and adulthood. See <http://en.cyberdodo.com/files/definition-of-the-child/2.html> last accessed 9 October 2009.

6 See Boberg (1977:530–531); cf. also Barnard et al. (1990:8; cited in Cronje 1990).

7 Boberg (ibid.) states that “active legal capacity, generally, inheres only in those of sound mind who have attained majority”.

8 No. 33 of 1960.

9 No. 6 of 2006.

10 See section 1, Children's Act.

... a person, whether infant or not, under the age of 18 years, ... and includes a person who is over the age of 18 years but under the age of 21

In terms of these provisions, a child is within the age bracket 0–21 years. The proposal to make the age limit 18 years is arguably made in line with international trends and practices, which have lowered the age of majority to or have always had it at 18.¹¹ It is, of course, arguable whether this will necessarily make sense for a country like Namibia, where in many instances some 18-year-olds are still at school.¹²

Meaning of *best interest of the child*

Simply put, the *best interest of the child* means considering the child before a decision affecting his/her life is made. This is a principle that has established itself through all matters and legislation affecting the well-being of the child. It is an overarching common law principle that has been used to assist primarily courts and other institutions in the decision-making process. It should be borne in mind that courts are the upper guardians of minor children and, if the need arises, have a final say in determining the overall welfare of the child. This they do through a relatively delicate balancing of interests. These interests themselves are particularly sensitive as they often relate to family status matters in terms of divorce, maintenance, and custody and control.

The most commonly cited examples of where the norm relating to serving the best interest of the child becomes applicable is in custody and divorce matters. As will be shown through examples in case law, the process of deciding on what exactly is the *best interest* of the child is not an easy task. Courts and other institutions confronted with this question often have to ask themselves the following questions:¹³

- Which specific interest is at issue?
- What is the nature of such interest?
- Is the interest of a long-, medium- or short-term duration?
- Are the criteria for determining such interest objective or are they based on the child's subjective wishes?

As one may well imagine, the responses to these questions is varied.

The sad fact is that the test or standard regarding what is in the best interest of the child has failed the child in some instances,¹⁴ and is therefore not complete proof that the

11 For instance, Article 1 of the Convention on the Rights of the Child (CRC) provides that *child* should mean “every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier”.

12 “Although the SA Act 38 of 2005 lowered the age of majority to 18, Namibia will probably stick with the traditional age of 21, experts say” (Van den Bosch 2009).

13 See Mahlobogwane (2005).

14 Currie & De Waal (2007:618) state the following:

The concept of the best interest of the child is not without difficulty. It has become controversial because it has failed in the past to provide a reliable or determinate standard. In addition it creates

application of the principle in determining what is in the best interest of the child is flawed. When applied correctly, the principle does yield the required results in that the interest of the child is taken care of. However, the consistency in applying this principle correctly each time there is a matter that requires the determination of the best interest of the child may require some form of uniform guidelines from the courts, without imposing a standard that disregards the uniqueness and merits of each individual case.

The 'best interest' principle through the lens of the courts

The 'best interest' principle has been used to develop child care jurisprudence in Namibia since Independence in 1990.

Namibian law is based on Roman–Dutch law and the South African common law, which means its statutes continued to be applicable in Namibia even after the latter's independence. Despite independence officially having signalled a break from its past, Namibia has only partially addressed the relevance of its inherited laws in the new state.¹⁵ For example, most – if not all – the inherited archaic laws that still apply in Namibia have in the intervening years already been repealed, amended and/or modified in South Africa.

Thus, whilst Namibia has developed an impressive corpus of jurisprudence on constitutional matters and some legal principles on family law and persons, the country has not specifically looked at and laid down broad principles on the application of the 'best interest' standard. It appears there is still quite a heavy reliance on pronouncements made on the issue in South African case law. Reference to decisions in case law only has strong persuasive value, and given the historical ties and similarities to its southern neighbour in context, Namibian courts are likely to follow similar approaches should similar matters be decided after the Child Care and Protection Bill.¹⁶

In a relatively old but valuable Appellate decision, the court in *Fletcher v Fletcher*¹⁷ had to decide on the question of custody of a minor child and what the best interest of the said child was. The case involved an appeal from a judgment in the court a quo following an order of divorce. The appellant had committed adultery,¹⁸ and had consequently lost

the danger of social engineering through what the helping professional or social services consider to be in the best interests of the child.

15 Article 140 of the Namibian Constitution provides for legal continuity, as follows:
...all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a competent Court.

16 See remarks by Julia Sloth-Nielsen, cited in Van den Bosch (2009):
The current Namibian Act of 1960 is rooted in the same historical context as South Africa's old legislation, so Namibia's child protection practice is closer to South Africa than any other country ...

17 1948 (1) SA 130(A), at 130–148.

18 For brief facts of the case, refer to 141 of the judgment.

custody of her minor children. She appealed against the decision, but only on the issue of custody.

The majority decision¹⁹ in this case confirmed the court a quo decision, which was that custody of the minor children was granted to their father, the respondent. Thus, the children were to live with their aunt, whilst their father prepared himself to receive them. In coming to its decision, the court relied quite heavily on the fact that the father was innocent²⁰ (whereas his ex-wife, the appellant, had committed adultery), reaffirming the principle that the innocence of one spouse should not be ignored, but it should also not be the determining factor. The overriding consideration in this case (which is not apparent from the example, which focuses on the aunt, the father and the mother) was the interest of the child itself.²¹

Further to this the appellant shot herself in the foot by lying in court and showing herself as unreliable and unstable.²² Because of the position of the Appellate court, in that they do not get to assess the character of the witness, they are not likely to depart easily from the views expressed by the court a quo.²³ It is clear that due consideration was accorded to her character, and how this would influence her children in the long run. Therefore, she was not seen as a fit and proper person to look after her children.²⁴

Interestingly, in this case, the majority of the court granted custody to the father, who was not going to take custody and control of the children immediately. The character of the appellant was tested against that of the aunt (sister to the respondent). Understandably, the character of the respondent was not put in issue; but for determining whether or not he was a fit and proper person, this should have been part of the evidence before the court a quo.

Due regard to the dissenting judgment is prudent, therefore.²⁵ This judgment shows how courts should exercise their discretion without being limited by a cast-in-stone standard called the ‘best interest of the child’.²⁶ The application and interpretation of this principle

19 Centlivres, JA, with Greenberg, JA agreeing.

20 *Rogers v Rogers* was quoted in the *Fletcher* case, at 134:

When a mother confesses to adultery, I cannot say that she is *prima facie* the proper custodian of her daughter. When the action is heard, this Court, which is the upper custodian of minors, will have to consider the whole question from the point of view of the children’s interests.

21 (ibid.).

22 Delivered by Schreiner, JA, at 148:

... I do not think she has shown herself as a well-balanced person. I have referred to attacks she made on witnesses ... I do not think it is in the best interest of the child that they should be put in the care of a person who is prepared to behave in that way.

23 See *Fletcher* case, at 137:

... I have come to the conclusion, which I have already expressed, that the defendant has deliberately lied in the witness-box ... and this is a fact that must be taken against her ...

24 (ibid.).

25 Delivered by Schreiner, JA, at 141–148.

26 (ibid.:144):

is by no means easy. This is evidenced by the difficulties the court had in either setting a rule to guide or simply treating each case on its own merits.²⁷ The Judge of Appeal, in writing his minority judgment, quite aptly used the evidence presented in court, and showed how wholly inadequate it was to conclude that the father was suitable to have custody of the minor children. He stated the following in this regard:²⁸

Unfortunately, there is no finding by the learned judge as to his impressions of the respondent's qualities so far as they were disclosed in the course of the trial. His character was, of course, not in issue in the case to anything like the same extent as that of the appellant, *but when considering which parent ought to be awarded the custody it is important to consider the factors relating to each in order to be able to decide. Not whether the one or the other is likely to be a really good or bad custodian, but which is likely to be the better.* [Emphasis added]

Now it is not being suggested here that the respondent was not a fit and proper custodian; however, there was no evidence before the court to support the assumption that he was in fact the more suitable of the two parents. Indeed, had evidence been presented, it may well have suggested that he was not or that he in fact was.²⁹ This case is a good illustration of the manner in which the courts ought to deal with custody matters when applying the notion of *best interest of the child*. It also demonstrates that a misapplication or misinterpretation of evidence, or not allowing for sufficient evidence to be heard, can lead to an absurdity that can eventually hurt the children.

Other cases cited in the above judgment enunciated the following set of general principles. In *Stark v Stark*³⁰ it was stated that –

... it is always to be borne in mind that the benefit and interest of the infant is the paramount consideration, and not the punishment of the guilty spouse ...

In the matter of *Krugel v Krugel*,³¹ the court had to decide whether to maintain a joint custody order in respect of two minor children, following relocation by one parent. The allegation was that the relationship between the two parents had completely broken

It has been said to be inadvisable to lay down strict rules as to how the Court's discretion should be exercised. But where that caution has been most clearly stated, Courts have at the same time considered it useful to repeat the preponderating importance of the welfare of the children, thus at least furnishing some guidance to those who have to exercise this discretion.

27 (ibid.):

I am at a loss to conceive how any general rule upon such a subject can be laid down"; and this was followed by another judge saying, "and it is always to be borne in mind that the benefit and interest of the infant is the paramount consideration ..."

28 (ibid.:147).

29 The respondent's plan was to have his children live with his sister and her husband, and not even with one of their biological parents (ibid.:47). Given the evidence that was presented, the learned Judge may have regarded the respondent as an unsatisfactory custodian of his children, but may have thought the aunt's apparently being a suitable person to look after them sufficient, thus rendering a full consideration of the respondent's qualities unnecessary.

30 *Stark v Stark* (1910 P.190) as quoted in *Fletcher*, at 144.

31 2003 (6) SA 220 (TPD).

down and would make a joint custody arrangement unpleasant.³² The court in the aforementioned case, considering the best interest of the child, stated as follows:³³

As long as both parents are fit and proper persons, it is important that they should have equal say in the raising of their children. ... Disagreements and negotiations are part of life. Unless the disagreement is of such a nature that the child is put at risk either physically or emotionally, it still seems preferable for the child to learn to deal with the ups and downs of two involved parents, than to lose half of his or her rightful parental input ...

In the result, the court was of the opinion that in this particular case the best interest of the children would be served by keeping the joint custody order intact.³⁴ This shows that the courts are careful in stating a rule or practice that should be followed in all cases. It leaves room for treating each case on its own merits. Nonetheless, the paramountcy of the best interest of the child is a constant.

In terms of general considerations and principles, the position of how the best interest principle should be treated by other courts and institutions dealing with issues affecting children has not changed much. The factors considered when determining the best interest of the child are not different today than they were in the year 1948. The factors that the courts need to consider are perhaps more entrenched now than before a constitution which has a rich catalogue of constitutionally protected rights for children. For example, the South African Constitution specifically protects the principle.³⁵ In *Hlope v Mahlalela*,³⁶ the court held as follows:

‘The best interest of the child’ was the main criterion to be employed in disputes relating to the custody of children, to the exclusion of any rule of customary law. Therefore, the criterion, irrespective of the type of marriage contracted, and irrespective of whether or not the parents are unmarried, or *lobolo* has been fully provided, applies to all disputes concerning children.

In other words, the application of the ‘best interest’ principle cannot be conveniently excluded on the basis of culture, historical context and/or any matter that may seem justified in the circumstances.

The legal basis for the best interest of the child

There are a number of legal instruments that specifically provide for the best interest of the child as a legal norm. This principle is a well-established principle of the international,

32 Reference is of course made to various cases supporting the traditional viewpoint against joint custody; see e.g. *Kastan v Kastan* 1985 (3) SA 235 (C); *Pinion v Pinion* 1994 (2) SA 725 (D), cited in the *Krugel* decision at 224–225.

33 See *Krugel* case, 228C–D.

34 (ibid.).

35 Section 28(3), South African Constitution.

36 Maithufi (2000:146). See also *Bannatyne v Bannatyne* CGE as *Amicus Curiae* 2003 (2) SA 363.

regional and national normative framework. The principle is also entrenched and provided for in United Nations human rights legal instruments;³⁷ in addition, the African Union's African Charter on Human and Peoples' Rights (the African Charter) and the African Charter on the Rights and Welfare of the Child (ACRWC) provide for it, and national constitutions in their children's rights provisions make reference to it.

There are a number of statutes such as the Maintenance Act, the Children's Status Act and the envisaged Child Care and Protection Act that either make specific reference to the principle of the best interest of the child, or such principle can be inferred from the provisions in the statutes that the factors will lead to a determination of the best interest of the child.

The best interest of the child in the Namibian context

The Namibian Constitution is the supreme law of the country,³⁸ and provides for the protection and promotion of a wide array of human rights.³⁹ This supremacy then also means that any law or conduct inconsistent with the provisions of the Constitution will be invalid.⁴⁰ Children's rights are provided for in terms of Article 15(1). Unlike the South African Constitution,⁴¹ which specifically provides that "A child's best interest is of paramount importance in every matter concerning the child", there is no such explicit provision in the Namibian Constitution. Instead, the supreme law of leaves this task to the legislator.⁴² This is problematic because, as the supreme law, the Constitution ought to be the guiding document. Legislators are supposed to seek guidance from the Constitution when drafting laws that will affect the rights of children. For example, in the Married Persons' Equality Act,⁴³ it is not clear on what basis custody and control of minor children are granted. Whilst the courts would probably refer to jurisprudence on the subject to make a determination, the law ought to be self-sufficient enough to ensure there is no prejudice to the beneficiaries of such law.

Despite the earlier lament that the principle of serving the best interest of the child is conspicuously absent in the highest law of the land, it does not mean the inclusion of the principle in other laws of general application is insufficient. Moreover, the comprehensive

37 Universal Declaration of Human Rights and the Convention on the Rights of the Child. See also the Hague Convention of 1980 on the civil aspects of international child abduction.

38 See Article 1(6), which states that "[t]his Constitution is the supreme law of Namibia".

39 In terms of its Chapter 3, the Namibian Constitution has an entrenched and justiciable Bill of Rights.

40 See Article 25(1) of the Constitution, which states that –
... Parliament ... shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid:

41 See Act No. 108 of 1996, section 28(2).

42 Naldi (1995:79).

43 No. 1 of 1996.

nature of the envisaged Child Care and Protection Act can possibly fill any lacunae that exist. Giving effect to the principle in question is further buttressed by Namibia's obligations under international and regional instruments. So, in the event that domestic law – including a country's Constitution⁴⁴ – does not adequately protect the rights of the child, the safeguards provided by, for instance, the Convention on the Rights of the Child (CRC) should be sought.

The 'best interest' principle as provided for under international law⁴⁵

Article 144 of the Namibian Constitution, although it remains arguable and subject to many interpretations, provides for international law and states that unless an Act of Parliament provides otherwise, international agreements and the general rules of public international law are applicable and part of Namibian domestic law. In other words, once Namibia ratifies an international instrument, it is supposed to be directly applicable into its legal system.⁴⁶ However, this is not entirely the position in practice because reality dictates that, for a law to be enforced, it requires an enforcement mechanism. It is clear that even the Namibian courts have not taken this provision into account when interpreting constitutional matters.⁴⁷ That the provision is binding is without question; but whether the citizenry can actually get an effective remedy using international law as a basis is questionable – albeit not impossible.

Since Namibia ratified the CRC,⁴⁸ it is applicable in the country. Article 3 of the Convention provides the following:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

In its General Comment No. 7,⁴⁹ the Committee stated the following:⁵⁰

The principle of the best interests applies to all actions concerning children and requires active measures to protect their rights and promote their survival, growth, and well-being, as well as measures to support and assist parents and others who have the day-to-day responsibility for realizing children's rights ...

44 Articles 5, 22 and 25 can be used to institute proceedings if a party is aggrieved.

45 See the contribution by Oliver Ruppel elsewhere in this volume.

46 See Horn (2008:141).

47 (ibid.).

48 This Convention entered into force on 2 September 1990, and Namibia ratified it on 30 September 1990; see United Nations (2002:183).

49 Committee of the Rights of the Child, General Comment No. 7, 2005 CRC/C/GC/7/Rev.1, para. 13, as quoted in Hodgin & Newell (2007:37).

50 (ibid.).

On the regional front, Namibia, as a member of the African Union, has an obligation to comply with the standards set out in the ACRWC.⁵¹ Namibia ratified this Charter on 23 July 2004 – approximately five years after its adoption, whereas it ratified the CRC in the same month that it entered into force in 1990. The latter could probably be attributed to the euphoria that came with Namibia's independence in that year.

The 'best interest' norm, as provided for in the ACRWC, was solidified by making the 'best interest' consideration the ultimate consideration – as opposed to simply being one of many, as in the CRC.⁵² Furthermore, the ACRWC slightly augmented the norm by the addition of Article 4(2). Article 4 provides for the opportunity for a child who is in the position to do so – i.e. that can communicate – that such child's views be heard and that such views be taken into consideration "by the relevant authority in accordance with the provisions of appropriate law".⁵³

The protection of children's rights is dependent, at least notionally, on the duties and responsibilities parents have in relation to their children. For children to enjoy their rights to the maximum requires parental guidance and support.⁵⁴ In addition to this, States Parties are obliged to enact legislation similar in tone and scope to the international instrument they ratify to ensure its effective implementation.

Other statutes

The Maintenance Act⁵⁵ provides for a tone that supports the best interest of the child. Previously, the issue of maintenance was a 'battle of the sexes'. The emphasis of the current legislation on maintenance is that it is about the welfare of the child.⁵⁶ For example, a father who pays maintenance faithfully cannot stop paying because he is refused access to the child; instead, he must fight the injustice as regards his reasonable access whilst he continues to pay.

The idea of *best interest of the child* is implied throughout the Act.⁵⁷ The Act also places considerable emphasis on the role played by maintenance officers, like obliging them

51 Adopted in Addis Ababa, Ethiopia, on 11 July 1990; it entered into force on 29 November 1999.

52 See Viljoen (2007:263):

In any event, the overriding consideration in resolving interpretive disputes should be the guideline that the best interest of the child shall be *the primary* consideration. [Emphasis added].

Also see Article 4(1) of the African Children's Charter, as quoted in Viljoen (*ibid.*:214).

53 See Article 4(1) and (2) of the African Children's Charter, which sets out the best interest of the child; see the full text in Heyns & Killander (2007:64).

54 (*ibid.*).

55 No. 9 of 2003.

56 See section 4(1), which sets out the principles that need to be considered in maintenance cases.

57 (*ibid.*). See section 16(2), (3) and (4), which provides for all circumstances.

to institute an inquiry almost immediately if payments are not made on time, in order to avoid financial hardships for the beneficiary.

The Child Care and Protection Bill quite comprehensively sets out the ‘best interest’ principle as well as the factors to be considered when making a decision in the interest of the child. For example, the Bill takes into account the nature of the relationship between the child and its parents and/or other caregivers, their capacity, their attitude, and the effect that a change in environment will have on the child.⁵⁸ Compared with previous legislation dealing with children’s issues, the envisaged Act will give adequate content to the principle of the best interest of the child. Similarly, the Children’s Status Act has as its objective the promotion and protection of the best interest of the child, and to this end provides the following:

When making any decision pertaining to custody, guardianship or access, the best interests of the child are, despite anything to the contrary contained in any law, the paramount consideration ...

It then enumerates the factors⁵⁹ that the Children’s Court or any other competent court

58 Please refer to the full discussion of the Bill in Dianne Hubbard’s contribution elsewhere in this volume. The provision is in terms of section 4(1) of the Bill.

59 See subsections (1) and (2) of section 4, which provide the list of factors that can be very useful guide, as follows:

- (1)...
 - (a) the child’s age, sex, background and any other relevant personal characteristics;
 - (b) the child’s physical, emotional and educational needs;
 - (c) the capability of each parent, and of any other relevant person, to meet the child’s physical, emotional and educational needs;
 - (d) the fitness of all relevant persons to exercise the rights and responsibilities in question in the best interests of the child;
 - (e) the nature of the relationship of the child with each of the child’s parents and with other relevant persons;
 - (f) the degree of commitment and responsibility which the respective parents have shown towards the child, as evidenced by such factors as financial support, maintaining or attempting to maintain contact with the child or being named as a parent on the child’s birth certificate;
 - (g) any harm which the child has suffered or is at risk of suffering, directly or indirectly, from being subjected or exposed to abuse, ill-treatment, violence or other harmful behaviour;
 - (h) in a case where an application has been brought before the children’s court, the reasons for the application in question;
 - (i) any wishes expressed by the child or his or her representative, in light of the child’s maturity and level of understanding;
 - (j) the practical difficulty and expense of present and proposed arrangements;
 - (k) the likely effect of any change in the child’s circumstances; and
 - (l) any other fact or circumstance that the court considers relevant.
- (2) When deciding what is in the best interests of the child, the children’s court must consider the financial positions of the parents, together with the guidelines enumerated in subsection (1), but –
 - (a) the financial positions of the parents are not the decisive factor; and
 - (b) the court may not approve an application for the custody of a child if the application is based on a desire to avoid the payment of maintenance in respect of that child.

must take into account when making these decisions.⁶⁰ These factors are comprehensive and offer a useful guide in determining what it entails to protect the best interest of the child.

Conclusion

This contribution was an attempt to look broadly at the well-established norm of serving the best interest of the child. Clearly, this principle cannot be adequately discussed unless reference is made to the issues that commonly affect children, such as divorce, custody, maintenance, and so forth. It can also only be adequately illustrated by using real-life cases, as was done here, to show how the principle is considered and applied. Despite the limitation that the examples were mostly South African cases, they reflected fairly well what courts, domestic legislation and international instruments provide for with regard to this paramount principle in efforts to protect children.

The paper also showed that the 'best interest' principle cannot be cast in stone; and even though there is an attempt in the legislation to provide a list of factors to consider when deciding a matter affecting a child, the list is by no means exhaustive: it is simply a guiding framework. Inherent in our court systems are the principles of *stare decisis*⁶¹ and judicial precedent. Courts tend to rely on each other's judgments, such that there is not always enough room for flexibility. It will require some judicial activism on the part of judges and judicial officers to ensure each unique case is attended to on its own merits.

In the end, the courts, the administrative bodies and all other relevant authorities that may be confronted with having to decide on matters affecting children are obliged to consider each case on its own merits. It is hoped that, in the near future, once the Child Care and Protection Bill has been enacted, Namibia will develop a rich corpus of jurisprudence that will, in turn, mould this norm into a legal legacy that will enhance the protection of children and truly establish whether or not this principle truly lives up to ensuring the best interest of the child.

References

- Cronje, DSP. 1990. *The South African Law of Persons and Family*. Durban: Butterworths.
- Boberg, PQR. 1977. *The law of persons and the family, with illustrative cases*. Cape Town: Juta & Co. Ltd.
- Currie, I & J de Waal. 2007. *The Bill of Rights handbook*. Lansdowne: Juta & Co. Ltd.
- Davel, T. 2007. "General principles". In Davel, CJ & AM Skelton (Eds). *Commentary on the Children's Act*. Lansdowne: Juta & Co. Ltd, pp 6–9.
- Fouche, MA. 2007. *Legal principles of contracts and commercial law*. Durban: Lexis Nexis.

60 See sections 2 and 3 of the Act.

61 Fouche (2007:9): Meaning "to stand by previous judgements".

- Heyns, C & M Killander. 2007. *Compendium of key human rights documents of the African Union*. Pretoria: Pretoria University Law Press, p 64.
- Hodgkin R & P Newell. 2007. "Best interest of the child". In United Nations Children's Fund (Eds). *Implementation handbook for the Convention on the Rights of the Child*. New York: UNICEF.
- Horn, N. 2008. "International human rights norms and standards: The development of Namibian case and statutory law". In Horn, N & A Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Education Namibia, p 141.
- Kruger, J & B Currin (Eds). 1994. *Interpreting a Bill of Rights*. Kenwyn: Juta & Co. Ltd.
- Mahlobogwane, F. 2005. "South African courts and the best interest of the child in custody disputes". *Codicillus*, 46(1).
- Maithufi, I. 2000. "The best interest of the child and African customary law". In Davel, CJ (Ed.). *Introduction to child law in South Africa*. Lansdowne: Juta Law, p 146.
- Naldi, G. 1995. *Constitutional rights in Namibia: A comparative analysis with international human rights*. Kenwyn: Juta & Co. Ltd.
- The Namibian*, 9 October 2009; "Protecting the next generation: Have your say on the child care and protection bill". Available at <http://www.namibian.com.na/columns/full-story/archive/2009/may/article/protecting-t...2006>; last accessed 7 October 2009.
- Van den Bosch, Servaas. 2009. "Namibia updating child protection", 20 August 2009. Available at <http://allafrica.com/stories/printable/200908210002.html>; last accessed 9 October 2009.
- Vincent, RJ. 1986. *Human rights and international relations*. Cambridge: Cambridge University Press.
- Viljoen, F. 2007. *International human rights law in Africa*. Oxford: Oxford University Press.
- United Nations. 2002. *Human rights: A compilation of international instruments*. New York United Nations.

Children’s right to citizenship

Faith Chipepera and Katharina G Ruppel-Schlichting

Introduction

The proliferations of bills of rights in constitutions throughout all regions of the world have been well documented. However, it is only now that tentative steps are being taken to examine the place of children within this development. Notwithstanding this new move, children remain legally partially invisible in that they are accorded no special treatment and very little recognition in constitutions. It is assumed, rightly or wrongly, that these rights encompass all persons – irrespective of the special position that children occupy as minors. In fact, despite ratifying the Convention on the Rights of the Child (CRC), the notion of children as rights-bearers remains a highly contentious issue.¹ Equally contentious is the view that children are citizens in their own right.²

According to Roche, much current discussion about children is marked by a series of interlocking discourses which serve to problematise and marginalise children.³ This dominant ‘negative agenda’ thrives despite recognition of the many complex and demanding responsibilities accepted by children, and the challenges that bear down as much on children as they do on adults.⁴ The topic of citizenship and children requires one to take up the long-overdue discussion on issues pertaining directly to children.

However, can one really talk of *citizenship* in Namibia where children are concerned? The concept itself seems very remote from the set-up an African child usually finds itself in, founded on the *we* concept: *citizenship* seems to emphasise an individual bearer of rights. But difficult as it might be to envisage a child as a bearer of rights, it is even more difficult to consider a child without an identity. Upon closer inspection, the *we* that the child belongs to will be shown to be the essence of citizenship: it says *we* belong to a certain group; it echoes *we* are Namibian. This is the point the court was at pains to make in *Swart v Minister of Home Affairs, Namibia*,⁵ where it stated the following:

Given the historical background within which our Constitution was framed, it had to address the diversity of origin of all Namibia’s people to bring about one nation under a common citizenship ...

1 See, in this regard, Campbell (2003:402); Guggenheim (2003:781); Jackson (1999:223); McGillivray (1994:243).
2 As will be discussed below, practice has shown that citizenship is based on the parents’ status to such a degree that the child’s status has become uncertain.
3 Roche (1999:475).
4 (ibid.).
5 *Swart v Minister of Home Affairs, Namibia*, 1997 NR 268 at 274.

It is from this history, which emphasised that different 'tribes' could not belong to a common heritage, let alone belong to the same group, that it became essential to denounce such an ideology and expressly declare a common citizenship. Therefore, the aim of this paper is to determine how children form part of Namibian citizenry: for example, in what ways do children acquire such status? What requirements need to be met before they can attain citizenship? Do any rights accrue to them based on such citizenship? What is the possibility of children losing their right to citizenship? The paper will also critically probe some of the issues that have arisen with regard to citizenship in relation to children.

The child's right to citizenship

One of the unique features characterising the Namibian Constitution is the incorporation of a substantial citizenship scheme not normally present in others.⁶ Usually, the question who qualifies for citizenship is a mandate given to Parliament. However, Namibia chose a substantially constitutional as opposed to purely legislative citizenship scheme so as to guarantee citizenship as a right.⁷ It is under this scheme that one finds a provision on the children's right to nationality.

The right to nationality is a traditional right for children enunciated in several international instruments.⁸ The importance of the right of nationality is to prevent statelessness, which has the further effect of denying an individual the rights that accrue from citizenship status.⁹ Experience has shown that nationality could be used to deprive certain persons the civil and political rights that accrue from such status, as was the case in South Africa before its democratisation in 1995.¹⁰ In recognition of this possibility, Namibia's Supreme Law enshrined detailed provisions regulating the acquisition and loss of citizenship. Chapter 2 of the Constitution, which is dedicated to citizenship, espouses ways in which citizenship can be obtained. It guarantees to all persons living in Namibia a mechanism for becoming a Namibian citizen. Its explicitness may also be attributed to the fact that Namibia was a new state and, hence, had no citizens.¹¹

In the case of children, a special constitutional provision was included under Article 15(1). It provides that –

6 Carpenter (1991:31–32).

7 *Thloro v Minister of Home Affairs*, (P) A 159/2000, High Court judgment delivered 2 July 2008.

8 Article 7, CRC; Principle 3, Declaration of the Rights of a Child; Article 15(1), Universal Declaration of Human Rights; Article 24(3), International Convention on Civil and Political Rights; and Article 20(1), American Convention on Human Rights.

9 Currie & De Waal (2005:272).

10 People associated with the former South African 'homelands' – Transkei, Bophuthatswana, Venda and Ciskei, or TBVC states – ceased to be South African citizens when 'independence' was conferred on their territories. Consequently, they could not enjoy civil and political rights in South Africa, and were not entitled to South African passports or diplomatic protection.

11 Light (2000:164).

[c]hildren shall have the right from birth to a name, the right to acquire right to acquire a nationality ...

This right echoes Namibia's international obligation under Article 7 of the United Nations Convention on the Rights of the Child, which is aimed at preventing the phenomenon of stateless children. This right to be registered as a national commences at birth. However, as noted by Davis et al., the ambit of the right is not clearly defined, especially in respect of a stateless child who resides in Namibia.¹² The question is whether such child is entitled to claim Namibian nationality or not. The South African legislature adopted the view that a stateless child has a right to be accorded South African nationality where such child is born in South Africa.¹³ This conclusion accords well with the possible course that Namibia will take once confronted with this scenario. This view is based on the fact that Namibia acceded¹⁴ to the Convention on the Reduction of Statelessness which expressly requires States Parties to grant their nationalities to persons within their territories who would otherwise be stateless.

It follows, therefore, that this right recognises that children born in Namibia should be recognised as nationals.¹⁵ Once such recognition has been conferred, then it follows that rights of citizenship and all other rights accrue to them – as was stated in the case *Planned Parenthood v Danforth*, where it was held that –¹⁶

[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess Constitutional rights.

This view accords with the finding of the Namibian Supreme Court in *Ex Parte Attorney General: In Re: Corporal Punishment by Organs of State*,¹⁷ where the infliction of corporal punishment in government schools pursuant to the existing code formulated by the Ministry of Education (then the Ministry of Education, Culture and Sport) or any other direction by any organ of government was found to be in conflict with Article 8 of the Constitution and, therefore, declared unconstitutional.¹⁸ It is clear from the foregoing that once the status of citizenship has been conferred to a child, certain rights as provided for in the Constitution accrue to him/her.

12 Davis et al. (1997:266).

13 See section 2(4)(b) of the Citizenship of South Africa Act, 1995 (No. 88 of 1995).

14 Namibia acceded to this Convention on 17 February 1995; see *States Parties to the 1961 Convention on the Reduction of Statelessness*; available at <http://rsq.oxfordjournals.org/cgi/reprint/21/4/246.pdf>; last accessed 5 October 2009.

15 Davis et al. (1997:266).

16 *Planned Parenthood v Danforth*, 428 US 52 (1976).

17 Text of the judgement available at <http://www.saflii.org/na/cases/NASC/1991/2.html>; last accessed 3 November 2009.

18 1991 NR 178.

Notably, both the CRC and the relevant provision in the Constitution dealing with children's citizenship do not make use of the word *citizenship*, and prefer the term *nationality* to define the right. Nevertheless, the terms *nationality* and *citizenship* have been used interchangeably and loosely to indicate a connection between the individual and the state. Devenish et al., who defined *citizenship* or *nationality* as the legal connection between a state and the persons deemed to be its nationals.¹⁹ However, as indicated by Dugard,²⁰ there is a clear distinction between the terms *nationality* and *citizenship*. According to Dugard, *nationality* is essentially a term of international law which denotes a legal connection between the individual and the state for external purposes.²¹ *Citizenship*, on the other hand, is a term relating to constitutional law, and is at best used to describe the status of the individual internally, particularly the aggregate of civil and political rights to which s/he is entitled.²² It follows from this that a Namibian national may travel on a Namibian passport and is entitled to protection by the Namibian government if s/he is injured in another country. This begs the question whether, in adopting the term *nationality*, the Namibian Constitution intended its literal meaning or is merely guilty of failing to draw a clear distinction between the two concepts.

This question was dealt with in *Thloro v Minister of Home Affairs*.²³ In the case, Maritz J stated the following:

Whilst I recognize the sometimes notional, sometimes subtle and sometimes very real difference between the legal concepts of "citizenship" and "nationality", they are, within the context of Namibian law, for the greater part, essentially two sides of the same coin: the one being definitive of the legal relationship between the Namibian State and its citizens in a notional context and the other definitive of the same legal relationship and its implications in the broader context of international law.

Thus, there is no material distinction between the legal consequences of the use of either of the terms under Namibian law: the rights of nationality and citizenship accrue irrespective of the term used. The question that remains, however, is which children are entitled to citizenship in Namibia?

Acquisition of Namibian citizenship by a child

It is trite law that each state has the prerogative to determine under its own law who can and who cannot qualify as a national. Equally trite is the fact that there are certain recognised grounds followed by most states in respect of the conferment of nationality.

19 Devenish (1999:283).

20 Dugard (2005:283).

21 (ibid).

22 (ibid).

23 *Thloro*, at 36. Text of the judgement available at <http://www.saflii.org/na/cases/NAHC/2008/65.html>; last accessed 3 November 2009.

These include birth (*jus soli*),²⁴ descent (*jus sanguinis*),²⁵ and naturalisation, which is usually acquired after a period of residence in the state concerned. The Namibian Citizenship Act,²⁶ as amended by the Immigration Control Act,²⁷ and Chapter 2 of the Constitution conform to these international standards as they provide for nationality to be acquired through the forms enunciated above.

Acquisition by birth

Article 4(1) of the Constitution recognises the acquisition of Namibian citizenship through birth (*jus soli*). As a general rule, the Article provides that the following children qualify to be Namibian citizens by birth:

- children whose fathers or mothers are Namibian citizens, and
- children whose fathers or mothers are ordinarily resident in Namibia.

Interpreting this Article, in *Thloro v Minister of Home Affairs* the court stated that –²⁸

[b]ut for a number of narrowly defined exceptions, Article 4(1) of the Namibian Constitution recognizes the automatic acquisition of Namibian citizenship as of right by the mere incidence of birth in the country ... The automatic acquisition of Namibian citizenship by birth may not be otherwise regulated or derogated from by Act of Parliament.

It was further stated that those falling within the ambit of this sub-Article become Namibian citizens purely by operation of law, and they are not required to do anything as a precondition to having Namibian citizenship conferred upon them.²⁹ From the foregoing, the question that arises is which categories of children born in Namibia are not eligible to acquire the right to citizenship by mere incidence of their birth in Namibia? In other words, can children that are, for example, born of illegal immigrants qualify for citizenship as of right by mere incidence of their birth?

This is a contentious issue in the United States of America,³⁰ where the 14th Amendment stipulates that –

... all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

This provision was interpreted in *United States v Wong Kim Ark*,³¹ where Wong Kim Ark – the son of Chinese nationals who were not eligible for US citizenship – was born

24 Latin for “Law of the ground”.

25 Latin for “Law of the blood”.

26 No. 14 of 1990.

27 No. 7 of 1993.

28 (*ibid*).

29 (*ibid*).

30 Famiglietti (2007).

31 169 US 649 (1898).

in the USA but returned to China. Wong later came back to the USA, but was denied entry on the ground that he was not a US citizen. The Supreme Court interpreted the 14th Amendment as meaning that each and every child born in the USA, regardless of the status of their parents, is regarded as a US citizen.³² This was based on the *jus soli* birthright citizenship, which finds its roots in English common law.

Under Namibian law, it is contended that birth is not the sole requirement for citizenship. Several exceptions to the claim on citizenship based on *jus soli* are contained in Article 4(1) of the Constitution. In particular, Article 4(1)(d) of the Constitution lists children born from the following persons as not being eligible for citizenship – even if they were born in Namibia:

- Children of parents enjoying diplomatic immunity
- Children of career representatives of other countries
- Children whose parents are members of security forces deployed into Namibia by another country, and
- Children of illegal immigrants.

However, the above exceptions will not apply if denial of citizenship would result in statelessness as prohibited under the Convention on the Reduction of Statelessness. It follows, therefore, that the approach followed by the USA will not find application under Namibian law, as the Constitution has expressly limited the claim to citizenship by *jus soli*.

Furthermore, children of non-citizens whose parents are *ordinarily resident* in Namibia qualify to be citizens if they are born in Namibia at the time of such residency as provided under Article 4(1)(d) of the Constitution. The bone of contention is what the phrase *ordinarily resident* means, since neither the Constitution nor the Citizenship Act define it. In *Robinson v COT*,³³ however, the court had to define *residence*. It stated that –

[t]he authorities are clear that residence is a word which varies in meaning according to the circumstances under which it is used ... But a mere passer-by or casual visitor is not a resident, although in a sense he may be said to reside during the period of his visit. Perhaps the best description of what is imported by residence is that it means a man's home or one of his homes for the time being; though exactly what period or what circumstances constitute home is a point on which it is impossible to lay down any clearly defined rule. Clearly physical presence for a prolonged period would constitute residence.

However, in *Cohen v CIR*,³⁴ the court found that the word *resident* as opposed to *ordinarily resident* is wider in its meaning. *Ordinarily resident*, as the narrower term, was held to mean the following:

32 (ibid.).

33 1917 TPD 542.

34 1946 AD 174.

A person's ordinary residence would be the country to which he would naturally and as a matter of course return from his wanderings; as contrasted with other lands it might be called his usual or principal residence and it would be described more aptly than other countries as his real home.

Therefore, whether or not one is *ordinarily resident* is a question of fact that might need a court pronouncement to determine. This creates uncertainty with regard to children born of foreign nationals. Is one *ordinarily resident* if one holds a permanent residence permit? Some people have resided in Namibia for more than ten years on an employment permit only. These are some of the questions that make unclear the ambit of application of the *ordinarily resident* requirement. And what is the relationship between *ordinarily resident* and *domicile*?

According to section 22 of the Immigration Control Act, –

[n]o person shall have a domicile in Namibia, unless such person –

- (a) is a Namibian citizen;
- (b) is entitled to reside in Namibia and so resides therein, whether before or after the commencement of this Act, in terms of the provisions of section 7(2)(a) of the Namibian Citizenship Act, 1990 (Act 14 of 1990);
- (c) is ordinarily resident in Namibia, whether before or after the commencement of this Act, by virtue of a marriage entered into with a person referred to in paragraph (a) in good faith as contemplated in Article 4(3) of the Namibian Constitution;
- (d) in the case of any other person, he or she is lawfully resident in Namibia, whether before or after the commencement of this Act, and is so resident in Namibia, for a continuous period of two years.

Although section 22(1)(d) could clarify the question as to how long a person has to have resided in Namibia in order to attain domicile, section 22(2) states as follows:

For the purposes of the computation of any period of residence referred to in subsection (1) (d), no period during which any person –

- (a) is or was confined in a prison, reformatory or mental institution or other place of detention established by or under any law;
- (b) resided in Namibia only by virtue of a right obtained in terms of a provisional permit issued under section 11 or an employment permit issued under section 27 or a student's permit issued under section 28 or a visitor's entry permit issued under section 29;
- (c) involuntarily resided or remained in Namibia;
- (d) has entered or resided in Namibia through error, oversight, misrepresentation or in contravention of the provisions of this Act or any other law; or
- (e) resided in Namibia in accordance with the provisions of paragraph (d), (e), (f) or (g) of section 2(1),

shall be regarded as a period of residence in Namibia.

If one looks at the term *domicile*, it becomes clear that every person has domicile somewhere, and that is usually one's permanent home for legal purposes. *Domicile* is

a concept central to Roman–Dutch private international law. The concept of *domicile* determines which law governs a person, meaning there must be a link between person and place.³⁵

There are, however, various varieties of domicile. The first of these is the domicile by operation of law. Under common law, for example, one's domicile of origin is acquired automatically at birth. Under common law, for the so-called legitimate child, this was always the domicile of the child's father at the time of birth. The so-called illegitimate child acquired the domicile of his/her mother at the time of birth.³⁶ One's domicile of choice entails the free will of a person to establish his/her lawful presence in the chosen domiciliary area, with the intention of staying there for an indefinite period. Now if the father or mother of a newborn child has his/her domicile of choice in Namibia, would this not mean that the child would also acquire domicile in Namibia?

Courts in South Africa have gone so far as recognising that a person who has his/her residence in the country on the basis of an employment permit or while applying for a permanent residence permit, has, notwithstanding the precarious nature of his/her residence, established a domicile.³⁷ Courts in Botswana have made clear that even an employee on contract is not thereby precluded from acquiring domicile in his/her place of employment.³⁸ It remains unclear, however, whether *ordinarily resident* can be read as a synonym for *having domicile*. It is argued here that *domicile* is the narrower term.

What about the case of children born of refugees? Refugees do not acquire a domicile of choice in the place where they have found refuge: they retain their last domicile, which then also applies to their children.³⁹ Refugee children also do not fall under the exceptions listed in Article 4(1)(d) of the Namibian Constitution. Section 17 of the Namibia Refugees (Recognition and Control) Act⁴⁰ makes provision for the family of the refugee to be admitted in Namibia as well. It makes provision for the integration of the family by way of identity passes, among other things. Children born in refugee camps are accorded identity documents such as birth certificates – an obligation expressly provided for in the Refugee Conventions that Namibia has signed.⁴¹ However, it is contended that, if practice is anything to go by, children born in such camps are regarded as refugees, not residents.

Finally, no distinction is made between children born inside marriage or outside it when it comes to the acquisition of citizenship. The language of the Constitution is couched in

35 Kahn (1972:12ff).

36 *Govu v Stuart*, (1903) 24 NLR 440 a7 441f.

37 *Toumbis v Antoniou*, 1999 (1) SA 636 (W).

38 See particularly *Kenyon v Kenyon & Jenkins*, 1974 (1) BLR 2. For further reference see Forsyth (2007:138).

39 Davel & Jordaan (2005:46).

40 No. 2 of 1999.

41 United Nations Convention Relating to the Status of Refugees, of 28 July 1951.

such a way that the child can become a citizen, subject to the stated exceptions, on the basis of either parent or both parents. The phrase *whose fathers or mothers* permeates the provisions on citizenship in the Constitution. It follows logically from the use of the word *or* in such phrase that the status of either parent is enough to bestow citizenship. Therefore, a child born outside marriage whose mother or father is a Namibian citizen or is ordinarily resident in Namibia is eligible for citizenship.

Another question that arises is whether a child can acquire citizenship later in the case where the parents obtain citizenship after the birth of their child. The scenario envisaged in this case is where, say, both parents are illegal immigrants at the time of the child's birth, and they subsequently attain citizenship. In such a case, it is unclear if the child will be a Namibian citizen as well. The birth requirement explicitly states that, in order to acquire citizenship, the fathers or mothers must be Namibian citizens "at the time of birth of such persons".⁴² However, Article 14 of the Constitution, which provides for protection of the family unit, may justify a more liberal view. In fact, practice has shown that where parents later apply for citizenship, they include their minor children in the application to ensure that the whole family obtains the same status.

Acquisition by descent

Apart from acquiring citizenship by birth, a child born outside Namibia may acquire citizenship by descent if his/her father or mother is a Namibian citizen at the time of its birth (*ius sanguinis*). In this case, however, acquisition is regulated by section 2 of the Citizenship Act as per Article 4(2)(b) of the Namibian Constitution. The section provides that the child is obliged to be registered at any Namibian diplomatic mission in accordance with the laws of registration of birth. Alternatively, the child has to be registered within a year after re-entry into Namibia.

From the section, it follows that there is a condition precedent to acquisition of citizenship. This is in contrast with acquisition by birth, which is automatic if the child does not fall within the exceptions. The condition is that registration should occur within a stipulated time. Failure to register within the stipulated time may mean forfeiture of the right to citizenship. Consequently, parents may decide to deprive their child of Namibian citizenship by not adhering to the time limits set. There seems to be no way of claiming citizenship when the child attains majority, except at the discretion of the Minister, who may condone the non-compliance with the time limits.⁴³

Acquisition by registration

A child can also acquire citizenship through registration, as per Article 4(4) of the Constitution. A condition to acquisition in this way is residency in Namibia for at least five years. Although it is accepted that children do not have the capacity to apply for

42 See Article 4(1), Namibian Constitution.

43 See section 2(2)(ii), Namibian Citizenship Act.

citizenship by registration, this can be done on their behalf by a parent or guardian. Once the child has attained the age of 18, section 4(2)(b) of the Namibian Citizenship Act provides that s/he has a year in which to make a declaration to the effect that s/he no longer wishes to resume his/her Namibian citizenship, if that is the case.

Acquisition by naturalisation

Citizenship by naturalisation is at the discretion of the Minister. Section 5 of the Namibian Citizenship Act stipulates the requirements and conditions that have to be met in order to attain citizenship by these means. However, an applicant for naturalisation has to be full of age and capacity. As such, it is not possible for a child to acquire citizenship in this manner,⁴⁴ unless the application is made on the child's behalf by a parent or guardian.

Acquisition by adoption

The Constitution makes no provision for adopted children to acquire citizenship on the basis of an adoptive parent's citizenship. This omission is addressed under section 2(2) (b) of the Namibian Citizenship Act, which provides for adoptive children to acquire citizenship in Namibia. This section provides for deemed acquisition of citizenship by descent. Several requirements need to be met before citizenship can be deemed to have been acquired, however. They are as follows:

- (i) The child must be adopted in terms of the provisions of the laws regulating adoption in Namibia;
- (ii) By a Namibian citizen;
- (iii) The birth must be registered at a Namibian diplomatic mission or before a year lapses after re-entering Namibia; and
- (iv) An application for citizenship must be made to the Minister.

Once these requirements have been met, the child is deemed to have acquired citizenship by descent. However, the provision also regulates the status of adoptive children born outside Namibia. This limitation does not take into account a child born in Namibia who falls in the exceptions to citizenship as enunciated in Article 4(1)(d) of the Constitution. This limitation is addressed in section 2(3) of the Namibian Citizenship Act. This section prohibits the following persons from being capable of acquiring citizenship by descent:

- (a) A child who is a prohibited immigrant when s/he entered Namibia;
- (b) A child of illegal immigrants;
- (c) A child of parents who are security forces from another country performing their services in Namibia.

Therefore, once the child has been adopted, it enjoys the same rights as other children born in Namibia – and that includes assuming its adoptive parents' status as citizens. The question that arises is whether the aforementioned only applies to statutory adoption or

44 See section 5(1)(c), Namibian Citizenship Act.

to customary adoption as well.⁴⁵ This question becomes particularly relevant in northern Namibia, where the territorial borders between Namibia, Angola and Zambia do not physically split the communities there who share a common background, language, custom, etc.

Acquisition by special conferment

Parliament was granted plenary powers by Article 4(9) of the Constitution to make laws, not inconsistent with the Constitution, regulating the acquisition and loss of Namibian citizenship. It is under this provision that Parliament adopted the Namibian Citizenship Special Conferment Act.⁴⁶ The rationale for this special conferment lies in the country's unique historical foundations:⁴⁷

During the decades preceding independence many Namibians, unable to bear or unwilling to tolerate the inequalities and injustices of colonialism, racism and apartheid, left the country –some fleeing to escape extermination by war upon them; others emigrating to find dignity, life and refuge elsewhere; many to take up the struggle against those injustices ... but most of those who had left, were determined that they and their descendants would return one day when the country of their birth [had] been liberated from colonial rule.

While there are several ways of acquiring citizenship, there are also possibilities that children can lose their citizenship. This stems from the fact that citizenship has been attached to the status of the child's parents and, in some cases, when that status changes, it also affects the child's citizenship.

Loss of citizenship

As stated in the *Thloro* case –⁴⁸

... the tenor in which the Constitution frames the citizenship scheme reflects an inverted relationship between the intimacy of a person's bond with Namibia and the powers entrusted to Parliament to regulate the acquisition or loss of citizenship.

Therefore, just as the Constitution provides for acquisition of citizenship, it also provides for loss of citizenship. The general provision for loss of citizenship is found in Article 4(7), which states that –

Namibian citizenship shall be lost by persons who renounce their Namibian citizenship by voluntarily signing a formal declaration to that effect.

45 For similarities and differences between the two institutions, see the contribution on adoption by Oliver C Ruppel and Pombili L Shipila elsewhere in this volume.

46 No. 14 of 1991.

47 *Thloro*, at 18.

48 *Thloro*, at 22.

It is contended that a child lacks the capacity to legally renounce its citizenship. However, a child can still lose its citizenship under section 8(3) of the Namibian Citizenship Act:

Whenever a person ceases under subsection (2) to be a Namibian citizen, his or her child under the age of 18 years and who is not or has not been married shall also cease to be a Namibian citizen if the other parent of such child is not, or does not, remain a Namibian citizen.

This provision is questionable. It reinforces the idea that children's citizenship is subject to their parents' status as citizens. It does not recognise the child's right to nationality as guaranteed under Article 15(1) of the Constitution. It is inconceivable that the Constitution intended for children – especially those who acquired citizenship by birth or descent – to ever lose their citizenship. This loss of citizenship derogates from the purport of Article 4(1) and, as stated in the *Thloro* case, –⁴⁹

... the automatic acquisition of Namibian citizenship by birth may not be otherwise regulated or derogated from by an Act of Parliament. Parliament may not deprive individuals of Namibian citizenship by birth.

The rationale for this provision could be that parents are expected to make the best decisions for their children; but it is also contended that, should parents wish to act as legal guardians in this regard, an application can be made specifically for the child and then vetoed by the Master of the High Court as the super-guardian of minors.

It is no consolation that section 8(4) of the Namibian Citizenship Act allows the child, after attaining 18 years of age, to perform certain chores before it can re-claim its citizenship. The spirit of the Constitution points to a jealous protection of citizenship where it is acquired by birth or descent, and it goes against that spirit for children to lose that right so easily.

Article 4(8) of the Constitution empowers Parliament to enact legislation providing for the loss of Namibian citizenship by persons who did not acquire citizenship by birth or descent if such persons –

- (a) have acquired the citizenship of any other country by any voluntary act; or
- (b) have served or volunteered to serve in the armed or security forces of any other country without the written permission of the Namibian Government; or
- (c) have taken up permanent residence in any other country and have absented themselves thereafter from Namibia for a period in excess of two (2) years without the written permission of the Namibian Government:

provided that no person who is a citizen of Namibia by birth or descent may be deprived of Namibian citizenship by such legislation.

49 (ibid).

Section 9(3) of the Namibian Citizenship Act expands on this list by providing for involuntary loss where the person is convicted of an offence or is a prohibited immigrant, among other things. In relation to children, section 10(1) of the Act provides for deprivation of citizenship in the case of children, as follows:

[W]henever the responsible parent of a child under the age of 18 years and who is not or has not been married, has in terms of the provisions of section 7(1) ceased to be a Namibian citizen or has been deprived in terms of the provisions of section 9 of his or her Namibian citizenship, the Minister may order that such child, if he or she is a Namibian citizen by registration or naturalization, shall cease to be a Namibian citizen.

Once again, the impression is that a child cannot be a full holder of citizenship until s/he attained the age of 18. According to Carpenter,⁵⁰ the possibility that a Namibian citizen – albeit by naturalisation – may be deprived of his/her citizenship by the executive, by reason of conviction of a serious offence or even if the Minister concerned deems it not in the interests of the country that such a person should remain a citizen, is not provided for in the Constitution, and legislation to this effect is arguably in conflict with the fundamental rights in Chapter 3 of the Supreme Law. Even more contentious is if this discretion is extended to the children of such parent as per section 10(1) of the Namibian Citizenship Act.

Dual citizenship

The general understanding is that, where a child enjoys dual citizenship, that child is not compelled to make a decision as to which citizenship it wishes to assume. Thus, children are given a grace period until they turn 18 to choose between two (or more) citizenships. However, recent developments point to the possibility that the child can retain dual citizenship without having to choose one over the other. Be that as it may, the notion of *dual citizenship* in Namibia has been a contentious issue among academics. Light notes that there is a common misconception that dual nationality is not allowed under Namibian law.⁵¹ This misconception possibly stems from section 26 of the Namibian Citizenship Act, which provides the following:

Subject to the provisions of this Act or any other law, no Namibian citizen shall be a citizen of a foreign country.

The High Court interpreted this section in the *Thloro* case.⁵² In the latter, the court had to decide on the constitutionality of this section, as it was submitted by the applicant that the requirement to renounce citizenship under this section went contrary to the provision of Article 4(5) of the Constitution. With regard to this constitutional challenge, it was held that –

50 Carpenter (1991:32).

51 Light (2000:166).

52 *Thloro*, at 29.

[a]lthough the section prohibits Namibian citizens to also be citizens of other countries, it does so subject to “the provisions of this Act or any other law”. In as much as the Constitution is one “other” law contemplated in the proviso to the prohibition, the contention that the prohibition falls foul of the Constitution is clearly untenable. The prohibition is expressly made subject to the provisions of the Constitution and, therefore, no conflict can arise.

Admittedly, the Constitution does not expressly allow dual citizenship, but according to the interpretation given in the *Thloro* case, dual citizenship –⁵³

... follows naturally and logically from the implementation of the Constitution's provisions and was expressly contemplated as a possibility.

This case showed that whether or not one was entitled to dual citizenship was dependent on the way one's citizenship had been acquired.

Duality where acquisition was by birth or descent

According to Light, based on Article 4(8) of the Constitution, Namibian citizens by birth or by descent cannot be deprived of their Namibian citizenship under any circumstances.⁵⁴ Such citizens will remain Namibian regardless of whether or not they are citizens in other countries. This contention was adopted with approval in the *Thloro* case, where the following was stated:⁵⁵

The automatic acquisition of Namibian citizenship by birth may not be otherwise regulated or derogated from by an Act of Parliament. Parliament may not deprive individuals of Namibian citizenship by birth – not even if, after Independence, they have acquired the citizenship of any other country, or served in the armed forces of such a country without permission of the Namibian government or if they have taken up residence in such a country and absented themselves thereafter from Namibia for a period of more than two years without such permission. The only manner in which persons falling within this category may be deprived of Namibian citizenship is by voluntary renunciation in formal deed to that effect.

With regard to those who had attained citizenship by descent, the court stated that –⁵⁶

...much the same holds true for the second group: those who have acquired the right to Namibian citizenship by descent, except that in their case, Parliament may require of them to register as citizens as a precondition to acquisition of citizenship and, in relation to those born after independence, may require registration within the specific time and at a place mentioned in paragraph (b) of Article 4(2).

Therefore, it is legal as well as possible for Namibian citizens to have multiple citizenships.

53 (ibid).

54 Light (2000:166).

55 *Thloro*, at 22. See also *Alberts v Government of Namibia & Another*, 1993 NR 85.

56 *Thloro*, at 23.

Light gives the following example:⁵⁷

For example, a person born in Namibia, who is not excluded under any of the exceptions in Article 4(1), is a Namibian citizen by birth. If such a person's parents were South African citizens, the person would also be a South African citizen by operation of South African law. If the person marries a person who is a citizen of another country other than Namibia or South Africa, this person may also be entitled to assume the citizenship of their spouse.

This position was accepted by Judge Maritz who held as follows:⁵⁸

Moreover, if permitted under the laws of a foreign State, Namibian citizens by birth or descent are at liberty to acquire citizenship of those States even after Independence without being at risk of losing their Namibian citizenship.

According to Light, the Ministry of Home Affairs currently operates under the notion that Namibia does not allow dual citizenship.⁵⁹ This is so because an applicant is required to declare under oath that s/he has "no passport of another country in possession". Light concludes, therefore, that the form emphasises that dual nationality is prohibited.⁶⁰

Notwithstanding the above, to date, many Namibian citizens not only hold South African citizenship, but also a German passport. Of course, this phenomenon has historical implications.⁶¹ According to Von Münch, such dual or multiple citizenship can create legal problems,⁶² especially in terms of the principle of equality before the law.⁶³

Duality where acquisition was by registration or naturalisation

Article 4(4) of the Constitution expressly provides that the *conditio sine qua non* for acquiring citizenship by registration is the renunciation of the citizenship of any other country of which the person might be citizen. Equally important is section 7(1)(a) of the Namibian Citizenship Act, which provides that once a citizen by registration acquires another citizenship, then such citizen ceases to be a Namibian citizen. In *Thloro*,⁶⁴ the rationale for this requirement was explained as follows:

Whilst loyalty to the Namibian State may well be assumed from Namibian citizens tied to the country by birth or blood (*jus soli* or *jus sanguinis*), others not so intimately or closely

57 Light (2000:166).

58 *Thloro*, at 29.

59 Light (2000:167).

60 (*ibid*).

61 See Ruppel (2008).

62 Von Münch (2007:180ff).

63 See, for example, Article 10(1) of the Namibian Constitution and Article 3(I) of the *Grundgesetz*, or German Basic Law (serving as the Constitution of the Federal Republic of Germany).

64 *Thloro*, at 32.

connected may be required to demonstrate their loyalty and allegiance to Namibia by renouncing their citizenship of the other State and to take an oath of allegiance to Namibia.

Article 4(5) of the Constitution deals with the acquisition of citizenship through naturalisation. It is silent as to the issue of duality. The foreign applicant who wishes to become a Namibian citizen needs to be willing to renounce his/her citizenship of any foreign country in which s/he is a citizen. After renouncing such other citizenship(s), section 7(1)(a) of the Namibian Citizenship Act prohibits such persons from acquiring citizenship of another country as this would again result in losing the Namibian citizenship.

The constitutionality of this restriction was challenged in the *Thloro* case. In *Thloro*, a South African citizen applied for citizenship in Namibia. She qualified on all grounds, until she was requested to renounce her citizenship as required by the section. She could not do so, as she had plans to go back and resettle in South Africa at some indefinite period in the future. The restriction was held to be based on security reasons, a restriction that the Constitution mandated Parliament to regulate. The court stated the following:⁶⁵

Unwavering allegiance and loyalty to Namibia and a willingness to sacrifice – if required – even your life for her is clearly one of the most important underlying reasons for the citizenship requirement in the Act. The security objectives and concerns may well be compromised if persons serve in the Force with divided loyalties or, worse, actual loyalties to foreign countries or Heads of State – more so if the belligerence of those foreign countries threatens the territorial or internal security of Namibia.

Concluding remarks

From the above discussion, it transpires that Namibia's citizenship law is largely in line with its international obligations, especially in relation to children. However, although the law is in place, some of the policies adopted in implementing it need an upgrade in order to comply with the rights it creates, especially with respect to duality, as explained by Light.⁶⁶

Furthermore, the unhealthy preoccupation with the status of the child's parents in determining its status runs contrary to the certainty that the Constitution desired to instil in the Namibian citizenry. Many questions as to the ambit of application of provisions such as section 10(1) in the Namibian Citizenship Act desperately need judicial pronouncement as they violate, *prima facie*, the spirit and tenor of the Constitution. In addition, the uncertainty with regard to *ordinarily resident* needs to be addressed because the wording of the Constitution, the Namibian Citizenship Act and the Immigration Control Act is inconsistent in this respect, and poses the danger of inconsistent application.

65 *Thloro*, at 39.

66 Light (2000:167).

Lastly, and this is more of an administrative nature, it is important to note that, in order to promote an efficient administration and good governance and to create a culture of accountability, what is needed are openness and transparency in public administration or in the exercise of public power.⁶⁷ One of the authors of this article – who has ordinarily resided in Namibia since 2006 – recently gave birth to a child here. Upon receipt of the full birth certificate she applied for the child's Namibian citizenship. Being a foreign national, the application was halted by the Ministry of Home Affairs “until proof has been provided of a permanent residence permit”. Upon request for the reasons, no such reasons were given. Upon referral to the rights stipulated in the Namibian Constitution and with reference to the relevant legislation, an immigration officer provided the applicant with the following verbal reasons regarding the halted application:

The Constitution does not apply to foreigners.

The only response the applicant can make to this utterance is to note that the Namibian Constitution deals with administrative justice in two of its Articles, as follows:

- Article 18 requires that administrative bodies act fairly and reasonably, and comply with the requirements stipulated in common law and relevant legislation, and
- Article 5 contains the fundamental obligation enshrined in modern constitutionalism according to which the three organs of the state – including the executive, therefore – are obliged to uphold and respect the fundamental rights and freedoms as spelled out in Chapter 3 of the Constitution.

In other words, whatever the state does is subject to these rights. Whatever the administration does is subject to these rights. And finally, the law that regulates the administration is subject to these rights.

References

- Blackburn, R (Ed.). 1993. *Rights of citizenship*. London: Mansell Publishing Limited.
- Campbell, A. 2003. “Stretching the limits of ‘rights talk’: Securing health care entitlements for children”. *Vermont Law Review*, 27:399.
- Carpenter, G. 1991. “The Namibian Constitution – *ex Africa Aliquid Novi* after all?”. In Van Wyk, D, M Wiechers & R Hill (Eds). 1991. *Namibia: Constitutional and international law issues*. Pretoria. VerLoren van Themaat Centre for Public Law Studies, University of South Africa.
- Currie, I & J de Waal. 2005. *The Bill of Rights handbook*. Cape Town: Juta & Co.
- Davel, CJ & RA Jordaan. 2005. *Law of persons* (Fourth Edition). Cape Town: Juta & Co.
- Davis, D, H Cheadle & N Haysom. 1997. *Fundamental rights in the Constitution: Commentary and cases*. Kenwyn: Juta & Co.
- Devenish, GE. 1999. *A commentary on the South African Bill of Rights*. Durban: Butterworths.
- 67 Hinz (2009:82f).

- Dugard, J. 2005. *International law: A South African perspective*. Lansdowne: Juta & Co.
- Famiglietti, M. 2007. *Proposal would deny citizenship to US-born children if illegal immigrants*. Available at http://www.house.gov/apps/list/press/ca50bilbray/morenews/20070323_shns.shtml; last accessed 8 October 2009.
- Forsyth, CF. 2003. *Private international law* (Fourth Edition). Lansdowne: Juta & Co.
- Forsyth, CF. 2007. *Private international law* (Fifth Edition), Lansdowne: Juta & Co.
- Guggenheim, M. 2003. "Maximizing strategies for pressuring adults to do right by children". *Arizona Law Review*, 45:765.
- Hinz, MO, SK Amoo & D van Wyk (Eds). 2000. *The Constitution at work: 10 years of Namibian nationhood*. Pretoria: VerLoren van Themaat Centre for Public Law Studies, University of South Africa.
- Hinz, MO. 2009. "More administrative justice in Namibia? A comment on the initiative to reform administrative law by statutory enactment". *Namibia Law Journal*, 1:81–89.
- Jackson, R. 1999. "The war over children's rights". *Buffalo Human Rights Law Journal*, 5: 223.
- Kahn, E. 1972. *The South African Law of Domicile of Natural Persons*. Cape Town: Juta & Co.
- Light, C. 2000. "Citizenship under the Constitution". In Hinz, Manfred Hinz, Sam Amoo & D Van Wyk (Eds). *The Constitution at work: 10 years of Namibian nationhood*. Pretoria: VerLoren van Themaat Centre for Public Law Studies, University of South Africa.
- Olivier, L. 2008. "Citizenship legislation in southern Africa". *Open Society Initiative for Southern Africa*, 2(2):38–43. Available at http://www.osisa.org/resources/docs/PDFs/OpenSpace-June2008/2_2_pp038-43_louise_olivier_citizenship_legislation.pdf; last accessed 8 October 2009.
- McGillivray, A. 1994. "Why children do have equal rights: In reply to Laura Purdy". *International Journal of Children's Rights*, 2:243.
- Roche, J. 1999. "Children: Rights, participation and citizenship". *Childhood*, 6:475–493.
- Rosenblatt, J & I Lewis. 1997. *Children and immigration*. London: Cavendish Publishing Limited.
- Ruppel, OC. 2008. "Eine juristische Dauerbaustelle. Alles über die deutsche Staatsangehörigkeit". *Allgemeine Zeitung*, 28 November 2008. Available at <http://www.az.com.na/kultur/eine-juristische-dauerbaustelle.77223.php>; last accessed 8 October 2009.
- Tobin, J. 2005. "Increasingly seen and heard: The constitutional recognition of children's rights". *South African Journal on Human Rights*, 21:86–126.
- Van Wyk, D, M Wiechers & R Hill (Eds). 1991. *Namibia: Constitutional and international law issues*. Pretoria: VerLoren van Themaat Centre for Public Law Studies, University of South Africa.
- Von Münch, I. 2007. *Die deutsche Staatsangehörigkeit. Vergangenheit – Gegenwart – Zukunft*. Berlin: De Gruyter.

Custody and guardianship of children

Felicity !Owoses-/Goagoses

Introduction

Pursuant to its powers under Article 44¹ of the Namibian Constitution, Parliament² enacted the Children’s Status Act.³ The Act has made immense changes in the status of children born outside marriage (also referred to as *illegitimate children*). The status of children born inside marriage (also referred to as *legitimate children*) is uncontroversial. For the purpose of this paper, use of the terms *legitimate* and *illegitimate* are avoided in favour of the phrases *children born inside marriage* and *children born outside marriage*, respectively.

The aim of this paper is to revisit the status of children born inside or outside marriage. Furthermore, it addresses custody and guardianship of such children. Moreover, it explains the status of the said categories of children before the enactment of the Children’s Status Act, upon its enactment, and the implications of these changes for the said children and other persons to whom the Act applies.

The Children’s Status Act

The enactment of this law is a result of the discriminatory practices imposed by common law and statutory law between children born inside or outside marriage in matters relating to custody, guardianship and inheritance.⁴ The short title of the Act reinforces the reasons underlying the enactment of the Act, as follows:

1 Article 44 provides as follows:
The legislative power of Namibia shall be vested in the National Assembly with the power to pass laws with the assent of the President as provided in this Constitution subject, where applicable, to the powers and functions of the National Council as set out in this Constitution.

2 Article 146(1)(a) provides as follows:
“Parliament” shall mean the National Assembly and, once the first National Council has been elected, shall mean the National Assembly acting, when so required by this Constitution, subject to the review of the National Council.

3 No. 6 of 2006; hereinafter referred to as the *Act* or the *Children’s Status Act*, depending on context. The Act came into operation on 3 November 2008 in terms of *Government Notice* No. 266 of 3 November 2008.

4 Heathcote AJ delivered the judgement in *Frans v Paschke & Others*, 2007 (2) NR 520 (HC), para. 19, declaring the common law rule barring children born outside of marriage from inheriting intestate from their fathers unconstitutional.

To provide for children born outside marriage to be treated equally regardless of whether they are born inside marriage or outside marriage; to provide for matters relating to custody, access, guardianship and inheritance in relation to children born outside marriage; to provide for matters which are in the best interest of all children; and to provide for matters connected thereto.

In addition, the Act aims to remedy the situation explained above. Accordingly its objectives are —⁵

... to promote and protect the best interests of the child and to ensure that no child suffers any discrimination or disadvantage because of the marital status of his or her parents and this Act must be interpreted in a manner consistent with these objectives.

The Children's Status Act contains certain important definitions, which are as follows:⁶

“child” means a person who is under the legal age of majority;

“marriage” means a marriage in terms of any law of Namibia and includes a marriage recognised as such in terms of any tradition, custom or religion of Namibia and any marriage in terms of the law of any country, other than Namibia, which marriage is recognised as a marriage by the laws of Namibia;

“parent” means a woman or a man in respect of whom parentage has been acknowledged or otherwise established;

“sole custody” means the exercise of the rights, duties and powers of custody by one person, to the exclusion of all other persons; and

“sole guardianship” means the exercise of the rights, duties and powers of guardianship by one person, to the exclusion of all other persons.

The reference to age of majority in the definition of a *child* is a reference to the Age of Majority Act,⁷ which fixes the age of majority at 21 years.⁸ The definitions are important for understanding –

- to whom the Act applies
- the rights and responsibilities of the persons to whom the Act applies, and
- the legal consequences that attach to the said rights and responsibilities.

What is *parental authority*?

The common law⁹ concept of *parental authority*¹⁰ (also referred to as *parental*

5 Section 2.

6 Section 1.

7 No. 57 of 1972.

8 Section 1.

9 Section 1(1) of the Administration of Justice Proclamation No. 21 of 1919 made the Roman-Dutch law, as it existed and was applied in the Cape of Good Hope as at 1 January 1920 and after that date, the Common Law of the Protectorate (South West Africa). Article 66 of the Namibian Constitution recognises common law as part of Namibian law. See also *R v Goseb*, 1956 (2) SA 696 SWA.

10 See Spiro (1985:84), who explains that some writers refer to *parental authority* as distinct from *parental power*, but that the terms are synonymous in his view.

power)¹¹ refers to the complex of rights, powers, duties and responsibilities vested in or imposed upon the parent, by virtue of their parenthood, in respect of their minor child and his or her property. For the purpose of this paper the term *parental authority* is adopted.

The common law concept of *parental authority* has two components, namely custody, and guardianship.¹²

Van Heerden states that *custody* is that portion of parental authority which pertains to the personal day-to-day life of the child.¹³ *Custody* is also seen as the control and supervision of the daily life and person of the child.¹⁴ The common law concept of *custody* includes the following duties:¹⁵

- The duty to provide the child with accommodation, food, clothing and medical care
- The duty to maintain and support the child
- The duty to educate and train the child, and
- The duty to care for the child's physical and emotional well-being.

Guardianship is used in two senses: one broad, the other narrow. In its broad sense, *guardianship* is equated with parental authority and includes custody. It is seen as the lawful authority which one person has over the person and/or property of another who suffers from the incapacity to manage his or her own affairs and/or person, in the interest of the latter.¹⁶ In its narrow sense, *guardianship* refers, firstly, to the control and administration of the child's estate, and secondly, to the capacity to assist and represent the child in legal proceedings or in performance of juristic acts.¹⁷ In this latter sense, *guardianship* is seen as relating exclusively to the guardianship of minors. In this context, the term *natural guardian* is used as a synonym for *parental authority*.¹⁸ Both Van Heerden¹⁹ and Schäfer²⁰ agree that the latter – narrow – definition is the more common and sensible approach when it comes to the guardianship of minors.

The Children's Status Act does not define the terms *custody* and *guardianship*; hence, these terms retain their common law meanings as explained above. Unlike Namibia, South Africa has codified and amended the common law concept of *parental authority*

11 Van Heerden (1999:313). In *Chief Family Advocate & Another v G*, 2003 2 SA 599 W 601 para. I, the courts seem to use the term *parental responsibility* as being synonymous with *parental authority* and *parental power*.

12 Van Heerden (1999:313).

13 (ibid.).

14 Schäfer (2007:38).

15 (ibid.).

16 Van Heerden (1999:313).

17 Schäfer (2007:38).

18 Van Heerden (1999:313).

19 (ibid.).

20 Schäfer (2007:38).

and replaced it with “parental rights and responsibilities”,²¹ while the term *custody* has been replaced with “care”²², and the term *access* with “contact”.²³

The concepts of *sole custody* and *sole guardianship*

Schäfer states that a distinction is made in South African law between (*single*) *custody* and *sole custody*, and (*single*) *guardianship* and *sole guardianship*.²⁴ These distinctions have an impact on the rights and duties of the parents in each case. Schäfer further states that a parent with sole custody is subject to all the duties imposed by common law in relation to custody, with the additional power of appointing, by testamentary disposition, any person to be vested with sole custody of the child.²⁵ With respect to *sole guardianship*, Schäfer states that a sole guardian has all the powers, and is subject to all duties imposed by common law, with the additional power of appointing a testamentary guardian.²⁶

Namibia seems to have followed the South African law as to the meaning of the concepts *sole custody* and *sole guardianship*.²⁷ The Children's Status Act defines these terms as the exercise of the rights, duties and powers of custody or guardianship by one person, to the exclusion of all other persons.²⁸

Section 13(3) of the Act provides that any of the following persons may seek an order for sole guardianship:

21 Section 18, Children's Act, 2005 (No. 38 of 2005).

22 (*ibid.*:section1(2)).

23 (*ibid.*).

24 Schäfer (2007:41).

25 (*ibid.*).

26 (*ibid.*:35).

27 In respect of *sole custody*, section 20(2) and (3) provides as follows:

(2) A parent with sole custody of a child may, by will or other testamentary disposition, appoint any other person as a custodian of the child, and where a will or other testamentary disposition appoints a guardian without naming a custodian, that guardian is the custodian of the child unless a competent court, on application made to it, directs otherwise.

(3) Where a parent shares joint custody with another parent because the parents are or were married, or in terms of any law or agreement, the surviving parent acquires sole custody upon the death of the other parent, unless a competent court, on application made to it, directs otherwise.

In respect of *sole guardianship*, section 21(2)–(4) provides as follows:

(2) On the death of one of two equal guardians, the surviving guardian does, unless a competent court directs otherwise, acquire sole guardianship over a child.

(3) A person with sole guardianship of a child may, by testamentary disposition, appoint another person as the sole guardian of that child.

(4) Where there is no provision in a will or other testamentary disposition naming a guardian for a child, or where there is for any other reason no competent guardian for a child, a guardian can be registered for the child by means of the procedure contained in this section.

28 Section 1.

The following persons may seek a court order granting sole guardianship to one parent, or to some other person:

- (a) either parent;
- (b) the child;
- (c) someone, other than the mother or father of the child, who is acting as the primary caretaker of the child; or
- (d) a person authorised in writing by the Minister to act on behalf of the child.

Section 13(7) of the Act provides as follows, however:

Unless the children's court orders otherwise, the written consent of both parents is required for –

- (a) the adoption of the child, subject to the provisions for dispensing with any required consent, contained in the law on adoption; or
- (b) the removal of a child from Namibia for a period longer than one year.

The provisions of section 13(3) and 13(7) seem to apply to both children born inside marriage and those born outside marriage.²⁹ A reading of section 13(7) suggests that an order of *sole guardianship* does not divest the person who does not have guardianship from parental authority in total, and that such person retains the right of consent as provided in that section.

Parental authority and the Namibian law

The common law concept of *parental authority* is treated as being outmoded and unsatisfactory as it treats parental authority from a parent's point of view.³⁰

Namibia has made commitments both domestically³¹ and internationally³² to observe, protect and uphold children's rights. For example, Article 15(1) of the Namibian Constitution provides as follows:

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

29 See section 4(3) of the Act, which provides as follows:

The procedures for orders pertaining to custody in section 12, orders pertaining to guardianship in section 13(3) to (6), orders restricting or denying access to a non-custodian parent [in] section 14(5) to (8) and orders dealing with the unreasonable denial or restriction of access in section 14(11) to (12) will apply with the necessary changes to children of divorced parents.

30 Van Heerden (1999:17).

31 Article 5, Namibian Constitution.

32 Article 144 of the Namibian Constitution provides as follows:

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

Namibia has ratified a number of international instruments which call on its signatories to observe, protect and uphold children's rights. The most notable are the United Nations Convention on the Rights of the Child,³³ the Convention on the Elimination of all Forms of Racial Discrimination against Women and Children,³⁴ and the African Charter on the Rights and Welfare of the Child.³⁵

Both the constitutional utterances on children's rights and the ratification of such international instruments demand a shift from the currently adopted parent-rights-based approach to one where children are seen as holders of rights.

Status of children born outside marriage

A *child born outside marriage* is one whose parents were not legally married to each other at the time of the child's conception or birth or at any intervening time.³⁶

Under common law, children born outside marriage are distinguished as follows:³⁷

- **Natural children:** These are children who are born of parents who, though not married to each other at the time of the child's conception or birth or at any intervening time, could have validly married each other.
- **Adulterine children:** These are children where one or both of the child's parents were married to someone else at the time of the child's conception.
- **Incestuous children:** These are children born of parents who could not have been married to each other at the time of the child's conception, because they were closely related.
- **Children procreated by means of artificial insemination (now called assisted reproduction):**³⁸ These are children born as a result of assisted reproduction of an unmarried woman or a married woman with the semen of a man other than the husband of the thus fertilised woman.³⁹

However, the categorisation of children seems to have been done away with in light of court decisions such as *Frans v Paschke & Others*⁴⁰ and with the enactment of the Children's Status Act.

33 Namibia signed the Convention on 26 September 1990 and ratified it on 30 September 1990.

34 Namibia acceded to this Convention on 23 November 1992.

35 Namibia signed this Convention on 13 July 1999, and ratified it on 23 July 2004; Convention text available at <http://www.africa-union.org/child/home.html>; last accessed 2 October 2009.

36 Cronjé & Heaton (2003:45).

37 (ibid.).

38 See section 24, Children's Status Act.

39 Section 13(2), Children's Status Act.

40 In that case the court declared the common law rule that barred children born outside of marriage from inheriting intestate from their fathers as unconstitutional.

Common law on custody and guardianship of children born outside marriage

In terms of common law, custody and guardianship of a child born outside marriage vests in the mother of the child.⁴¹ If the mother of a child born outside marriage is also a minor, guardianship vests in the guardian of the minor mother,⁴² but the minor retains custody of the child.⁴³ If the mother of a child born outside marriage is a minor but acquires status of majority by marriage⁴⁴ or obtains a declaration of majority under the Age of Majority Act,⁴⁵ custody and guardianship vests in the mother.

Notwithstanding the above, the court has power in terms of common law to award guardianship and custody of a child born outside marriage to the father if it is in the best interest of the child.⁴⁶

Children's Status Act on custody and guardianship of children born outside marriage

The current status of children born outside marriage is contained in the Children's Status Act. The Act provides that both parents have equal rights to become custodians of the child born outside marriage.⁴⁷ The Act further provides that the person with custody of the child is also the guardian of the child, unless a competent court on application made to it directs otherwise.⁴⁸ The above-mentioned provisions suggest that the mother of a child born outside marriage no longer has the automatic custody and guardianship of the child that she had under common law: the Act places both parents of the child born outside marriage on equal footing in respect of custody and guardianship of their child.

The position Namibia has taken on the parental authority of children born outside marriage accords with the fundamental rights entrenched in the country's Constitution.⁴⁹ It further reflects Namibia's international commitments contained in the Convention on the Rights of the Child, which provides that both parents have common responsibilities for the upbringing and development of the child.⁵⁰

41 *Dhanabakium v Subramanian*, 1943 AD 160; *Engar v Engar v Desai*, 1966 (1) SA 621 (T).

42 See *Dhanabakium v Subramanian*, at 166.

43 Spiro (1985:454)

44 Section 24(2), Marriage Act, 1961 (No. 25 of 1961).

45 Section 6.

46 Cronjé & Heaton (2003:45).

47 Section 11(1).

48 Section 13(1).

49 Article 10(1) of the Namibian Constitution guarantees equality before the law. Article 10(2) prohibits discrimination on the grounds of sex and marital status, among other things.

50 Article 18(1) of the Convention on the Rights of the Child. Section 16(1) of the Convention on the Elimination of all Forms of Discrimination against Women directs states parties to take appropriate measures to ensure that men and women have the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children.

From the above-mentioned, it seems that the status of parents determines the legitimacy of a child, and at this stage it is important to understand who the child's parents⁵¹ are for the purposes of the Children's Status Act. In most cases, the parentage of a mother is not in question, whereas the same cannot be said for that of the father. For this reason, the Children's Status Act provides for a number of rebuttable presumptions in disputes relating to paternity in order to assist both women who are or were married or unmarried women. The Act provides as follows:⁵²

Despite anything to the contrary contained in any law, a rebuttable presumption that a man is the father of a person whose parentage is in question exists if:

- (a) he was at the approximate time of the conception, or at the time of the birth, of the person in question, or at any time between those two points in time, married to the mother of such person;
- (b) he cohabited with the mother of the person in question at the approximate time of conception of such person;
- (c) he is registered as the father of the person in question in accordance with the provisions of the Births, Marriages and Deaths Registration Act, 1963 (Act 81 of 1963);
- (d) both he and the mother acknowledge that he is the father of the person in question; or
- (e) he admits or it is otherwise proved that he had sexual intercourse with the mother of the person in question at any time when such person could have been conceived.

The above-mentioned provision means that, unless the alleged father – who is termed the “putative father” in the Act⁵³ – institutes parentage proceedings under section 8 of the Act to rebut the presumptions contained in section 9 of the Act, he is regarded as the father of the child. The onus is on the putative father to prove that he is not the father of the child, and the onus of proof is on the balance of probabilities.⁵⁴

However, a problem arises where a putative father or a putative mother⁵⁵ disputes parentage. To remedy this situation, the Children's Status Act provides for a procedure for bringing parentage proceedings. In terms of section 8 of the Act, parentage proceedings may be brought by –

- (a) the mother or putative mother of the person whose parentage is in question;
- (b) the father or putative father of the person whose parentage is in question;
- (c) the person whose parentage is in question;
- (d) someone, other than the mother or father of the person whose parentage is in question, who is acting as the primary caretaker of such person; or

51 Section 1. Children's Status Act.

52 Section 9(1).

53 Section 8(1)(a) defines *putative father* as a man who claims or is alleged to be the father of a persons for whom parentage has not yet been established or acknowledged without dispute.

54 Section 8(4).

55 Section 8(1)(b) defines *putative mother* as a woman who claims or is alleged to be the mother of a person for whom maternity has not been established or acknowledged without dispute.

- (e) a person authorised in writing by the Minister to act on behalf of the person whose parentage is in question.

Status of children born inside marriage

At common law, a *child born inside marriage* is one whose parents were lawfully married to one another other at the time of conception, birth, or at any time between these dates.⁵⁶

Traditionally, children born inside marriage have been categorised as follows:

- Children conceived and born during the subsistence of the marriage of their parents.⁵⁷
- Children born of a putative marriage⁵⁸ are considered to be legitimate, to use the old terminology. At common law, the annulment of a voidable marriage rendered children born or conceived of the union retrospectively as children born outside marriage.⁵⁹

Statute law has enlarged the categories of children born inside marriage as follows:

- In terms of section 74(2) of the Children’s Act,⁶⁰ an adopted child is deemed in law to be a “legitimate” child (child born inside marriage) of the adoptive parent.
- Contrary to the consequence of the common law rule that the annulment of a voidable marriage rendered children born or conceived of the union retrospectively as children born outside marriage, the status of a child conceived of a voidable marriage is not affected by the annulment of the marriage by a competent court, and that child is regarded as a child born inside marriage.⁶¹
- Under common law, a child born as a result of assisted reproduction of an unmarried woman, or assisted reproduction of a married woman with the semen of a man other than her husband, is treated as a child born outside marriage, even if the husband consented.⁶² The Children’s Status Act seems to have repealed that common law rule. In terms of section 24(1), the Act provides that a child born to a woman as a result of assisted reproduction or in vitro fertilisation with the gamete or gametes of any person other than that woman and her spouse, provided they both consented to the use of assisted reproduction or in vitro fertilisation, is regarded as a child born inside marriage. There is a rebuttable presumption that the necessary consent was present.⁶³

56 Schäfer (2007:6); Van Heerden (1999:327–328).

57 Schäfer (2007:6).

58 Schäfer (2007:7); Schäfer states that “a *putative marriage* is one which, although invalid, was entered into in good faith by at least one of the parties”.

59 Van Heerden (1999:329–330).

60 No. 33 of 1960.

61 Section 22, Children’s Status Act.

62 Section 5.

63 Section 24(2), Children’s Status Act.

- Another inroad made by the Children's Status Act is the definition of marriage.⁶⁴ The definition of marriage includes a marriage recognised as such in terms of any tradition, custom or religion of Namibia. Section 26(1) of the Act provides as follows:

Subject to subsection (2), this Act applies to all children or persons, where applicable, and to all matters relating to children or persons, where applicable, irrespective of whether the children or persons, where applicable, were born or the matters arose before or after the coming into operation of the Act.

- A conjunctive reading of the definition of *marriage* and section 26(1) of the Act suggests that children born of customary marriages are recognised as children born inside marriage.

Custody and guardianship of children born inside marriage

Joint and equal custody and guardianship vests in both parents of a child born inside marriage. Section 14(1) of the Married Person's Equality Act⁶⁵ provides the following:

Notwithstanding anything to the contrary contained in any law or the common law, but subject to any order of a competent court with regard to sole guardianship of a minor child or to any right, power, or duty which any other person has or does not have in respect of a minor child, the father and the mother shall have *equal guardianship* over a minor child, including an adopted child, of their marriage, and such guardianship shall, subject to subsection (2), with respect to rights, powers and duties be equal to the guardianship which every guardian immediately before the commencement of this Act had under the common law in respect of his or her minor children. [Emphasis added]

Section 14(2) of the Act further provides that –

[w]here both the father and the mother have guardianship of a minor child, each one of them is competent, subject to any order of a competent court to the contrary, to exercise independently and without the consent of the other any right or power or to carry out any duty arising from such guardianship: Provided that, unless a competent court orders otherwise, the consent of both parents shall be necessary in respect of –

- (a) the contracting of a marriage by the minor child;
- (b) the adoption of the minor child;
- (c) the removal of the minor child from Namibia by either of the parents or any other person;
- (d) the application for the inclusion of the name of the minor child in the passport issued or to be issued to any one of the parents;
- (e) the alienation or encumbrance of immovable property or any right to immovable property vesting in the minor child.

The above-mentioned provision is reflective of joint guardianship shared by persons who are married.

⁶⁴ Section 1, Children's Status Act.

⁶⁵ No. 1 of 1996.

Who may seek custody and guardianship of a child?

The Children's Status Act provides the following:⁶⁶

- (1) The following persons may seek an order pertaining to custody of a child born outside marriage, provided that such a proceeding [is] brought by or on behalf of the person who is seeking custody of the child:
 - (a) the father, regardless of whether he is a major or a minor;
 - (b) the mother, regardless of whether she is a major or a minor;
 - (c) someone, other than the mother or father of the child, who is acting as the primary caretaker of the child; or
 - (d) a person authorised in writing by the Minister to act on behalf of the child.

With respect to guardianship, the Act provides the following:⁶⁷

- (3) The following persons may seek a court order granting sole guardianship to one parent, or to some other person:
 - (a) either parent;
 - (b) the child;
 - (c) someone, other than the mother or father of the child, who is acting as the primary caretaker of the child; or
 - (d) a person authorised in writing by the Minister to act on behalf of the child.

The application for a custody order under section 12(2) of the Children's Status Act and the application for a sole guardianship order under section 13(4) of the Children's Status Act⁶⁸ needs to be made to the children's court.⁶⁹ The Act further provides that the children's court may vary or withdraw a custody or guardianship order made under section 12 or 13, respectively.

Under section 13, the Act further provides the following in respect of a custody application:

An order for custody in terms of this section may only be made after the prescribed attempts have been made to notify the child's parents, the child's primary caretaker and any other person or persons with custody or guardianship of the child immediately prior to the application, and that person has or those persons have been given an opportunity to be heard.

Under section 14, the Act further provides the following in respect of a guardianship application:

⁶⁶ Section 12(1).

⁶⁷ Section 12(3).

⁶⁸ Regulation 5 and 6 of the Regulations relating to Children's Status, published under Government Notice No. 267 of 2008.

⁶⁹ Section 1 of the Children's Status Act states that children's court "means the children's court referred to in section 1 of the Children's Act, 1960 (Act 33 of 1960)". Section 4(2) of the Children's Act provides "that every magistrate's court shall be a children's court for any part of the area of its jurisdiction for which no children's court has been established under subsection (1)".

An order for guardianship in terms of this section may only be made after the prescribed attempts have been made to notify the child's parents, the child's primary caretaker and any other person or persons with custody or guardianship of the child immediately prior to the application, and that person has or those persons have been given an opportunity to be heard.

Another inroad made by the Children's Status Act is that persons convicted of rape have no rights to custody, guardianship or access in terms of the Act, unless the Children's Court orders otherwise.⁷⁰ This provision has the effect that, in respect of a married woman who gives birth to child who is a result of rape by her husband, and whose husband is convicted of rape, that husband forfeits rights to custody and guardianship of that child.

Conclusion

From the above it is clear that the Children's Status Act has modified and repealed the discriminatory common law practices relating to children born outside marriage as regards custody, guardianship and inheritance. The Act also recognises that persons other than the parents of the child may have an interest in its well-being. The Act therefore allows for custody and guardianship applications to be made by the child's caretaker or the Minister of Gender Equality and Child Welfare, amongst others.

A notable jurisdictional change brought about by the Children's Status Act is that the children's court may vary or withdraw a guardianship order made by the High Court.⁷¹

References

- Cronjé, DSP & J Heaton. 2003. *The South African Law of Persons*. Durban: LexisNexis.
- Schäfer, LI. 2007. *Family law service*. Durban: LexisNexis.
- Spiro, E. 1985. *The law of parent and child*. Cape Town: Juta & Co. Ltd.
- Van Heerden, B, A Cockrell & R Keightley, with J Heaton, C Brigitte, J Sinclair & T Mosikatsana. 1999. *Boberg's Law of Persons and the family*. Cape Town: Juta & Co. Ltd.

70 Section 15(1).

71 See section 13(1), where reference is made to "a competent court". In terms of the High Court Act, 1990 (No. 16 of 1990), only the latter has the jurisdiction to hear and determine issues relating to the status of a person.

Adoption: Statutory and customary law aspects from a Namibian perspective

Oliver C Ruppel and Pombili L Shipila

Introduction

Article 14(3) of the Namibian Constitution states that the family is the “natural and fundamental group unit of society and is entitled to protection by society and the State”. Article 15 of the Constitution provides that –

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

In addition to these provisions, Article 144 of the Namibian Constitution reads as follows:

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

Namibia has ratified some of the international agreements on child welfare and is bound to enact legislation that adequately safeguards the welfare of children.¹ In particular, Namibia is a signatory to the Convention on the Rights of the Child (CRC). Article 20 therein provides that, for the best interests of a child to be cared for and protected, such care and protection includes adoption or if necessary, placement in suitable institutions for the care of such children.²

According to the Hague Convention on Inter-country Adoption of 1993, to which Namibia is up to now not a signatory, children who are permanently or temporarily deprived of family life are entitled to protection from the state and alternative care must be assured for such children, including adoption and fostering.³

1 See the contribution by Oliver C Ruppel elsewhere in this volume, on the protection of children’s rights under international law from a Namibian perspective.

2 Goran & Alfredson (1997:279).

3 Article 20(1) of the CRC.

There are an estimated 80 adoptions per year in Namibia, and 14,000 children were estimated to be in foster care as at February 2009.⁴ There are 250,000 registered orphans and other vulnerable children (OVC) in Namibia.⁵ These figures indicate that the rate of adoption in Namibia is far lower than that in other parts of the world. The reason for this lies in the plurality of the Namibian law and in the different perceptions of each type of law when it comes to adoption.

This article is concerned with laws that govern adoption in Namibia. Attention will be paid to statutory and customary law.

Adoption under statutory law

Adoption was already practised under Roman law. It was regulated under the so-called *Institutiones*, the Institutes of Roman law.⁶ Yet, as a means of creating a legal relationship between a child and its parents, adoption was unknown under Roman–Dutch law until 1923.⁷ Current legislation that provides for the adoption of children in Namibia is the Children's Act,⁸ which in South Africa had been repealed by the Child Care Act.⁹

To date, the most significant provision on adoption in Namibia is section 71(2) of the Children's Act, which stipulates as follows:¹⁰

- (2) Save as provided in section seventy-two, a children's court to which application for an order of adoption of a child is made shall not grant the application unless the court is satisfied –
 - (a) that the applicant is or that both applicants are qualified to adopt the child; and
 - (b) that the applicant is or that both applicants are of good repute and a person or persons fit and proper to be entrusted with the custody of the child and possessed of adequate means to maintain and educate the child; and
 - (c) that the proposed adoption will serve the interests and conduce to the welfare of the child; and
 - (d) that consent to the adoption has been given –
 - (i) by both parents of the child, or, if the child is illegitimate, by the mother of the child, whether or not such mother is a minor or married woman and whether or not she is assisted by her parent, guardian or husband, as the case may be; or

4 MGECW (2009a).

5 MGECW (2009b:58).

6 *Institutiones* 1.11.

7 See Himonga (2007:193).

8 No. 33 of 1960, at section 71.

9 No. 74 of 1983.

10 In view of Article 140 of the Namibian Constitution, which provides, inter alia, that “all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended”, the words “South Africa”, “South African Citizen” and “South Africa Citizenship Act” in section 71 should be read as *Namibia*, *Namibian Citizen*, and *Namibian Citizenship Act (No. 14 of 1990)*, respectively.

- (ii) if both parents are dead, or, in the case of an illegitimate child, if the mother is dead, by the guardian of the child; or
 - (iii) if one parent is dead, by the surviving parent and by any guardian of the child who may have been appointed by the deceased parent; or
 - (iv) if one parent has deserted the child, by the other parent; or
 - (v) if one parent is as a result of mental disorder or defect incompetent to give consent to the adoption of the child or has in terms of section three hundred and thirty-five of the Criminal Procedure Act, 1955 (Act 56 of 1955), been declared an habitual criminal, by the other parent; or
 - (vi) if one parent is dead and the surviving parent has deserted the child or is as a result of mental disorder or defect incompetent to give consent to the adoption of the child or has in terms of section three hundred and thirty-five of the Criminal Procedure Act, 1955, been declared an habitual criminal, by any guardian of the child who may have been appointed by the deceased parent; and
- (e) that the child, if over the age of ten years, consents to the adoption; and
- (f) in the case of a child born of any person who is a South African citizen, that the applicant or one of the applicants is a South African citizen resident in the Republic: Provided that the provisions of this paragraph shall not apply –
- (i) where the applicant or one of the applicants is a South African citizen or a relative of the child and is resident outside the Republic; or
 - (ii) where the applicant is not a South African citizen or both applicants are not South African citizens but the applicant has or the applicants have the necessary residential qualifications for the grant to him or them under the South African Citizenship Act, 1949 (Act 44 of 1949), of a certificate or certificates of naturalization as a South African citizen or South African citizens and has or have made application for such a certificate or certificates, and the Minister has approved of the adoption.

In Namibia, the Children's Act has remained in force since 1960 and was last amended in 1977. This raised the question whether adoption laws in Namibia are responsive to the realities of current social development and globalisation. The old Act is a remnant of colonial days; thus, child law needs to be updated and brought in line with Namibia's international obligations and societal needs. For this reason, Namibia has been in the process of amending its laws pertaining to children's rights, especially by means of the Children's Status Act¹¹ and the recent Child Care and Protection Bill.¹²

The Children's Status Act covers aspects of adoption in section 13(7), as follows:

Unless the children's court orders otherwise, the written consent of both parents is required for –

- (a) the adoption of the child, subject to the provisions for dispensing with any required consent contained in the law on adoption; or
- (b) the removal of a child from Namibia for a period longer than one year.

11 No. 6 of 2006.

12 MGECW (2009b).

Although the Children's Status Act has not yet become operational, section 13 can be understood as an amendment of section 71(2) of the Children's Act.

The provisions of section 71(2)(f) of the Children's Act seem to suggest that Namibian citizenship is a prerequisite for the adoption of children born to a Namibian parent. However, in a ruling delivered in 2004, the High Court of Namibia held that it is unconstitutional to adopt a blanket rule preventing foreigners from adopting children in Namibia.¹³ In the 2004 case, two German nationals intended to adopt a child they had fostered for years, who was born to a Namibian citizen. The applicants were informed that, due to an exclusion clause in section 71(2)(f) of the Children's Act, they could not adopt the child in question. In arriving at its decision, the Court took into account the provisions of the CRC, as follows:¹⁴

This case sits alongside the Convention of the Rights of the Child and the African Charter on the Rights and Welfare of the Child. Namibia is a party to both of these international agreements, meaning that they are by virtue of Article 144 of the Namibian Constitution "part of the law of Namibia". Both of these agreements state that inter-country adoption may be considered as an alternative means of providing care for the child – if the child cannot be cared for in the country of origin in any suitable manner. The African Charter calls inter-country adoption a "last resort". Both agreements require governments to take measures (a) to ensure that the safeguards and standards for inter-country adoption are equivalent to those for national adoption; (b) to ensure that placement in inter-country adoption does not result in trafficking or improper financial gain for anyone involved; and (c) to promote bilateral or multilateral arrangements to regulate inter-country adoption.

In another recent Namibian case *the Namibian* reported the following:¹⁵

[A] Canadian teacher ... adopted a Namibian baby after the baby's biological mother chose her as the child's adoptive parent. The baby's biological mother decided before the baby's birth that she wanted to give the girl up for adoption, the court was informed. The adoptive mother is a 43-year-old primary school teacher living in the Vancouver area in British Columbia in Canada. The biological mother is 25 years old. She also has an older child who is living with a relative because she is not in a financial position to take care of the child, the court was informed. The adoptive mother informed the court in an affidavit that she approached an adoption agency in Canada to assist her in her wish to adopt a Namibian baby. A Canadian friend of hers who worked in Namibia for a while had also adopted a Namibian child, she stated. The adoption agency later informed her that the biological mother of a child had chosen her as the child's adoptive parent. After the baby was born in late July, she travelled to Namibia to proceed with the adoption process. The baby was placed in her care when she was nine days old and has been staying with her in an apartment in Windhoek since then, she stated. She is planning to fly back to Canada with the baby on September 28. A social worker from the Canadian adoption agency and a Namibian social worker, Waldi Kubirske, wrote glowing reports on the adoptive mother in which they recommended that her adoption of the

13 *Detmold & Another v Minister of Health and Social Services & Others*, 2004 NR 174 (HC).

14 Hubbard & Coomer (2009).

15 Menges (2009).

child should be approved. The Ministry of Gender Equality and Child Welfare's Permanent Secretary, Sirkka Ausiku, however[,] also wrote a letter to Magistrate Horn on August 11 in which she informed the Magistrate that the proposed adoption was not endorsed by the Ministry. She recommended that the Ministry should instead be given a chance to look for prospective adoptive parents for the baby in Namibia.

The aforementioned situation seems to be complicated –¹⁶

... by inadequate procedures in the Children's Act which currently governs adoption. Because private social workers can make reports to the courts recommending adoptions without channelling these through the Ministry of Gender Equality and Child Welfare, the Ministry is faced with completed adoptions without previously having a chance to see if local options for the child were properly considered. Furthermore, this law does not give the Ministry any right to appeal an order of adoption. Ministerial consent was previously required for the limited exceptions to the prohibitions on adoption by foreigners, but this safeguard fell away when the Detmold case invalidated that provision in its entirety. Yet the regulations issued under the Act give the Ministry, in its role as the Registrar of adoptions, a duty to ensure that the correct rules and procedures have been followed in respect of all adoption orders. So the existing procedures for inter-country adoption have large gaps, which can (as in the present case) leave the Ministry in the position of being expected to register an inter-country adoption even where it is not clear to the Ministry that local alternatives have been exhausted.

The question of adoption of a Namibian child by a non-Namibian has led to some frustration as to what exactly would happen to the adoption application, as the previous law on inter-country adoption had been declared unconstitutional. This left a void in the law, which then resulted in the delays that led to litigation.¹⁷ The case of the Canadian teacher has been the source of widespread controversy amongst Namibians, with some viewing adoption as the facilitation of the export of Namibian human capital, where others simply call it *baby-shopping*.¹⁸

Although rich foreigners have been adopting children from poorer countries for decades,¹⁹ it seems that African adoptions are indeed a part of growing trend.²⁰ But who should be able to adopt a child in Namibia is so far not easy to determine.²¹

On a similar note, on 12 June 2009, after the United States (US) pop star Madonna's bid to adopt a baby in Malawi was initially rejected by a lower court, Malawi's Supreme Court ruled in the singer's favour, according to a Reuters report, and overturned the earlier ruling. Although it was stated that the decision to grant Madonna the right to adopt a second Malawian child had been warmly received by many in the southern African

16 Hubbard & Coomer (2009).

17 (ibid.).

18 (ibid.).

19 For example, Mia Farrow and Angelina Jolie.

20 Jacobson (2009).

21 MGECW (2009a).

state,²² this decision has created a prominent but questionable precedent. In the three-judge panel's ruling, Chief Justice Lovemore Munlo said that the singer's commitment to helping disadvantaged children should have been taken into account when deciding the matter. The Supreme Court ruling further stated that the earlier decision had been based on outdated interpretations of old laws:

In this global village a man can have more than one place at which he resides The matter of residence should be determined at the time of application of the adoption. In this case, Madonna was in Malawi not by chance but by intention. She is looking after several orphans whose welfare depends on her. She can therefore not be described as a sojourner. . . . Every child has the right to love.

It is highly questionable whether this is the correct legal approach to deal with this type of subject matter. One may argue this case in favour of or against the concept of cultural nationalism versus Western imperialism.²³ In the end, it is the socio-economic conditions in Africa that produce thousands of orphans and other vulnerable children, a sad reality which needs to be addressed and improved. It is, however, not the right approach to make the African child a marketable export commodity, especially since adoption has become a major issue in many industrialised Western societies. Child-bearing postponement among two-career couples in Europe and the US brought about changes in the participation of women in the labour force, and a rising incidence of infertility, which led to an increase in the number of couples and individuals seeking to adopt babies. Birth control and abortion practices and societal acceptance of single motherhood have also contributed to a sharp decrease in the birth rate in the northern hemisphere.²⁴

Moreover, adoption in the industrialised parts of the 'more developed' world is conceived as an important route of parenthood for gays and lesbians.²⁵ Notwithstanding that a revision of the traditional notions of *parenthood*, as some argue, does not seem appropriate for the societal fabric in Namibia, it seems more than necessary to give due consideration to language, religion and culture when matching prospective parents with children. With the HIV/AIDS pandemic affecting Namibia, some see inter-county adoption as a way of providing for the best interest of OVC.²⁶ The response of the authors of this article is that foreigners who wish to adopt a Namibian child should generally be required to reside in Namibia for a minimum of three years before such adoption can be finalised.²⁷

Adoption under customary law

Article 66(1) of the Namibian Constitution states the following:

22 Tenthani (2009).

23 See Ngugi (2009).

24 Berry (1993).

25 Bonthuys & Albertyn (2007:150).

26 MGECW (2009a).

27 This is in line with, for example, the 1997 Ugandan Children Act.

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

Customary law refers to the laws of the indigenous people of Namibia. The term also refers to the manner in which people conduct their affairs, whether these concern adoption, marriage, divorce, dispute resolution, the bequest of property (inheritance), succession, or the allocation and occupation of different land tenure systems, among other things.²⁸

The majority of indigenous Namibians still live in accordance with their customary laws. Namibia gave the same recognition to these laws as that accorded to common law. Thus, Article 66 of the Constitution makes Namibia a hybrid legal system governed by legal pluralism.²⁹

Moreover, both the Namibian Constitution and the CRC recognise the right of indigenous populations to practise their own culture. Article 19 of the Constitution provides as follows:

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

Article 30 of the CRC stipulates that –

[i]n those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

It is, however, clear that this recognition does not derogate from the fundamental rights enshrined in these two instruments, and that customary law has to be measured against norms laid down in both the CRC and Chapter 3 of the Constitution.

In spite of significant difference to the statutory law, the term *adoption* can also be applied to a related institution in customary law.³⁰ For example, foster care, which in Africa is common practice, is similar to adoption in the sense that a child is placed from one family into the other. However, unlike adoption, foster care is not necessarily permanent. Under customary law, foster care arrangements are actually so common that they are not in any sense formal, bearing little or even no legal implications.³¹ In most cases of foster

28 Hinz (2003:9).

29 Griffiths (1986:4).

30 See Bennett (2004:319).

31 (ibid:321).

care, there is the intention that the child will eventually return to his or her own parents, so there is no severing of relationships with the biological family. The child retains his or her original legal status, family name, and rights and duties acquired at birth, and acquires no legal rights in the home of the foster parent. Conversely, the foster parent has no legal rights or duties towards the child under customary law.

Under statutory adoption, the adoptive parents take the place of the biological parents. It is as though, by operation of law, that the 'new' parents become the 'real' parents of the child. Under customary law, although the 'adoptive parents' assume the role of primary caregivers, strictly speaking, they do not become the parents of the child. Of course, this has legal consequences for the child.³²

In terms of statutory adoption, children who have been formally adopted in accordance with the Children's Act inherit from their adoptive parents in the same way as biological children do. The situation is quite different under customary law, however. Under the latter system, it is argued that children belong to their parents (especially to their mothers);³³ therefore, they should not be allowed to inherit from their 'adoptive' parents. In more modern times it has also been argued that allowing informally adopted children to inherit from their adoptive parents appears to condone – and, indeed, promote – informal adoption, which could sometimes be detrimental to the child. Instances where adoption under customary law is not in the best interest of the child have become more rampant. For example, they can be seen where a child whose biological parents are deceased is adopted (informally) by another family member whose intention is really to use the child as a token through which to receive the social grant that the Government gives for OVC. In some cases, these grants do not reach the child, but end up in their supposed caregiver's pockets.

Moreover, in the past, the nature of the extended family was such that it was possible to absorb all OVC, but now there are simply too many. The result is an extremely fluid environment that leaves children more vulnerable to being sent from pillar to post, with no one really taking responsibility for them. Conversely, the extended family set-up is an integral part of Namibia's societal structure, and it has become the norm that, when one passes on, one's children are left to one's closest relatives. This is what is known as *kinship care*, that is, the full-time care of a child by a relative or another member of the extended family (or even by a close family friend). Kinship care is often informal and unregulated by the state.

The 'best interests of the child' principle is notoriously vague and indeterminate. Thus, the way in which the principle is interpreted and applied may well be influenced by cultural norms and the social and economic circumstances in which a particular child lives. In view of this, Bennett concludes as follows:³⁴

32 (ibid.).

33 This is the position as practised by matrilineal societies.

34 Bennett (1999:108).

Groups may pursue their right to culture and at the same time defer to the child's interest by arguing that children develop fully only under the protective umbrella of their own origin Hence it is alleged, for the sake of the child's sense of identity, that it must grow up in the social milieu from which it came; short-term gains of financial security and education should be subordinate to the child's long-term psychological well-being.

One may be of the opinion that adoption under customary law brings about a considerable degree of uncertainty.³⁵ In addition to that it has, for example, long been uncertain whether statutory provisions governing the procedure and effect of adoption override customary law. However, in the South African case of *Kewana v Santam Insurance Co. Ltd*, it was held that the Children's Act of 1960 – which still governs adoption in Namibia today – did not affect customary law.³⁶ In this case, an unmarried woman had assumed full responsibility for a related child and had marked the occasion by slaughtering a sheep and a goat. The court found that this ceremony constituted a valid adoption under customary law.³⁷ As becomes clear from the case, in customary law 'adoption' is a private arrangement. The child in question is usually the offspring of one's kin. Nevertheless, children given up for adoption become the adoptive parent's child in as far as the formalities under customary law are observed. Another related issue is that, if payment is made to compensate the natural parents for rearing the child, it raises the question of whether or not customary adoption infringes on the prohibition on trafficking in children.

After all, it is important to note that, on the one hand, the traditional African value system still focuses on the interests of the family group or household, and treats the child as a member of that household; in such cases, the individual child's interests are often subsumed under those of the family or household as an integral part of the social structure. On the other hand, customary law affects children in the context of the shift from a small-scale, largely rural and communal society to an urban, industrialised and individualistic society. This shift in the social order has been accompanied by the dislocation of the extended family and corresponding shrinkage of the network of kin available for the care and protection of a child.

Conclusion and recommendations

It should be the legislators' aim to ensure a balance between –

- the ideal that the child should, as far as possible, be kept within his/her community of origin, and
- the ideal that a child should grow up in a loving, stable and permanent family environment instead of an institution.

Therefore, a workable adoption policy for Namibia should provide that, before a Namibian child is adopted abroad, it must have been impossible to place the child in an

35 Wanitzek (2008).

36 1993 (4) SA 771 (TkA), at 776.

37 Bennett (2004:320).

adoptive home domestically within the given time frame, despite having made all the required efforts, within reason, to do so.

As stated earlier, Namibia is not yet a signatory to the Hague Convention on Inter-country Adoption. The principal purpose of this Convention is for signatory states – ³⁸

... to establish safeguards to ensure that inter-country adoptions take place in the best interests of the child and with respect for his or her fundamental rights.

In order to safeguard children's rights more effectively, Namibia should strongly consider acceding to the Convention. In doing so, however, Namibia would be required by Article 4 of the Convention to establish a central authority dealing with inter-country adoptions. Adoption, be it within the family, within the community, within the country, or beyond it, inevitably carries a variety of risks for the child. Such risks include abuse, exploitation, sale and trafficking. Therefore, legislation and monitoring measures need to be put in place to curb such consequences. This requires careful screening and background checks of the adoptive parents in regard to their criminal record, income tax assessments, occupation history, and so on.

As has recently been stated by two of the contributors to the current volume, –³⁹

... the Hague Convention does not encourage inter-country adoption – quite the contrary, it says that inter-country adoption should take place only if authorities have determined that this would be in the child's best interests, and possibilities for placement of the child within the country of origin have been given due consideration. The Hague Convention also provides mechanisms to ensure that an inter-country adoption will be recognised in the country to which the child is going, so that the adopted child does not end up stateless in some foreign country. It also provides for cooperation between authorities in both the sending and receiving countries, to provide for proper monitoring and control. ... Similarly[,] if not carefully handled and regulated, inter-country adoption can lead to baby-buying, where parents desperate for a child are prepared to pay enormous sums of money to "baby brokers" who can source a child for them. This is a form of child trafficking which must be guarded against – Namibian children should not be made available to the highest bidders. There is no doubt that these problems will threaten Namibia. ... The forthcoming Child Care and Protection Act should repair those flaws and make the process clearer and smoother for all concerned, with the focus securely on the best interests of the child.

Notwithstanding the fact that legal dualism – also with regard to the issue of adoption – has value to it,⁴⁰ it can also cause legal uncertainty and loopholes. To introduce a sense of modernity to the legal aspects of adoption in Namibia, the onus will be on the Namibian Government, and the legislature in particular, to introduce a contemporary law to meet the needs of its people. This can be made possible by attaching a greater degree

38 Article 1(a), Hague Convention on Inter-country Adoption.

39 Hubbard & Coomer (2009).

40 Bennett (2004:27).

of importance and recognition to the fact that (formal) adoption as we now know it is premised on a Western ideology where the family consists only of one's immediate kin, i.e. mother, father and brothers. But also in the traditional African family structure, laws need to more actively cater for all notions of caring for children by others, ranging from foster care to adoption and everything in between. In light of the above, the following questions need to be addressed:

- To what extent should customary law affecting children be directly or indirectly incorporated into the proposed new legislation?
- If the decision is not to incorporate detailed customary law provisions, to what extent should the fundamental principles underpinning such a statute be made sensitive to and compatible with existing principles of customary law?
- Lastly, and perhaps most importantly, how can the 'best interests of the child' be rendered as optimally compatible with traditional African values as possible, bearing in mind the increasing impact of the ideology of individualism on traditional societies?

References

- Bennett, TW. 1999. *Human rights and African customary law*. Cape Town: Juta & Co.
- Bennett, TW. 2004. *Customary law in South Africa*. Lansdowne: Juta & Co.
- Berry, M. 1993. "Risks and benefits of open adoption". *The Future of Children*, 3(1):125–138.
- Bonthuys, E & C Albertyn. 2007. *Gender, law and justice*. Cape Town: Juta & Co.
- Griffiths, J. 1986. "What is legal pluralism?". *Journal of Legal Pluralism and Unofficial Law* 24:4ff.
- Goran, M & G Alfredson (Eds). 1997. *The Raoul Wallenberg compilation of human rights*. The Hague: Martinus Nijhoff Publishers.
- Griffiths, J. 1986. "What is legal pluralism?". *Journal of Legal Pluralism*, 24:1.
- MGECW/Ministry of Gender Equality and Child Welfare. 2009a. *Booklet No. 1: The Draft Child Care and Protection Act: Issues for public debate*. Windhoek: MGECW.
- MGECW/Ministry of Gender Equality and Child Welfare. 2009b. *Draft Child Care and Protection Bill, April 2009*. 58. Windhoek: MGECW.
- Himonga, C. 2007. "Persons and family: Part II". In Du Bois, F (Ed.). *Wille's Principles of South African Law* (Ninth Edition). Cape Town: Juta & Co., pp 170–213.
- Hinz, MO. 2003. *Customary law in Namibia. Development and perspective* (Eighth Edition). Windhoek: Centre for Applied Social Sciences.
- Hinz, MO. 2008. "Strengthening women's rights: The need to address the gap between customary and statutory law in Namibia". In Ruppel, OC (Ed.). *Women and custom in Namibia: Cultural practice versus gender equality?*. Windhoek: Macmillan Namibia, pp 93–106.
- Jacobson, C. 2009. "African adoption part of growing trend". *The Namibian*, 3 April 2009.

- Hubbard, B & R Coomer. 2009. "Inter-country adoption: The complexities behind the conflict". *The Namibian*, 1 October 2009.
- Menges, W. 2009. "Judge slams official for stalling adoption". *The Namibian*, 24 September 2009.
- Ngugi, T. 2009. *Weep not, child: Cultural nationalism and the Madonna adoption case*. Available at <http://allafrica.com/stories/200907230942.html>; last accessed 12 October 2009.
- Tenthani, R. 2009. "Malawi welcomes Madonna adoption". *BBC News*, 13 June 2009. Available at <http://news.bbc.co.uk/2/hi/8098719.stm>; last accessed 10 October 2009.
- Wanitzek, U. 2008. "Women's and children's rights in Africa. A case study of international human rights and family law in Tanzanian courts". *Recht in Afrika*, 1/2008. Köln: Rüdiger Köppe Verlag, pp 33–60.

Child labour: A universal problem from a Namibian perspective

Clever Mapaure

Introduction

After World War I, the Treaty of Versailles mentioned common labour standards, including the right of association, wages for a reasonable standard of life, an eight-hour working day, the abolition of child labour, the equal remuneration of men and women, and equal rights for migrant workers. These calls for international workers' rights as well as the formation of the International Labour Organisation (ILO) were a response to the threat of the capitalist system posed by the Russian revolution and Bolshevism. Amongst other things, these calls reflected an understanding that labour was not a commodity, and in any country across the globe, children were one of the important components of the social structure needing protection against social injustice. Any undue influence on the child forcing or burdening him/her to work could cause a severe disruption of the social fabric, thereby disabling the future advancement of society. In this light, both national and international law put restrictions on the use of child labour.

An analysis of the issue of child labour brings one to the controversy of intersecting rights – socio-economic rights and the founding values of human dignity, equality and freedom – which reinforce one another at the point of intersection. For example, if there is a need to abolish child labour, there is a negative impact on family income in families that allow their children to be employed because of poverty; yet, at the same time, the welfare and dignity of the child is affected negatively by such employment.

The universality of the child labour phenomenon

The ILO reports that more than 200 million children in the world today are involved in child labour, doing work that is damaging to their mental, physical and emotional development.¹ This is underlined by the International Programme on the Elimination of Child Labour (IPECL):²

One in every six children aged 5 to 17 worldwide is exploited by child labour in its different forms ... Many of these children are forced to risk their health and their lives and mortgage their future as productive adults.

1 ILO (2009a).

2 IPECL (2003:v).

Children work because their survival and that of their families depend on it. Child labour persists even where it has been declared illegal, and is frequently surrounded by a wall of silence, indifference, and apathy. But that wall is beginning to crumble. While the total elimination of child labour is a long-term goal in many countries, certain forms of child labour must be confronted immediately. Nearly three-quarters of working children are engaged in the worst forms of child labour, including trafficking, armed conflict, slavery, sexual exploitation, and hazardous work. The effective abolition of child labour is one of the most urgent challenges of our time.

The use of child labour in the early phases of industrialisation in many countries has attracted special attention.³ It is to be understood that child labour hampers the growth of human resources. It reduces not only the individual's educational achievements, but also the effect and quality of the education system. Furthermore, child labour has redistribution effects on the labour market.⁴ In this light, the fight against child labour has gained international momentum during the last decade, and has become a major challenge for the Millennium Development Goals (MDGs).⁵ A statement from the Children's Forum to the United Nations (UN) in May 2002 read as follows:⁶

We are the world's children. We are the victims of exploitation and abuse. We are street children. We are the children of war. We are the victims and orphans of HIV/AIDS. We are denied good quality education and health care. We are victims of political, economic, cultural, religious and environmental discrimination. We are children whose voices are not being heard: it is time we are taken into account. We want a world fit for children, because a world fit for us is a world fit for everyone.

This statement shows the predicament of children since time immemorial. After the Industrial Revolution and particularly after WWI, the ILO – set up in 1919 under the League of Nations – saw the need for international guidelines by which the employment of children under a certain age could be regulated in industrial undertakings.⁷ It was then suggested that the minimum age of work be 12 years. During the Legislative Assembly debates, the question of raising the minimum age from 9 to 12 years had created a furore.⁸

The ILO Convention defines *child labour* as –

- the engagement in work done by all children below 18 in harmful occupations or work activities in the labour market or their own household
- all children undertaking work in the labour market or household interfering with their primary education

3 Rena (2009:1–8).

4 (ibid.).

5 (ibid.).

6 Nienke (2007:1).

7 Ray (2009).

8 (ibid.). See also *MC Mehta v State of Tamil Nadu & Others*, AIR1997SC699.

- all children under 15 in full-time employment, and
- all children under 13 in part-time work.

Thus, *child labour* is defined not by the activity per se, but by the effect such activity has on the child.

The 2006 follow-up report to the ILO Declaration on Fundamental Principles and Rights at Work reveals that, globally, there were 317 million economically active children aged between 5 and 17 in 2004; of these, 218 million could be regarded as child labourers.⁹ Of this latter number, 126 million were involved in hazardous work.¹⁰ This shows that, generally speaking, child labour is found in every part of the world.

Although the figures for the number of child labourers vary, they are all significantly high if one considers that the child economic activity rate for 1980–1991 was 13.5% for males and 10.3% for females.¹¹ In comparison, other developing countries such as Malaysia and Sri Lanka had lower activity rates: 8.8% for males and 6.5% for females in Malaysia, and 5.3% for males and 4.6% for females in Sri Lanka.¹²

The traditional picture of child labour is of something that takes place in poverty-stricken less-developed countries. But the United Farm Workers' Union in the United States of America estimates that at least 800,000 children work in the fields of the US.¹³ And when the urban sweatshops of the garment and other industries are accounted for, the total number of child labourers in that country runs even higher. In this light, it is estimated that some 250 million children between 5 and 14 have had their childhood stolen from them. That is because they have been forced to work – about half of them full-time. It is conceivable that, in the richest country in the world, these children will never know a childhood that does not include the stress, fatigue and cruelty of work.

The US's National Institute for Occupational Safety and Health (NIOSH), relying on reports by the Department of Labor's Bureau of Labor Statistics and the Current Population Survey, estimates that 2.78 million 16- and 17-year-olds were employed in 2000, as well as over 450,000 15-year-olds, for a total of 3.23 million youth workers.¹⁴ The NIOSH report has no estimate for the number of youth workers under age 15. However, many children under this age do in fact work, as starkly evidenced by the Department of Labor's Bureau of Labor Statistics estimate that 134 children under age 15 were killed on the job during the period 1992–1998.¹⁵ The Child Labour Coalition believes the US Government estimate of 3.23 million child labourers significantly under-

9 UNICEF (2009).

10 (ibid.).

11 ILO (1995:113).

12 (ibid.).

13 Smith (2000:6–7).

14 NIOSH (2002:3).

15 US Department of Labor (2000:60).

represents the actual number of child labourers, especially in agriculture, as well as the number of children who may legally work under the age of 15.

In Germany, some 1.492 million children between 15 and 19 years of age were economically active in 2000.¹⁶ A total of 1.434 million teenagers between 15 and 19 years of age are child labourers in Germany.¹⁷ In 1995, there were 0 economically active children between the ages of 10 and 14.¹⁸ In the German Army, there are also indications of under-18s as the minimum recruitment age is 17.¹⁹ The minimum age for conscription is 18 years.²⁰

In China, children are abundant. Thus, child labour is a common phenomenon despite it being outlawed. Child labour in China is far too multifaceted to be summarised in black and white terms, save to say that it is a huge problem, and that there is clear evidence that it is increasing. Although there is no official figure on the number of children working in China, it is estimated by many that of the 10 million children out of school, over 5 million work in factories.²¹ There are some who even consider this a conservative estimate.²² It was reported that, in Sichuan, China's most populated province, 85% of children who drop out of school work elsewhere. Even in some less populated rural provinces, over 20% of the work force is made up of children.²³ In some areas of China, children make up 10–20% of the work force.²⁴ Many companies prefer child labour because children are cheap, obedient and agile enough to manoeuvre in small, machine-cramped work areas.²⁵

The Chinese Government sees child labour as one way to combat poverty and does little to enforce the laws against it.²⁶ Chinese companies are more interested in their economic investments than the status of their workers. So far, therefore, there have not been any convincing signs that the situation will improve or that the issue has become a government priority.²⁷

16 ILO (2001).

17 ILO (1999).

18 ILO (1995).

19 CSUCS (2001).

20 Goodwin-Gill & Cohn (1994).

21 Gilley (1996:159).

22 China Labour Bulletin (2009).

23 Gilley (1996:159).

24 (ibid.).

25 (ibid.).

26 Wang (1988:33, 42).

27 (ibid.). The 1971 census data showed an overall child work participation rate of 12.69% in 1961, and 7.13% by 1971. This data is misleading because the definitions of *child labour* are different in the two censuses: unpaid workers were not included in the 1971 census. Hence, a comparison cannot be completely valid. The data also shows that, in a span of 20 years (1961–1981), the proportion of children working in India has not changed significantly; but since comparisons with this data were not valid, this conclusion is questionable.

In India, the 1981 census reports show there were 13.6 million child labourers.²⁸ Indian Government extrapolations of this 1981 data place the current number of child labourers at between 17 and 20 million.²⁹ This extrapolation seems highly unlikely as –³⁰

[t]he Official National Sample Survey of 1983 reports 17.4 million child labourers, while a study ... sponsored by the Labour Ministry, concluded that the child-labour force was 44 million.

The United Nations Children's Fund (UNICEF) cites –³¹

... figures ranging from seventy-five to ninety million child labourers under the age of fourteen.

A universal difficulty in obtaining accurate data is that individuals fail to report child labour participation during surveys for fear of persecution.

In South Africa, while the true extent of child labour is not known, estimates suggest that as many as 200,000 children are working.³²

In Zimbabwe, children have been found working in the export-oriented mining sector.³³ No children are formally employed in mines, but children, working either for independent operators or through subcontractors, can be found mining chromium and gold. At present, Zimbabwe's labour legislation does not address child labour. While there is no minimum age set by the government, labour standards for the mining industry are determined by the industry-wide collective bargaining agreement developed by the National Employment Council for the Mining Industry (NEC), an incorporated body composed of representatives of labour and management. Under Zimbabwean law, the agreement concluded by the NEC is binding on all employers and employees in the industry, whether or not they are NEC members. Under the current NEC agreement, negotiated in 1990, no person under 17 is permitted to be employed in the mining industry.³⁴

Like many other countries in sub-Saharan Africa, Zambia has seen an increase in cases of child labour in the last decade, due in part to HIV/AIDS. Fortunately, infections are on a downward trend, at 14.3% from 19%, according to the 2008 Zambia Demographic Survey.³⁵ The Child Labour Survey of 2005 showed that 895,246 children between the ages of 5 and 17 were engaged in work that was either hazardous or it involved long

28 Government of India (1981; cited in Weiner 1991:20).

29 Human Rights Watch (1996:122).

30 Weiner (1991:20–21).

31 Human Rights Watch (1996:122).

32 IDEA (2000).

33 United States Department of Labor (2009).

34 (ibid.).

35 Kayaya (2008).

hours. Among these children, the ILO observes that 336,546 (38%) had lost either one or both parents to HIV/AIDS.³⁶ This shows not only that there is a link between child labour and HIV and AIDS, but also that HIV and AIDS are a product of poverty – as evidenced by the number of children living and working on the street. The said Zambian Demographic Survey showed that most of the street children had lost their parents to AIDS, and that they had resorted to employment as child labourers or engaged in the worst forms of child labour, such as prostitution, to earn a living.³⁷

A rapid assessment of 173 children in the Lusaka and Chongwe Districts of Zambia revealed a worrying scenario regarding child labour. Of the 173 children interviewed, 149 (86%) were engaged in domestic work. Some 56% of this figure comprised girls who were engaged in the same work as their male counterparts.³⁸ The survey further revealed that 73% of children engaged in domestic work were female, while 27% were male. Some 61% of all children engaged in domestic work were in the age group 10–14 while a significant portion of children (140 children out of the sample of 149, which is about 94%), worked without pay.³⁹ Only five children were paid in cash, whereas four received only food as payment for their labour. The majority of children working in households (131 out of 149 in the sample) had never been to school. In another survey, data on 176 children aged between 5 and 17 was captured.⁴⁰ Results showed that more than 90% of the children in the latter survey worked for four or more hours.⁴¹

In Mozambique for the year 2000, the ILO reported that there were 791,000 economically active children, 328,000 girls and 462,000 boys between the ages of 10 and 14, representing 32.4% of this age group.⁴² An estimated 8,000 children actively participated in the civil war between FRELIMO⁴³ and RENAMO.⁴⁴ There were credible reports that there was some trafficking in persons, primarily women and children, to South Africa and Swaziland.⁴⁵ Both countries apparently offered economic opportunities that attract poor women and children, who were sometimes victimised by traffickers.⁴⁶ Child prostitution appeared to be most prevalent in Maputo and Beira, although it might also exist in rural areas. Child prostitution was growing in the Beira, Maputo and Nacala areas, which have highly mobile populations and a large number of transport workers.⁴⁷

36 (ibid.).

37 (ibid.).

38 (ibid.).

39 (ibid.).

40 (ibid.).

41 (ibid.).

42 ILO (2000).

43 *Frente de Libertação de Moçambique*.

44 *Resistência Nacional Moçambicana*; ILO (2000).

45 (ibid.).

46 (ibid.).

47 (ibid.).

In response to these problems, Mozambique supported a “straight-18”⁴⁸ ban on military recruitment during negotiations on the Optional Protocol on the Involvement of Children in Armed Conflict. Mozambican law allows conscription from the age of 18, but this age limit may be lowered during times of war. There are concerns that former child soldiers, now of drafting age, might once again be liable for compulsory military service. This is because all Mozambican citizens between the age of 18 and 35 years are subject to compulsory military service and the military obligations that derive from it.⁴⁹ In time of war, the above ages for fulfilling these military obligations may be changed by law.

Causes of child labour and international legal enlightenment

It appears that the cause of child labour in most countries across the globe is poverty and other related socio-economic problems. Indeed, child labour is a source of income for poor families the world over.⁵⁰ A study conducted by the ILO Bureau of Statistics found that –⁵¹

[c]hildren’s work was considered essential to maintaining the economic level of households, either in the form of work for wages, of help in household enterprises or of household chores in order to free adult household members for economic activity elsewhere.

Mitesh and Badiwala report that, in some cases, a child’s income accounted for between 34% and 37% of the total household income.⁵² The study concludes that a child labourer’s income is important to the livelihood of a poor family.⁵³

One aspect of this study is questionable, however. It was conducted in the form of a survey, and the responses were given by the child labourers’ parents.⁵⁴ Parents would

48 The ‘straight-18’ position defines *child* and *child soldier* in terms of the chronological age of 18. For instance, under the title *Who are child soldiers?*, Save the Children (2001) introduced the definition from the Cape Town Principles and explained the rationale of this definition by asserting that –

[t]he upper age of eighteen as defined in the Cape Town Principles corresponds to the threshold between childhood and adulthood defined in the Convention on the Rights of the Child.

Organisations that have played a predominant role in propagating this type of discourse include Amnesty International, Human Rights Watch, the Quaker United Nations Office, the International Save the Children Alliance, and the International Committee of the Red Cross. Many of these organisations also serve on the steering committee for the Coalition to Stop the Use of Child Soldiers. However, beyond the legal rationale, this explanation does not actually address why anyone under 18 should be considered to be a child and why military participation should be permitted to an 18-year-old while prohibited to a 17-year-old.

49 These are Law No. 4/78 (*Lei do servico militar obrigatorio*) and Decree No. 3/86 (*Regulamento basico do militar nas forces armadas de Moçambique*). See Pan-African News Agency (1997).

50 Mitesh & Badiwala (2009).

51 Mehra-Kerpelman (1996:8).

52 Mitesh & Badiwala (2009).

53 (ibid.).

54 (ibid.).

be biased into being compelled to support their decision to send their children to work, by saying that it was essential. They are probably right: for most poor families in India, for example, alternative sources of income are close to nonexistent. There are no social welfare systems such as those in the West, nor is there easy access to loans. However, as Mitesh and Badiwala point out, —⁵⁵

[w]hat is apparent is the fact that child labourers are being exploited, shown by the pay that they receive. For the same type of work, studies show that children are paid less than their adult counterparts ... Although 39.5% of employers said that child workers earn wages equal to adults, if the percentage of employers admitting that wages are lower for children are added up, a figure of 35.9% is found. This figure is significant when taking the bias of employers into account. Employers would have been likely to defend their wages for child workers, by saying that children earn the same wages as adults. The fact that no employers stated children earned more than adults, should also be noted. Other studies have also concluded that “children’s earnings are consistently lower than those of adults, even where there [are] two groups are engaged in the same tasks”.

In some countries, in the battle between industrial development and social upliftment, the socially and economically backward suffer and the children lose their childhood. In order to mitigate the surrounding incomparability to other children who are not in desperate situations, they fall victim to child labour by trying to secure two square meals a day.

The ILO’s worldwide endeavours in respect of child labour cover the following:

- The prohibition of children labour
- Protecting child labourers
- Attacking the basic causes of child labour
- Helping children to adapt to future work, and
- Protecting the children of working parents.

Lee says that the issue of trade and international labour standards predated the establishment of the ILO in 1919.⁵⁶ He notes a few salient features in terms of the historical developments underlying the debate on whether international trade has exacerbated the decline in labour standards and specifically the rise in child labour. Firstly, the ILO was established to undertake joint international action to improve labour conditions worldwide. The Preamble to the ILO Constitution captures this noble objective, and begins as follows:⁵⁷

Whereas universal and lasting peace can be established only if it is based upon social justice; and whereas conditions of labour exist involving such injustice, hardships and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled ...; Whereas also *the failure of any nation to adopt humane conditions*

55 (ibid.); the cited phrase is from Grootaert & Kanbur (1995:134, 187–201, 195).

56 Lee (1997:174).

57 ILO (1919; cited in Lee 1997:173–174).

of labour is an obstacle in the way of their nations which desire to improve the conditions in their own countries; . . . [Emphasis added]

Lee lists three motives behind the statements in the ILO Preamble:⁵⁸

- Social justice and humanitarian concerns over the existence of conditions of labour that cause hardship and privation to large numbers of people
- To stave off unrest that would imperil the peace and harmony of the world, and
- The need to eliminate the negative cross-border externalities generated by countries that fail to observe humane conditions of labour.

In 2006, Namibia planned to put in place an action programme to address child labour in the country. The process, which started in 2004, involved extensive consultation with stakeholders at national and regional level. It was led by the Ministry of Labour and Social Welfare, and was assisted by the ILO programme entitled “Towards the Elimination of the Worst Forms of Child Labour” (TECL). Below is an exposition of the child labour phenomenon in Namibia.

Prevalence of child labour in Namibia

The Namibian Child Activities Survey of 1999 found that children in the 6–18 age range who were working or looking for work comprised 16.3% of the 445,007 children in that age group.⁵⁹ This translated into 72,405 children working or wanting to work, with no fewer than 40,000 being under the minimum working age of 14 years. The overwhelming majority lived in rural areas, with about two-thirds working on communal farms. About one in ten of these children was in paid employment. Slightly more boys than girls were employed.⁶⁰

The research process that paved the way for the Namibian Action Programme on the Elimination of Child Labour 2008–2012 established that many of the worst forms of child labour were being practised in Namibia. It was estimated that between 10 to 30 children in conflict with the labour law were forced or instigated by adults to work, and that the commercial sex exploitation of children occurred both in terms of children being prostituted and in terms of adults taking advantage of needy children by providing basic necessities in return for sex.⁶¹ It seems that this situation is largely attributed to the high incidence of poverty, certain cultural practices, child labour, a lack of proper guidance for children, and a lack of resources in schools, amongst other things.

Furthermore, the Namibian Child Activities Survey concluded that children were being forced to work in the agricultural and domestic service sector, and that child trafficking

58 (ibid.).

59 Ministry of Labour and Social Welfare (2008:2).

60 (ibid.).

61 (ibid.).

was indeed occurring within the country and across the border, albeit on a limited scale.⁶² Around one million children are trafficked worldwide today,⁶³ and there is growing concern that the global economic crisis may further increase child vulnerability to trafficking – including in Namibia. This is a universal problem, and Namibia cannot solve its domestic occurrence alone. The ILO has been leading the fight against child trafficking, and is now taking the struggle to those best placed to help stop it through a new training package. ILO Convention No. 182 (1999) on the Worst Forms of Child Labour (WFCL) classifies *child trafficking* among “forms of slavery or practices similar to slavery” that are to be eliminated as a matter of urgency. Most trafficked children end up in child domestic labour, commercial sexual exploitation, agricultural work, drug couriering, organised begging, child soldiering, and exploitative or slavery-like practices in the informal economy.

There is no data in Namibia regarding where exactly most trafficked Namibian children end up, hence no specific data exists. However, within the territory, particularly in the small town of Outjo, a number of children were expelled from high school in 2007 after it was found that they were engaged in the commercial sex trade.⁶⁴ The school where they had been enrolled apparently felt that they would have a bad influence on fellow pupils. The expulsion of these children was deemed unfortunate, however, as they would now be in an even worse position than before, where they would have been subjected to ridicule and scorn if they had carried their pregnancy and attended school.⁶⁵

In addition, children were engaged in hazardous work – making charcoal, tending livestock in isolated areas, and carrying heavy loads. Worldwide, children from poor households and from rural areas were most likely to be engaged in child labour; this was confirmed to be the case in Namibia as well, as the Ministry of Labour and Social Welfare reported.⁶⁶ Across the globe, those burdened with household chores are overwhelmingly girls. The millions of girls who work as domestic servants are especially vulnerable to exploitation and abuse.⁶⁷

In Namibia, the work some children are expected to do includes getting involved in the sex trade for family members who act as pimps, and being made to work in the charcoal producing industry.⁶⁸ Some children move to the Outjo area from the Kavango Region with their parents in order to work as charcoal burners.⁶⁹ These children do not go to school; they live with their families in plastic, make-shift dwellings. Farmers generally make use of a loophole in the law to clear themselves of responsibility for

62 (ibid.).

63 ILO (2009b).

64 Isaacs (2007).

65 (ibid.); note the comments by Ulfried Schwacke, the ILO consultant in Namibia, contained therein.

66 Ministry of Labour and Social Welfare (2008).

67 ILO (2009b).

68 Isaacs (2007).

69 (ibid.)

these children.⁷⁰ While all farm owners interviewed by the ILO consultant in Namibia denied that children worked for them in charcoal production, some apparently said that they did not know whether or not there were cases of children “helping their parents”.⁷¹

Another case reported how a Grade 5 learner had to leave school to graze his second cousin’s cattle at the Eheke village in the Uukwambi area in northern Namibia. At the time, his mother was worried that her son would never return to school as the responsibility to herd the cattle was placed solely on his shoulders. Shortly after the story was published in a popular newspaper⁷² in the country, Chief Labour Inspectors of the Ministry of Labour and Social Welfare worked hard to make the parents and relatives understand that the situation violated the child’s rights. The child gained his freedom and was allowed to return to school.⁷³

The Ministry’s action shows a commitment on the part of the government to honour its obligations under international law. At the same time, it indicates a significant break from an abusive past which was implemented by a bureaucracy hostile to fundamental rights and accountability. The new Constitution envisages the role and obligations of government quite differently.

Namibian child labour law

The international and national legal framework

As noted above, Namibia has ratified a number of international and regional instruments regulating child labour. Such instruments are relevant considerations because Article 144 of the Namibian Constitution incorporates all ratified conventions and customary international law⁷⁴ into Namibian law. Therefore, the international and regional instruments on the rights of the child provide a framework within which Article 15, and ultimately other statutory provisions, can be evaluated and understood.⁷⁵

Namibia has ratified the following ILO Conventions:

- Forced Labour Convention, 1930⁷⁶
- Freedom of Association and Protection of the Right to Organise Convention, 1948⁷⁷

70 (ibid.).

71 Likela (2009).

72 (ibid.).

73 (ibid.).

74 *Customary international law* are laws that derive their authority from constant and consistent practice by states rather than from formal expression in a treaty or legal text. Thus, such law arose from custom and usage, and is recognised and accepted as binding even though it is not codified; it is also known as *opinio iuris*.

75 This position was set out in *S v Makwanyane & Another*, 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC), paragraphs 34–35.

76 No. 29; ratified on 15 November 2000.

77 No. 87; ratified on 3 January 1995.

- Right to Organise and Collective Bargaining Convention, 1949⁷⁸
- Abolition of Forced Labour Convention, 1957⁷⁹
- Discrimination (Employment and Occupation) Convention, 1958⁸⁰
- Minimum Age Convention, 1973⁸¹
- Tripartite Consultation (International Labour Standards) Convention, 1976⁸²
- Labour Administration Convention, 1978⁸³
- Termination of Employment Convention, 1982,⁸⁴ and
- Worst Forms of Child Labour Convention, 1999.⁸⁵

Namibia also does not have an Act designed specifically for child labour in the country. However, Article 15 of the Constitution provides for the rights of the child, as follows:

- (1) Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.
- (2) Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of this Sub-Article children shall be persons under the age of sixteen (16) years.
- (3) No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament. Nothing in this Sub-Article shall be construed as derogating in any way from Sub-Article (2) hereof.
- (4) Any arrangement or scheme employed on any farm or other undertaking, the object or effect of which is to compel the minor children of an employee to work for or in the interest of the employer of such employee, shall for the purposes of Article 9 hereof be deemed to constitute an arrangement or scheme to compel the performance of forced labour.
- (5) No law authorising preventive detention shall permit children under the age of sixteen (16) years to be detained.

This is the key provision in Namibian law which regulates child labour. It is important to note that the Namibian Constitution does not prohibit child labour: rather, it prohibits the employment of children in environments which are likely to be hazardous to them or to interfere with their education, or that may harm their health or physical, mental, spiritual, moral or social development. Therefore, if there is no threat to a child in respect of the situations specified, then he or she can be employed.

78 No. 98; ratified on 3 January 1995.
79 No. 105; ratified on 15 November 2000.
80 No. 111; ratified on 13 November 2001.
81 No. 138; ratified on 15 November 2000.
82 No. 144; ratified on 3 January 1995.
83 No. 150; ratified on 28 June 1996.
84 No. 158; ratified on 28 June 1996.
85 No. 182; ratified on 15 November 2000.

Therefore, the child's right not to be exploited is guaranteed by the above constitutional provision. This guarantee, read together with the provisions of the CRC and the African Charter on the Rights of the Child (ACRWC) casts a duty upon the state to direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner under conditions of freedom and dignity, and that childhood and youth are protected against exploitation and against moral and material abandonment.

Under the above legal framework, Namibian courts are obliged to consider the effect that their decisions will have on the rights and interests of the child. The legal and judicial process must always be child-sensitive.⁸⁶ But, as was held in South Africa in the case of *S v M*—⁸⁷

... the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited.

Namibian statutes should be interpreted in a manner which favours protecting and advancing the interests of children, and courts should function in a manner which at all times shows due respect for children's rights. Courts are bound to give effect to the provisions of Article 15 in matters that come before them and which involve children. Indeed, Article 5 of the Constitution makes it plain that the Bill of Rights binds the legislature, the executive, the judiciary and all other organs of state.

The Constitution also imports the term *best interest of the child* from international conventions such as the CRC as a yardstick in the consideration of matters that affect children. It is neither necessary nor desirable to define with any precision the content of the right to have the child's best interests given paramount importance in matters concerning the child. It is, as it was put in the case of *Sonderup*, "an expansive guarantee" that a child's best interests would be paramount in all matters concerning the child.⁸⁸ Thus, this provision imposes an obligation on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance in such decisions. Article 15 of the Constitution thus provides a benchmark for the treatment and the protection of children.

Article 3 of the CRC sets out the principle that the best interests of the child are a primary consideration in all actions concerning the child. This principle was introduced because children—⁸⁹

86 Convention 98, at para. 15.

87 *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 26.

88 *Sonderup v Tondelli & Another*, [2000] ZACC 26; 2001 (1) SA 1171 (CC); 2001 (2) BCLR 152 (CC), at para. 2.

89 General Comment No. 7 (2005) of the UN Committee on the Rights of the Child, para 13.

[b]y virtue of their relative immaturity ... are reliant on responsible authorities to assess and represent their rights and best interests in relation to decisions and actions that affect them, while taking account of their views and evolving capacities.

Article 3 specifically refers to actions undertaken by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”. The UN Committee on the Rights of the Child commented as follows on Article 3(1):⁹⁰

The article refers to actions undertaken by “public or private social welfare institutions, courts of law, administrative authorities or legislative bodies”. The principle requires active measures throughout Government, parliament and the judiciary. Every legislative, administrative and judicial body or institution is required to apply the best interests principle by systematically considering how children's rights and interests are or will be affected by their decisions and actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.

The phrase “to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development” in Article 15(2) of the Namibian Constitution was reproduced from Article 32 of the CRC.⁹¹ Article 32 was also reproduced in Article 15 of the ACRWC.⁹² Both Conventions bind Namibia and other states parties to take legislative, administrative, social and educational measures to ensure the implementation of the Articles concerned. To this end, and having regard to the relevant provisions of other international instruments, states parties of both Conventions are in particular bound to –⁹³

- provide for a minimum age or minimum ages for admission to employment, and
- provide for appropriate regulation of the hours and conditions of employment.

It is important to note that, for the purpose of the Namibian Constitution, a *child* is a person below the age of 16 years. This definition differs from the one in the CRC and ACRWC, which put the age of a child at 18.⁹⁴ The fact that, for the purpose of the Namibian Constitution, a person can attain majority at the age of 17 is not a discrepancy with the CRC, since the latter has a proviso that, although 18 may be the intended international definition, states parties can enact laws where majority can be attained earlier than that. Under common law, a child in Namibia can attain majority even below the age of 16 if s/he marries or is emancipated. In contrast, section 1 of the Age of Majority Act⁹⁵ provides that 21 is the age at which majority is attained, with the proviso that the person applies

90 General Comment No. 5 (2003) of the UN Committee on the Rights of the Child.

91 Ratified by Namibia on 30 September 1990.

92 Ratified by Namibia on 26 August 2004.

93 See Article 32 of the CRC and Article 15 of the Namibian Constitution.

94 Article 1 of the CRC and Article 2 of the ACRWC.

95 No. 57 of 1972.

to the High Court to be declared a major in terms of section 2 of the Act or enters into marriage.

In order to honour her obligations under these conventions and other binding international instruments, Namibia has included certain provisions specifically for children in the Labour Act.⁹⁶ Thus, section 3 of the Labour Act is entitled “Prohibition and restriction of child labour”, and provides as follows:

3. (1) A person must not employ or require or permit a child to work in any circumstances prohibited in terms of this section.
- (2) A person must not employ a child under the age of 14 years.
- (3) In respect of a child who is at least aged 14, but under the age of 16 years, a person –
 - (a) must not employ that child in any circumstances contemplated in Article 15(2) of the Namibian Constitution;
 - (b) must not employ that child in any circumstances in respect of which the Minister, in terms of subsection (5)(a), has prohibited the employment of such children;
 - (c) must not employ that child in respect of any work between the hours of 20h00 and 07h00; or
 - (d) except to the extent that the Minister by regulation in terms of subsection (5) (b) permits, must not employ that child, on any premises where –
 - (i) work is done underground or in a mine;
 - (ii) construction or demolition takes place;
 - (iii) goods are manufactured;
 - (iv) electricity is generated, transformed or distributed;
 - (v) machinery is installed or dismantled; or
 - (vi) any work-related activities take place that may place the child’s health, safety, or physical, mental, spiritual, moral or social development at risk.
- (4) In respect of a child who is at least aged 16 but under the age of 18 years, a person may not employ that child in any of the circumstances set out in subsection (3)(c) or (d), unless the Minister has permitted such employment by regulation in terms of subsection (5)(c).

Subsection 5 further provides for the powers of the Minister responsible for the Labour portfolio to make regulations prohibiting the employment of children between the ages of 14 and 16 at any place or in respect of any work, and permitting the employment of children between the ages of 14 and 16 in circumstances contemplated in subsection (3) (d), subject to any conditions or restrictions that may be contained in those regulations.

Criminal employers under Namibian child labour law

In terms section 3(6) of the Labour Act of 2007, it is an offence for any person to employ a child, or require or permit a child to work in any circumstances prohibited under that section. Any person who is convicted of an offence under the said section is liable to a

96 No. 11 of 2007.

fine not exceeding N\$20,000 or to imprisonment for a period not exceeding four years, or to both such fine and imprisonment.

It seems that infringement of the fundamental right guaranteed by Article 15 is a delict which is actionable per se, that is, without proof of actual damage. Furthermore, consent by the child and/or his/her parents is no defence, considering that the right to education is a fundamental right. The state is equally liable to pay a fine should it be found that some arms of the state engage in child labour. A principle of law well settled is that no person should be condemned unheard. Therefore, before an employer is asked to pay the stipulated fine, s/he has to be given reasonable opportunity to be heard and to answer the case against the findings in the report submitted by the Labour Inspector. If convicted, the employer may be ordered to pay a fine of N\$20,000.

In Namibia, the constitutional provision found statutory precision in the Labour Act.⁹⁷ Therefore, violation of the Constitution triggers the sanction in the Labour Act and at the same time the aggrieved child can approach the court for violation of his or her rights. The infringement of a fundamental right or any other right conferred by the Constitution is a wrong under public laws⁹⁸ and it seems unjust, unduly harsh and oppressive on account of their poverty or disability or socially or economically disadvantageous position to require the person or persons affected by such infringements to initiate or pursue action in civil courts. It seems that section 3 of the 2007 Labour Act bars civil action for realisation of the compensation to be paid *to the child* whose rights are violated because it provides for only a criminal sanction: that of imprisonment or payment of a fine, as opposed to compensation. However, under the Constitution every person whose rights have been affected can approach the court to sue the person who has thus violated his/her rights.⁹⁹ There is no reason why an affected parent should be barred from suing the employer of his/her child – the constitutional right should always exist. Thus, section 3 of the Labour Act is perhaps worthy of a constitutional challenge. Furthermore, if one is acquitted under the Labour Act, an order of acquittal in a criminal charge under the Act should not bar one from instituting a civil or constitutional rights claim against the offender; nor should it forestall an action for realisation of child labour compensation according to the Indian case of *MC Mehta v State of Tamil Nadu*.¹⁰⁰ In this light, an order of conviction under the Labour Act can no doubt be legitimately used in the civil case to found civil liability for the payment of compensation.

In India, for example, the employer is not fined for violating a constitutional provision on the rights of the child, but is ordered to pay compensation. The employer will only be

97 No. 11 of 2007.

98 Those laws which regulate the structure and administration of the government, the conduct of the government in its relations with its citizens, the responsibilities of government employees and the relationships with foreign governments. Public law can be distinguished from private law, which regulates the private conduct between individuals, without the direct involvement of the government.

99 Article 18 of the Namibian Constitution.

100 AIR 1997 SC 699.

convicted of an offence if s/he violates the relevant statutory provisions on child labour. While, in India, the criminal liability of the employer of child labour arises in respect of a violation of the provisions of the relevant statutes, civil liability to pay compensation arises due to the violation of the fundamental right of the child not to be subjected to forced labour, as per the *MC Mehta* case, which has created new rights and obligations enforceable by law.

The imperative function of the Inspector appointed under section 124 of the Namibian Labour Act is to secure compliance with the provisions of the Act, and to see that, for each child employed in violation of the provisions of the Act, the employer concerned is prosecuted. The position of the Inspector qua the provisions set out in the Act is that of an enforcer, and it should not be expected of him or her to discharge the adjudicatory functions. It would have been ideal if the government had been proactive in framing the rules and procedure for the enforcement of rights and liabilities arising from large-scale infringement of children's fundamental rights as a result of failure to perform public law duty under the Constitution, which is of general application. A statute would be needed to cover specific issues encompassed in the broad provisions of the Constitution, and to cover the gaps in the Labour Act in respect of child labour.

In the adjudicatory process, it is important that courts follow the yardstick of the best interests of the child embedded in the Constitution as well as in international instruments on the protection of the child, in particular the CRC¹⁰¹ and the ACRWC.¹⁰² In a language substantially similar to Article 15 of the Namibian Constitution. Article 3(1) of the CRC proclaims that –

[i]n all actions concerning children, whether undertaken by public or private social institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child will be a primary consideration.

The ACRWC, in similar terms, proclaims that –¹⁰³

... in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be the primary consideration.

Namibia, as a state party to these instruments, and under Article 144 of its Constitution, is obliged to give effect to these instruments and to take all appropriate legislative and other measures to give effect, for example, to Conventions that embody the rights of the child.

101 This Convention was adopted by the UN General Assembly on 20 November 1989 and entered into force on 2 September 1990.

102 This Charter entered into force on 29 November 1999. See also *S v M* at para. 16, and *Director of Public Prosecutions, KwaZulu-Natal v P*, 2006 (3) SA 515 (SCA); [2006] 1 All SA 446 (SCA), at para. 13.

103 Article 4(1).

The way forward: Programmes and strategies

From the above exposition and due to data gaps and a lack of systematic studies, it is a rather intricate matter to ascertain with certainty what the exact causes of child labour in Namibia are. Usually, the causes for such labour are complex and include mainly economic, social, and cultural factors. The problem of child labour universally points at the overarching need to understand vulnerability – to move beyond ‘poverty’ and explore a range of vulnerability factors that have an impact on the level of risk for each child: at individual child, family, community, institutional and workplace levels; and in source communities and at recipient communities.¹⁰⁴ For example, in our responses to trafficking, we should be clear about which children are (most) vulnerable, who creates the demand for exploitation, and where such demand is created, and target our actions accordingly.¹⁰⁵

Therefore, solutions need to be comprehensive and should involve the widest possible range of partners in each society across the globe and in specific countries, Namibia not excluded. In fact, a single agency like UNICEF or the World Health Organisation – or any other organisation on its own – cannot solve the child labour problem.¹⁰⁶ Hence, child labour that is triggered mainly by poverty needs to be confronted by all social agencies on all fronts. The social agencies need to attack both the problem and its causes. Public and private sectors, with the support of non-governmental organisations, should play an important role in minimising, if not completely eradicating, the child labour problem in Namibia.

Despite the fact that Namibia has an appreciable legal framework to tackle the problems of child labour, the problem persists. The major area of concern in Namibia may be the monitoring and enforcement of laws. In this context, therefore, the key to fighting child labour is to stop it from being profitable through strict law enforcement, confiscating traffickers’ profits, increasing protection for children and, hence, reducing their vulnerability.

Regarding the worst forms of child labour, like child trafficking, understanding risk and vulnerability factors and putting in place ways of recognising these in children and their families – and then working to reduce or eliminate their vulnerability – is an important way to protect children from trafficking.¹⁰⁷ The ILO says it is crucial that countries recognise the negative impact of the economic crisis on the weakest members of society, and that the crisis may unravel many years of progress in implementing the Global Action Plan target of eliminating the worst forms of child labour, including child trafficking, by 2016.¹⁰⁸

104 ILO (2009a).

105 (ibid.).

106 Rena (2009:1–8).

107 ILO (2009b).

108 (ibid.).

Namibia needs to improve its child protection policies and mitigate the effects of the economic crisis on labour markets and the education system. In line with the ILO approach, this can be done, for example, by reducing the cost of schooling through free uniforms, textbooks and school meals, and by easing the credit constraints of poor households. This explains why the ILO recommends that countries reprioritise their expenditure patterns to benefit the poor and vulnerable.¹⁰⁹

There is also a need to strengthen institutions that work on the protection of children. Namibia's Action Programme on the Elimination of Child Labour reflects this approach, and it is very much appreciated. What may need to be focused on in this context is coordination of the tasks of such institutions, coupled with capacity-building and proper enforcement mechanisms for the institutions to work together effectively. Once in place, the coordination and protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide the necessary support for the child and for those who care for them, as well as provide for other forms of prevention and for identifying, reporting, referring, investigating, treating and following up instances of child maltreatment described earlier herein, and, as appropriate, provide for judicial involvement.

It should also be noted that labour often interferes with children's education. Ensuring that all children go to school and that their education is of good quality are key to preventing child labour.¹¹⁰ The right to education should be given priority for all children, and schools should follow up on those who drop out of school. A lack of information on school attendance and child labour in Namibia indicates this gap in how schools monitor attendance. It should be emphasised that the purpose of schools is to minimise the aggregate costs of parental error since teachers at school nurture the minds of children and bring them to a general understanding of what the world expects them to be rather than necessarily what their parents want them to be. Thus, in legal circles, teachers are not only taken to be *parentis in loco*¹¹¹ but also *parens patriae*.¹¹² More importantly, while acting *in loco parentis*, school officials are legally taken to be representatives of the state. The family, from this point of view, becomes a little baby-making factory, whose purpose is to create children for the benefit of the state.¹¹³ Schools should have a way of preventing parents from taking their children out of school so that they can be employed at home.

In light of the above, it may be that the problem would be taken care of to some extent by insisting on compulsory education. Indeed, Neera thinks that if there is at all a blueprint for taking on the problem of child labour, it is education.¹¹⁴ Even if this were so, the

109 (ibid.).

110 (ibid.).

111 Latin for "in the place of a parent" or "instead of a parent".

112 Latin for "the psychological parent".

113 Carter (1999:1082).

114 Neera [n.d.].

child of a poor parent would not receive education if it has to earn money to make ends meet for the family. Therefore, unless the family is assured of an income aliunde,¹¹⁵ the problem of child labour has little hope of getting solved. It is this vital question which has received very little attention universally.

Since poverty and other related socio-economic problems were identified as the major causes of child labour in Namibia, it is recommended that child labour issues be mainstreamed in the Namibian Government's poverty reduction strategy, annual budgets, and development plans. It is recommended, however, that more funds be allocated to these programmes to support initiatives aimed at stopping or at least reducing child labour in Namibia.

Conclusion

The above discussion has revealed that child labour is a universal problem, and in developing countries it poses a significant challenge for national development. The solution does not lie in a singular approach, but in one that is multidimensional and multifaceted. Hence, intervention at all levels of society is needed in order to alleviate problems affecting children. Such intervention includes achieving education for all children, reducing poverty, and eliminating child labour by enabling legislation, interventions and education efforts to work together to mobilise household and national resources. Together, these will accomplish much in curbing the prevalence of child labour.

It is incontrovertible that child labour does more than deprive children of their education and mental and physical development: their childhood is, in effect, stolen from them. Immature and inexperienced child labourers may be completely unaware of the short- and long-term risks involved in their work. They enjoy the short-term benefits and, with no oversight, they do not realise the long-term implications of their involvement in the labour market in their childhood. Working long hours, child labourers are often denied a basic school education, normal social interaction, personal development, and emotional support from their family. Besides these problems, children face many physical dangers – even death – from forced labour. There are alarming documented fatalities of child labourers. HIV/AIDS and some of the other sexually transmitted diseases are rife among the one million children forced into prostitution every year – something which is part of the worst forms of child labour across the globe. Under-age pregnancy, drug addiction and mental illness are also common among child prostitutes. Now is the time to rise, strongly and with the requisite determination, defend children's rights and stop child labour in all its forms.

115 Latin for "from elsewhere", "from a different source".

References

- Carter, S. 1999. "1997–98 Brennan Center Symposium Lecture: 'Religious freedom as if religion matters: A tribute to Justice Brennan'". *California Law Review*, 87:1059.
- China Labour Bulletin*. 2009. *As China's economy grows, so does China's child labour problem*. Available at <http://www.china-labour.org.hk/en/node/15889>; last accessed 30 September 2009.
- CSUCS/Coalition to Stop the Use of Child Soldiers. 2001. *Global report on child soldiers – 2001*. London: CSUCS.
- Gilley, B. 1996. "Following the money: China's growth spurt tempts children into jobs". *Far Eastern Economic Review*.
- Goodwin-Gill, G & I Cohn. 1994. *Child soldiers: The role of children in armed conflicts – A study on behalf of the Henry Dunant Institute*. Oxford: Clarendon Press.
- Grootaert, C & R Kanbur. 1995. "Child labour: An economic perspective". *International Labour Review*, 134:187–201, 195.
- Human Rights Watch. 1996. *The small hands of slavery: Bonded child labor in India*. New York: Human Rights Watch.
- IDEA/International Institute for Democracy and Electoral Assistance. 2000. "Children and youth: Child labour rules in South Africa". *International Disability News and Views*. IDEA: Stockholm.
- Iikela, M. 2009. "Government takes action in child labour case". *Informanté*, 25 February.
- ILO/International Labour Organisation. 1995. *World Labour Report*. Geneva: ILO.
- ILO/International Labour Organisation. 1997. "Economically active population 1950–2010". *ILO Bureau of Statistics Working Paper*. Geneva: ILO Bureau of Statistics.
- ILO/International Labour Organisation. 1999. *Yearbook of labour statistics*. Geneva: ILO.
- ILO/International Labour Organisation. 2000. *ILO Report on the Worst Forms of Child Labour* [Compiled by the Global March Against Child Labour]. ILO: Geneva.
- ILO/International Labour Organisation. 2001. *Yearbook of labour statistics*. ILO: Geneva.
- ILO/International Labour Organisation. 2009a. *Child labour*. Available at http://www.ilo.org/global/Themes/Child_Labour/lang--en/index.htm; last accessed 20 September 2009.
- ILO/International Labour Organisation. 2009b. *Questions and answers on child trafficking: Training tools for ILO constituents*. Geneva: ILO.
- IPECL/International Programme on the Elimination of Child Labour. 2003. *Investing in every child: An economic study of the costs and benefits of eliminating child labour*. Geneva: International Labour Organisation.
- Isaacs, D. 2007. "Child labour widespread". *The Namibian*, 11 May.
- Kayaya, B. 2008. "Tackling child labour in Zambia". *The Times of Zambia*, 3 June.

- Lee, E. 1997. "Globalization and labour standards: A review of issues". *International Labour Review*, 136(2):173–189.
- Mehra-Kerpelman, K. 1996. "Children at work: How many and where?". *World of Work*, 15:8.
- Ministry of Labour and Social Welfare. 2008. *Action Programme on the Elimination of Child Labour. Namibia 2008–2012*. Windhoek: Ministry of Labour and Social Welfare, p 2.
- Mitesh, V & MD Badiwala. 2009. *Child labour in India: Causes, governmental policies and the role of education*. Available at <http://www.geocities.com/CollegePark/library/9175/inquiry1.htm>; last accessed 15 September 2009.
- Neera, B. [n.d.]. "NREGA and its impact on child labour: field notes from Dungarpur". Available at http://www.levy.org/pubs/EFFE/NREGA_and_its_impact_on_child_labour.pdf; last accessed 29 September 2009.
- Nienke, G. 2007. "Rehabilitation or revenge: Prosecuting child soldiers for human rights violations". *Georgetown Journal of International Law*, January.
- NIOSH/National Institute for Occupational Safety and Health. 2002. *Recommendations to the US Department of Labor for changes to hazardous orders*. Available at www.cdc.gov/niosh/docs/NIOSHRecsDOLHaz/DOL-recomm.pdf; last accessed 20 September 2009.
- Pan-African News Agency. 1997. "Mozambican Assembly approves conscription, Renamo walks out"; 3 November 1997.
- Ray, A. 2009. Legislative lacuna and child labour abolition. *Online research in philosophy*. Available at <http://philpapers.org/rec/RAYLLA> last accessed 10 September 2009.
- Rena, R. 2009. "The child labor in developing countries: A challenge". *Industrial Journal of Management and Social Sciences*, 3(1):1–8.
- Smith, S. 2000. "Robbed of their childhood: Child labor USA". *The Socialist Worker*, 7 July:6–7.
- UNICEF/United Nations Children's Fund. 2009. *Facts on children*. Available at http://www.unicef.org/media/media_35903.html; last accessed 23 September 2009.
- United States Department of Labor. 2000. *Report on the Youth Labor Force*. Available at <http://www.bls.gov/opub/rylf/rylfhome.htm>; last accessed 26 September 2009.
- United States Department of Labor. 2009. *Zimbabwe*. Available at <http://www.dol.gov/ilab/media/reports/iclp/sweat/zimbabwe.htm>; last accessed 4 September 2009.
- Wang, L. 1988. "Child labour causes concern". *Beijing Review*, 7–13 November.
- Weiner, M. 1991. *The child and the state in India*. Princeton: Princeton University Press.

Realising the right to education for all: School policy on learner pregnancy in Namibia

Dianne Hubbard¹

A schoolgirl makes an unwise decision. Or she is coerced into having sex against her will by means of physical force, economic pressure or peer pressure. She becomes pregnant. The father may be a schoolboy, a teacher, a ‘sugar daddy’ or even a relative. What will this mean for her future?

The problem of teenage pregnancy among schoolgirls is a major concern in many countries and a constraint in the elimination of gender disparities in education. Furthermore, on a continent where the adage *When you educate a woman you educate a nation* holds so true, the repercussions of girls dropping out of school due to pregnancy cannot be underestimated.

The importance of education has long been cited as a critical factor in the development of nations and in the achievement of the Millennium Development Goals,² which place the achievement of universal primary education second only to the eradication of extreme poverty and hunger. There can be no argument about the value and benefit of knowledge and learning. Education allows children to learn the skills they need to negotiate an increasingly technical world. The social benefits of educating women in particular include improved agricultural productivity, improved health, reductions in fertility, and reductions in infant and child mortality rates.³

1 This chapter is based on a previously unpublished paper entitled “School policy on learner pregnancy in Namibia: Background to reform”, prepared for the Ministry of Education by the Legal Assistance Centre’s Gender Research and Advocacy Project (LAC 2008). The paper was circulated as part of the consultation around a proposed new policy on learner pregnancy.

2 The Millennium Development Goals were adopted by some 190 nations, including Namibia, at the United Nations Millennium Summit in 2000 (United Nations Millennium Declaration, Resolution 55/2 adopted by the General Assembly, 8 September 2000). The eight goals are as follows: (1) Eradicate extreme poverty and hunger; (2) Achieve universal primary education; (3) Promote gender equality and empower women; (4) Reduce child mortality; (5) Improve maternal health; (6) Combat HIV/AIDS, malaria and other diseases; (7) Ensure environmental sustainability; and (8) Develop a global partnership for development.

3 The United Nations Children’s Fund (UNICEF) estimates that approximately 180 women die each year from pregnancy-related complications, and a further 5,400 mothers suffer from serious complications and lifelong illnesses (UNICEF 2009). Increased education can

There are a significant number of teenage mothers in Namibia. According to the latest Demographic and Health Survey, conducted in 2006–2007, approximately 13% of women aged 15 to 19 at the time of the survey were already mothers, and another 3% in this age group were pregnant with their first child.⁴ Although these figures are a small improvement over those in previous surveys, the median age at first pregnancy has not changed over the last 14 years and remains age 21.⁵ The Ministry of Health and Social Services has observed that –⁶

[h]igh proportions of Namibian mothers are very young, and one consequence of teenage pregnancy is that young women are less likely to complete their basic schooling.

Table 1 shows the percentage of teenagers who have begun bearing children. The figures include both mothers and those pregnant at the time of the survey.

Table 1: Percentage of girls aged 15–19 who have begun child-bearing, 1992–2007

Age at time of survey	1992 survey	2000 survey	2006–2007 survey
15	1.3	2.2	2.7
16	6.3	5.8	5.5
17	18.7	16.0	13.9
18	36.0	27.6	21.6
19	45.4	39.3	34.7
Total	21.5	17.6	15.4

Source: MHSS (1993, 2003, 2008).

In 2007, there were 98 females for every 100 males in primary school, and 117 females for every 100 males in secondary school, with the overall percentage of female enrolment being *higher* than male enrolment in all secondary grades.⁷ But while females had higher promotion rates and lower repetition rates than males up to Grade 8, the opposite was true for higher grades; and after Grade 8, a higher percentage of females than males left school, with the main reason for dropouts being pregnancy.⁸

affect this outcome; the 2006–2007 Namibia Demographic and Health Survey showed that only 79% of uneducated pregnant women accessed antenatal care from a skilled provider, as compared with 97% of women who had more than secondary education accessing such care (MHSS 2008:116).

4 MHSS (2008:4).

5 (ibid.:53).

6 MHSS (2001:59).

7 NPC (2008:14); EMIS (2008:Table 29).

8 NPC (2008:15); EMIS (2008:commentary at Table 30). There was also a marked and progressive increase in the percentage of female repeaters and re-entrants after Grade 5. According to the Ministry of Education (EMIS 2008:commentary at Table 29), –

... the higher repetition rates could indicate a higher commitment among females to complete

The national statistics also conceal major regional disparities. For instance, in the Kavango Region, which has the highest rate of teenage pregnancy in the country (with 35% of teenage girls aged 15–19 having begun child-bearing), enrolment for girls and boys is about equal in upper primary school, but the number of girls relative to boys declines rapidly at secondary school level.⁹

Official statistics for 2007 show that a total of 1,465 learners dropped out of school for pregnancy-related reasons, with the number of such dropouts being highest by far in Kavango and Ohangwena, followed by the Regions of Caprivi, Omusati, Oshana, and Oshikoto.¹⁰

Table 2: Pregnancy-related school dropouts, 2007

Region	Male	Female	Total
Caprivi	0	83	83
Erongo	4	55	59
Hardap	3	44	47
Karas	0	37	37
Kavango	17	336	353
Khomas	1	49	50
Kunene	0	32	32
Ohangwena	2	300	302
Omusati	9	173	182
Oshana	6	95	101
Oshikoto	5	136	141
Otjozondjupa	13	41	54
Omaheke	1	19	20
Head Office	1	3	4
Total	62	1,403	1,465

Source: Ministry of Education, 2007; based on information from all primary and secondary schools where the reasons for dropouts were ascertained by the school

their education, whereas the re-entrants could possibly indicate females returning to school after pregnancy.

9 NPC (2008:15).

10 Ministry of Education, 2007; based on information from all primary and secondary schools where the reasons for dropouts were ascertained by the school.

Other evidence indicates that these official statistics are likely to be an underestimate.¹¹ For example, in 2004, Women's Action for Development surveyed six schools in the Khomas Region and found that at least 68 pregnancies had occurred amongst schoolgirls there between January and September 2004, involving girls as young as age 15.¹² As another point of comparison, a survey was done in all schools early in 1996 to establish how many learners had left school in 1995, and their reasons for dropping out. A total of 29,436 learners were reported to have dropped out in 1995, and the survey found that 24% of female dropouts – and up to 40% in some Regions – were due to pregnancy.¹³

The impact of learner pregnancy has far-reaching effects. According to a recent report by Save the Children, –¹⁴

... the children of uneducated mothers are more than twice as likely to die or be malnourished than the children of mothers who have secondary or higher education.

Children born to educated mothers have a higher chance of enrolling and completing school. Conversely, children of less educated mothers are less likely to complete school themselves, meaning that they will have fewer opportunities to better their lives since they lack the level of education that would allow them to compete successfully for jobs.¹⁵ Thus, the concern about improving the educational rights of girls who become pregnant is based in part on the knowledge that this will affect the fate of their children and future generations.

Past Namibian policies on learner pregnancy

Prior to 1994, there was no written national policy on learner pregnancy in schools, with decisions on this issue being left to the discretion of individual schools. Schoolgirls were normally expelled as soon as the school authorities learned about their pregnancies, and the decision on whether to readmit them after they had delivered the baby was left entirely to the individual school. The father of the child, in cases where he was a learner and had been identified, was usually expelled as well. Teachers who were found to be responsible for impregnating learners were dismissed, but, if fully qualified, could return to teaching in a different community after two years or at their former schools after five years. Unqualified teachers responsible for such pregnancies could return to teaching only if they first acquired professional teaching qualifications.¹⁶

11 In Botswana, when official statistics on pregnancy-related dropouts were compared with findings from other studies, the official figures were found to be misleadingly low (Meekers & Ahmed 1999:199–200).

12 *New Era*, 25 October 2005; “Let’s talk about sex, says WAD”, *The Namibian*, 20 October 2005.

13 Abt Associates South Africa (2002:Annex G, 94–97).

14 Save the Children (2005:4).

15 See e.g. (ibid.:27).

16 Becker et al. (1995).

In March 1994, the Ministry of Education published a brief written policy on the management of learner pregnancy. This policy stated that the learner-mother was expected to take care of the infant for two years, attending continuing education classes in the afternoon if she so wished. She could then attempt to find a place at another school, where she was not known to have had a child, but the decision on whether to admit her was at the discretion of the principal.¹⁷

[A] mother student cannot take up a place of any other deserving learner.

The policy made no mention of the father of the child.

The policy was updated at the beginning of 1995 by a circular from the Ministry of Education and Culture sent to all schools with secondary grades. The circular stated that female learners excluded from school because of pregnancy “may” be readmitted to their former schools or to another school, but only if they were not over the maximum permissible age.¹⁸ Thus, the decision was still left primarily at the discretion of the individual school, with the readmission of young mothers being limited nationally on the basis of age.

Following a Ministerial Consultation on School Dropouts and Adolescent Pregnancy convened by the Forum for African Women Educationalists, which brought African Ministers of Education together in Mauritius in September 1994,¹⁹ the Ministry of Basic Education and Culture introduced an initiative to develop a more comprehensive policy on teenage pregnancy. A Task Force involving both governmental and non-governmental representatives was set up to investigate the issue and make recommendations.

After some initial consultations, a draft policy was circulated for discussion during 1995. It was circulated again in May 1997, with a few changes based on feedback received from regional workshops. This draft policy was much more extensive than previous approaches to the topic. It included provisions on the role of the family and the community, and the learner-mother’s need for information. It proposed an approach which would encourage learner-mothers to continue with their education.²⁰

The girl may continue with her education at school until the time of her confinement or an earlier date on the advice of a medical practitioner or clinic sister. After giving birth, and provided that a social worker is satisfied that the infant will be cared for by a responsible adult, the girl shall have the right of readmission to the same school within twelve months of the date on which she left school, irrespective of her age. She shall have the option, within the same period, to return to another school, provided that space is available. Should the

17 As reproduced in Dieden (1994).

18 MBEC (1995). The ages referred to were as follows: learners applying to Grade 8 must not yet be 17 years old on 1 January of that school year; Grade 9 applicants must not yet be 18 years old; and Grade 10 applicants must not yet be 19 years old.

19 FAWE (1994).

20 MBEC (1997:para. 5.1.3).

girl decide not to return to full-time schooling, she should be counselled about the options available to her for continuing her education.

A noteworthy feature of this policy was its flexibility on both the date of departure before the anticipated delivery, and the date of return after the birth of the infant. The policy also considered the responsibilities of the father, noting the need to make the boy aware of the consequences of accepting or denying paternity and providing rules for leave of absence for learner fathers, similar to those put forward for learner-mothers.

However, the “temporary guidelines” approved by Cabinet in 1999 differed significantly from the policy which had been publicly discussed and debated.²¹ In contrast to the 1997 draft, which stated that schools must confront learner pregnancy “by rendering support to rather than punishing the learners who are to become parents”, the tone of the 1999 Cabinet guidelines was far more restrictive. Pregnant learners could attend regular classes “at least” until the pregnancy became visible, but were allowed to return to normal schooling only “after spending at least a year with the baby”. The Cabinet guidelines technically apply the same rules to any schoolboy who is held responsible for a pregnancy, but this is seldom imposed in practice;²² schoolboys accounted for only 6% of the students who left school for pregnancy-related reasons in 2007.²³

The “temporary” Cabinet guidelines remained in place for the next ten years, despite criticism of them from many quarters.²⁴

In 2001, the Forum for African Women Educationalists in Namibia (perhaps better known as *FAWENA*) commissioned a study to review the implementation of the policy on teenage pregnancy. This study, which included interviews with ten girls who had become pregnant while attending school, showed that the policy was being implemented inconsistently in different places – with one girl astonishingly being forced to stay out of school for one year after giving birth even though the baby had died. The study recommended the adoption of a policy which focused on support rather than punishment. It proposed that pregnant girls should be readmitted into the school system after delivery, as soon as the baby had been weaned. The study also recommended the establishment of “bridging centres” where young mothers could continue with their education while breastfeeding, counselling services for the girl and her parents, and the introduction of flexible models of attendance to provide additional opportunities for pregnant schoolgirls and young mothers to carry on with their classes.²⁵

21 MICT (2008). The Cabinet Guidelines were reiterated in Ministry of Basic Education, Sport and Culture, Circular Formal Education 5/2001, 20 April 2001.

22 MICT (2008).

23 See Table 2 above.

24 See, for example, Felton & Haihambo-Muetudhana (2002); Tjombonde (2002); Von Wietersheim (2002).

25 Tjombonde (2002).

A 2002 assessment of girls' education in the Rundu Educational Region conducted interviews at 28 schools there, including discussions with parents, principals, teachers, community leaders, female learners, and 26 girls who had dropped out of school – all but three of whom had permanently discontinued school because of pregnancy. None of the girls who had left school were continuing their education through the Namibia College of Open Learning (NAMCOL).²⁶

In 2005, the debate on the learner pregnancy policy was revived when a learner-mother, Utjiua Karuaihe, sought to be readmitted to school immediately after the birth of her child, without waiting for one year as stipulated in the Cabinet guidelines.

In March 2004, when Utjiua Karuaihe was 17 years old and in Grade 11, she became pregnant. The pregnancy was noticed in about October. Arrangements were made for Utjiua²⁷ to write her Grade 11 examinations separately from the other students. She passed these examinations and was, therefore, eligible to continue to Grade 12. Utjiua gave birth in December 2004 and sought to continue with her studies when the new academic year commenced in January 2005.

When the school refused to readmit her, her mother brought a court case on her behalf challenging this decision.²⁸ In the initial application, the High Court ruled that the temporary guidelines approved by Cabinet were not binding on schools, which had a duty to exercise discretion on issues relating to pregnancy amongst learners. The court stated further that –

... it cannot reasonably possibly be the intention of the Cabinet Policy to prohibit the enrolment of teenage mothers where the mother has a support system.

In Utjiua's case, the support system was present.

The court went on to draw a comparison with women in formal employment, who were entitled by law to a period of only three months' maternity leave, pointing out that these women invariably had to do what Utjiua had done: arrange for a relative or nanny to take care of the baby when they were unavailable. The judgment concluded that –²⁹

... much as society may abhor teenage pregnancies (with sound reason, I may add), it is not the intention of the Cabinet Policy to punish learners who happen to find themselves in the position of Utjiua.

26 Felton & Haihambo-Muetudhana (2002).

27 Use of her first name only is an attempt to avoid confusion with the actual party in the case, her mother Seuaa Karuaihe-Samupofu, and because the subject is a minor child; moreover, the quotations refer to her as Utjiua.

28 Because Utjiua was a minor, the court case was brought in the name of her mother, who was represented by the Legal Assistance Centre.

29 Unreported High Court judgment, per Manyarara, AJ, on file at the Legal Assistance Centre.

The question was referred back to the principal of the school to exercise his discretion in light of the court decision.

When the school still refused to readmit Utjiua for the 2005 school year, the family appealed the school's decision to the Minister of Basic Education, Sport and Culture. At this stage, the Ministry took the position – in an affidavit by the Permanent Secretary – that the constitutional right to education had to be balanced against the right of the child to be taken care of by his or her parents. The Permanent Secretary stated the following:³⁰

The small child has the right to be taken care of by his/her parents and the time spent with her little baby is to the benefit of such baby and his/her future development. It is incumbent on the parents of the young teenage scholar ... to ensure that the young teenage mother indeed learns responsibility by spending quality time with and taking care of her infant.

The Permanent Secretary also noted that youth should not be taught to simply transfer responsibility to grandparents, as this would “contribute to the erosion of moral and parental obligations”.³¹

Utjiua's mother disagreed with the Permanent Secretary's reasoning, saying that she could not understand –³²

... how denying a perfectly healthy and intelligent young girl the right to finish her secondary schooling amounts to an interest in the youth being educated.

She asserted that, on the contrary, “the object of the policy is to punish young girls for making the grave mistake Utjiua made”, and that the result was to stigmatise such girls.³³ Utjiua's mother emphasised that Utjiua was not transferring responsibility for her baby to anyone else, but was only being assisted by her family so that she could complete her education.³⁴

The Ministry ultimately supported the school's refusal to readmit Utjiua, with the crux of its argument being that the existing policy was “an honest and fair attempt” to balance the constitutional right to education against the rights of the newly-born child, as well as being –³⁵

... deeply grounded in certain basic and fundamental moral, ethical and educational principles [including] justice, fairness, responsibility, accountability, etc.

30 Affidavit of Permanent Secretary, on file at the Legal Assistance Centre.

31 (ibid.).

32 Affidavit of Seuaa Karuaihe-Samupofu, on file at the Legal Assistance Centre.

33 (ibid.).

34 (ibid.).

35 Letter from Minister dated 1 March 2005, on file at the Legal Assistance Centre.

Utjiua's mother then brought a court application for a review of the Ministry's decision, and an urgent court order to readmit Utjiua to school pending the outcome of the review. This urgent application was turned down by the High Court, in a ruling by a different judge from the one who had dealt with the initial application. This time, the Court found that there was no denial of Utjiua's right to education, since she would be allowed to continue her education after one year. The court also ruled that there was no merit to the argument that the requirement to stay out of school for a year was punishment, noting that Utjiua had the option of continuing her education through adult education programmes and that "in the unplanned circumstances she must face the realities".³⁶

There was little point in proceeding with further legal action at this stage, since the academic year was progressing and the question of when to readmit Utjiua would have become irrelevant before any further court proceedings could be concluded. Therefore, there was no final resolution of the varying opinions of the High Court on the Cabinet guidelines.

The right to education

The starting point for the right to education is Article 20(1) of the Namibian Constitution, which states that "All persons shall have the right to education". This provision echoes guarantees of the right to education in the Universal Declaration of Human Rights (Article 26), the International Covenant on Economic, Social and Cultural Rights (Article 13) and the Convention on the Rights of the Child (Article 28).

The right to education guaranteed by the Namibian Constitution must be read together with Article 10 of the Namibian Constitution which, again echoing several international conventions, guarantees equality and freedom from discrimination:

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

An additional buttress to the right to education is found in Article 95(e) of the Constitution, which commits the state to adopting policies which ensure that "every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law" – with education being a key public service.

However, these provisions are stated in general terms. There is a need to consider what the right to education means in terms of learner pregnancy.

In 1998, the United Nations Commission on Human Rights appointed a Special Rapporteur on the Right to Education.³⁷ The Special Rapporteur took on the task of giving

36 Unreported High Court judgment, per Gibson, J, on file at the Legal Assistance Centre.

37 Resolution 1998/33 of 17 April 1998.

content to the *right to education*. In a 1999 report, the Special Rapporteur structured government duties into a four-point scheme – availability, accessibility, acceptability and adaptability – to portray the complexity of governmental obligations arising from the right to education. This report cited the treatment of pregnancy as a disciplinary offence as an issue which undermines accessibility to education.³⁸ In a 2000 report, the Special Rapporteur addressed the issue of treating pregnancy as a basis for punishment in more detail, as an aspect of the acceptability of school discipline.³⁹ The Special Rapporteur acknowledged that “change does not come easily” – particularly because the –

... views of parents, teachers and community leaders tend to support the expulsion of pregnant girls from school, rationalising this punitive choice by the need to uphold a moral norm which prohibits teenage sex – pregnancy being considered as irrefutable proof that this norm was breached and as entailing punishment.

The report went on to suggest law on this issue as “a good starting point for the process of change”.⁴⁰ Five years later, the Special Rapporteur once again called attention to pregnancy and motherhood as a basis for discrimination against girls in education, noting that treating pregnancy as a disciplinary offence might even lead to increases in abortion.⁴¹

The UN Convention on the Rights of the Child also refers to the right to education, and the Committee which monitors it has emphasised the need for States Parties (which include Namibia) to provide support for adolescent parents and “to develop policies that will allow adolescent mothers to continue their education”.⁴²

Furthermore, as a signatory to the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Namibian government has committed

38 UN Commission on Human Rights (1999). The four-point scheme was elaborated upon by the Committee on Economic, Social and Cultural Rights in connection with the “right to education” guaranteed by Article 13 of the International Covenant on Economic, Social and Cultural Rights. It described *availability* as meaning that functioning educational institutions and programmes had to be available in sufficient quantity within the jurisdiction of the State Party. *Accessibility* encompassed three overlapping dimensions: *Non-discrimination*, *physical accessibility* and *economic accessibility*. *Acceptability*, according to the Committee, meant that the form and substance of education, including curricula and teaching methods, had to be relevant, culturally appropriate, and of good quality. *Adaptability* meant that education had to be sufficiently flexible to adapt to the needs of changing societies and communities, and to respond to the needs of students within their diverse social and cultural settings. When considering the appropriate application of these four “interrelated and essential features”, the best interests of the student had to be a primary consideration (Committee on Economic, Social and Cultural Rights 1999).

39 UN Commission on Human Rights (2000:para. 57–59).

40 (ibid.).

41 UN Commission on Human Rights (2006:para. 76).

42 Committee on the Rights of the Child (2003:para. 31).

itself to take all appropriate measures to eliminate discrimination against women in the field of education, more specifically through –⁴³

... the reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely.

The Committee which monitors CEDAW criticised Namibia's policy on learner pregnancy in 1997⁴⁴ and again in 2007, when it said that the provision requiring girls who became pregnant to return to normal schooling only after spending at least one year with the baby "could act as a deterrent for girls to resume their studies after childbirth" and recommended –⁴⁵

... that the State party implement measures to retain girls in school and monitor the impact of the Policy on Pregnancy among Learners on the rate at which girls return to school after childbirth.

The right to education for learner-mothers is stated even more strongly in the Charter on the Rights and Welfare of the African Child, to which Namibia is a signatory. Article 11 of this Charter sets forth measures which States Parties are obliged to take to achieve the full realisation of the right to education, including "measures to encourage regular attendance at schools and the reduction of drop-out rates" and special measures in respect of female children.⁴⁶ Even more specifically, governments are also obliged by the Charter to ensure that –⁴⁷

... children who become pregnant before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.

Similarly, the Protocol to the African Charter on the Rights of Women in Africa commits States Parties to the elimination of a range of barriers to girls' education, to –⁴⁸

43 Article 10(f).

44 The Committee expressed its concern that "pregnant teenage women were punished by expulsion from school" (Committee on the Elimination of Discrimination Against Women 1998:para. 77, 108).

45 Committee on the Elimination of Discrimination against Women (2007:para. 22–23).

46 Article 11(3)(d) and (e).

47 Article 11(6).

48 Article 12.2(c). In the same vein, the *World Declaration on Education for All* adopted by the World Conference on Education for All, in Jomtien, Thailand, in 1990, stated in Article III that –

the most urgent priority is to ensure access to, and improve the quality of, education for girls and women, and to remove every obstacle that hampers their active participation.

Declaration available at www.unesco.org/education/efa/ed_for_all/background/jomtien_declaration.shtml; last accessed 21 September 2009. Namibia's *National Plan of Action (2002–2015) for Education for All* identifies several activities which could contribute to achieving this objective (GRN 2002):

- Publicise and implement the policy on teenage pregnancy and encourage girls to continue with their studies for as long as possible

... promote the enrolment and retention of girls in schools and other training institutions and the organisation of programmes for women who leave school prematurely.

It is apparent that the right to education which appears both in international instruments and in the Namibian Constitution includes the right not to be discriminated against or 'disciplined' because of a pregnancy. Indeed, courts in some other countries have found that even a temporary suspension on the basis of pregnancy is impermissible discrimination in respect of the right to education. For example, the Supreme Court of Colombia found school regulations which suspended pregnant girls from schooling and rerouting them into tutorials impermissibly discriminatory, noting that while this approach –⁴⁹

... does not imply a definitive loss of the right to education, it does imply the provision of instruction to the pregnant schoolgirl in conditions which are stigmatizing and discriminatory in comparison with other pupils ... The conversion of pregnancy – through school regulations – into a ground for punishment violates fundamental rights to equality, privacy, free development of personality, and to education.

The 1991 *Mfolo* case from Bophuthatswana in South Africa also found a rule requiring the suspension of all pregnant students to be discriminatory. Here, the court considered a regulation applicable to teachers' colleges, which provided that pregnant students were to be suspended for the rest of the academic year. This regulation was challenged on the basis that it conflicted with section 9 of the Bophuthatswana Constitution, which provided for equality before the law and prohibited discrimination on the basis of sex. The court ruled that while there might be good reason for making specific provisions for pregnant female students, it was unjustifiable to apply a uniform sanction to all pregnant students. The Ministry of Education advanced a number of possible purposes for the regulations – including the encouragement of morality, health, and the maintenance of discipline – but the court found that none of these purposes justified the blanket regulation, which was ruled to be unconstitutional.⁵⁰

-
- Sensitise teachers, principals, school boards, community leaders, inspectors in order to reduce the stigma of pregnancy and motherhood.
 - Explore options which would allow pregnant girls to complete their education, and increase access to reproductive health services.

49 UN Commission on Human Rights (2000). The Colombia case referred to is Supreme Court of Colombia, *Crisanto Arcangel Martinez Martinez y Maria Eglina Suarez Robayo v Colegio Ciudad de Cali*, No. T-177814, 11 November 1998, as translated from Spanish. The original text reads as follows:

... aun que la 'desescolarización no implica la pérdida absoluta del derecho a la educación, si implica su prestación conforme a una condición que tiende a estigmatizar a la alumna embarazada y a discriminarla frente a los restantes estudiantes en la recepción de los beneficios derivados del [derecho a la educación]. ... [e]xigir – por vía reglamentaria – el embarazo de una estudiante en causal de sanción, viola los derechos fundamentales a la igualdad, a la intimidad, al libre desarrollo de la personalidad y a la educación.'

50 *Mfolo & Others v Minister of Education, Bophuthatswana* (1994) (1) BCLR 136 (B) (date of judgment 07/11/1991); 1992 (3) SA 181 (BG).

Although the Namibian approach to learner pregnancy has evolved over the years, it still falls short in its embodiment of a non-discriminatory right to education.

The newborn child’s right to be cared for by both parents

Article 15 of the Namibian Constitution says that –

[c]hildren shall have the right ... subject to legislation enacted in the best interests of children, as far as possible the right to know and be cared for by their parents.

This constitutional provision has been cited by the Ministry of Education as a justification for requiring new mothers (and fathers) to remain out of school for a year. However, reliance on this right to justify the current Policy on Pregnancy amongst Learners appears misplaced.

This constitutional protection applies to all children, throughout their childhoods. If it did support a policy forbidding new parents to continue their schooling for the first year of their child’s life, then working mothers and fathers would also have to be given a full year’s maternity and paternity leave from work. By the same token, the constitutional right of the child to be cared for by his or her parents does not come to an end at age 1. If the Constitution could be applied in the way that has been suggested, then parents would be forbidden from working or attending school altogether. The “care” envisaged in the Constitution logically cannot refer to full-time daily care of children of all ages, but must rather relate to ongoing parental contact, involvement and responsibility.⁵¹

The new policy

In 2008, the Legal Assistance Centre was asked to work with the Ministry of Education to create a new policy on learner pregnancy. The assignment was to create a policy with two aspects: prevention and management. The process of developing the new policy included interviews with learners and consultative meetings at regional and national level with a range of stakeholders, including teachers, principals, regional education officers, counsellors, social workers, school board representatives and non-governmental organisations. Feedback based on the input received was incorporated into a working draft, which was endorsed by the Ministerial Planning and Coordinating Committee in April 2009 and approved by Cabinet in October 2009.⁵²

51 The UN Committee on the Rights of the Child (2006:para. 19) has recognised that a diversity of family and caregiving relationships can be in the best interests of a young child, noting the role of –

... some combination of mother, father, siblings, grandparents and other members of the extended family, along with professional caregivers specialised in childcare and education.

52 Cabinet Action Letter, Decision No. 19th/13.10.09/004. Although Cabinet approved the policy, it suggested that other ministries should give written submissions on it to the Ministry of Education. Thus, it is possible that there may still be some fine-tuning of the policy before it is implemented.

The new policy reflects many of the principles developed in the previous unused draft developed through public consultations in the 1990s. The role of the family as well as the community is considered. Detailed provisions explain the type and range of information schools are obliged to provide to all learners, as well as specific information learner-parents will require. Most importantly, like the previous draft policy, the new policy emphasises flexibility. It acknowledges that different families and communities have different attitudes to learner pregnancy. Thus, it *allows* pregnant girls to remain in school until four weeks before the due date without *requiring* that they do so; if a girl and her family would not be comfortable for her to remain in school once the pregnancy becomes visible, she may leave at that stage. Similarly, it *allows* learner-mothers to return to school shortly after giving birth *if they wish*, provided that the school, family and health care providers are satisfied that she and the baby are in good health and that the baby will be suitably cared for when she is at school. If the young mother and her family feel that she should stay at home for a longer period of time with the infant, she may take a leave of absence for up to a maximum of one calendar year.

The new policy does not substitute its judgment for that of the family. It merely sets out the conditions under which the doors of the school will be open to the learner. It is still up to the learner-mother and her family to decide if and when she will take advantage of the opportunities which the policy makes available. No pregnant girl or learner-mother will be forced to remain in or out of school against her will. Decisions can be made according to her personal situation, and with the support of her family and the school.

This flexibility also allows for appropriate responses depending on the time of the academic year in which the pregnant learner gives birth. Many teachers consulted mentioned this factor as being an important one, and felt that it would be much better to time returns to school with reference to practical issues such as the curriculum and the timing of exams. No “one-size-fits-all” solution makes sense in practice.

The new policy does not provide for a leave of absence for learner-fathers, since their biological role with respect to the baby is different from that of the learner-mother who gives birth and breastfeeds, but it encourages learner-fathers to be involved and responsible parents and to share in the duty of maintenance. By allowing them to continue their education, the new policy places them in a better position to assist with future financial support.

It was generally accepted during the consultations that the newborn infant will have a far better chance in life if both parents are able to complete their secondary education. Furthermore, statistics show that learners who continue their education are more likely to delay subsequent pregnancies, supporting the need to return a learner-mother to the education system as soon as the situation permits. It should also be noted that several learners interviewed who became pregnant whilst still at school vowed that they would make every effort upon their return to school to discourage other learners from putting themselves at risk of the same fate.

The new policy places a very strong emphasis on prevention, which includes the encouragement of abstinence and the communication of values such as gender equality and respect for individual autonomy. Practical prevention measures such as providing safer school and hostel environments, facilitating effective access to contraceptives and encouraging alcohol-free social activities for youth are also included. It is anticipated that implementation of the prevention section of the policy will be the primary mechanism for reducing the incidence of learner pregnancies.

During the consultation process, learners themselves called for strong and consistent messages about responsible sexual behaviour. Some learners appreciated the new information they received just by attending the consultative workshops; as one student said, “this meeting was very useful since we don’t usually get things like this here”. Another learner summarised the need for information as follows:⁵³

I think teenage pregnancy can be prevented only if teachers, learners and parents co-operate together and when teachers at school talk to their learners on how to prevent, and the effect girls can have when they have babies at an early stage.

Where a pregnancy does occur, the focus is on support rather than punishment. In the various consultations, some people have favoured a punitive policy because they believe that a supportive approach ‘condones’ pregnancy amongst learners. But there is a difference between condoning learner pregnancy and addressing the problem of learner pregnancy. The new policy acknowledges the reality in Namibia that teenagers and learners do give birth, and proposes new methods to deal with this situation.

Moreover, the emphasis on support is also appropriate in an environment where significant numbers of learner pregnancies may result from forced sex rather than unwise choices. Recent police statistics indicate that just over one third of all victims of rape and attempted rape are under the age of 18, with the vast majority of juvenile rape victims being female.⁵⁴ The rape of children is particularly likely to go unreported. Additionally, even where there is no overt coercion, the disparities in gender equality in Namibia often mean that girls may feel powerless to negotiate sexual behaviour or contraceptive use. A 2006 UNICEF survey of 265 girls aged 15–24 in the Kavango, Ohangwena and Omaheke Regions found that 19% of them had already been pregnant – *with a shocking 40% of these pregnancies resulting from forced sex*.⁵⁵ A further need for a more supportive policy is indicated by evidence that illegal abortion, baby dumping and infanticide are options currently utilised by learner-mothers to prevent motherhood from interfering with their education.⁵⁶

53 Legal Assistance Centre records of workshop feedback.

54 National statistics from the Namibian Police for 2003–2005, as reported in LAC (2007:8). This includes both rape and attempted rape. The age of the victims was not recorded nationally prior to 2003.

55 UNICEF (2006:9).

56 See, for example, learner comments in *OYO Young, Latest and Cool*, 2004, 3(1) in “Teenage pregnancy, unwanted pregnancy and abortion”. Many of the learners writing inputs for the

Many of those consulted acknowledged that the current statistics on pregnancy-related dropouts prove that the previous guidelines did not achieve the desired deterrent effect. During the consultations around the proposed new policy, one of the participants stated that –⁵⁷

Namibia really cannot afford to lose any learning person as we are geared toward realizing Vision 2030, that of a Learning Nation for Industrialisation and a better life to all of us.

This statement captures the ultimate goal of an improved policy on learner pregnancy.

The new policy can best be summarised by reference to its six guiding principles:

- the right to education
- prevention by means of positive interventions rather than punishment
- providing learners with appropriate information about reproductive health matters, to encourage responsible decision-making
- respect for the right to freedom of choice for both boys and girls, as well as respect for the dignity of the individual
- support to learner-parents to help them complete their education in a manner which takes into account the health and welfare of the newborn child, and
- respect for cultural and family values by providing sufficient flexibility to allow for a range of options.

The new policy is also noteworthy for its recognition that the broader community needs to play a role in all of these areas:⁵⁸

Schools constitute only one of the many players which share in the role of shaping the behaviour of our youth. A child's family should have the first and foremost responsibility of providing the child with the values and examples which will guide him or her through childhood and adolescence. The religious community, the wider community, government ministries, the media and society at large also influence the values of Namibia's young people.

Ensuring that girl learners are able to continue their education after pregnancy is critical if Namibia's long-term goals concerning gender equality in education and development are to be achieved. It may be difficult to achieve consistent implementation of the new policy immediately, because of differing attitudes towards learner pregnancy in different communities. But the policy is intended to guide policy direction over the next ten years, and to assist Namibia in achieving the Millennium Development Goals and the objectives of Vision 2030. The most effective way to address the problem of learner pregnancy is undoubtedly a rights-based approach built around the right to education

magazine said that they would consider abortion if they became pregnant, while several reported that they had actually resorted to this option themselves.

57 Excerpts from opening speech by Mr Ben Boys, Director of Education, Hardap Region, September 2008.

58 Ministry of Education (2009).

for all, which is a prerequisite for the realisation of so many other rights. The Legal Assistance Centre believes that the new policy will be far more effective than past approaches in preventing learner pregnancy, and that it will simultaneously ensure that young parents are encouraged to complete their education for the benefit of themselves, their infants and the developing Namibian nation.

References

- Abt Associates South Africa. 2002. *The impact of HIV/AIDS on education in Namibia*. Windhoek: Ministry of Basic Education, Sport and Culture & Ministry of Higher Education, Training and Employment Creation.
- Becker, H, B Bruhns, M Maasdor & S Harring. 1995. "Teenage pregnancy and the right to education". *CASS Papers*, No. 32. Windhoek: Centre for Applied Social Sciences.
- Committee on Economic, Social and Cultural Rights. 1999. *Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 13*. Geneva: Economic and Social Council.
- Committee on the Elimination of Discrimination Against Women. 1998. *Concluding observations: Namibia*. UN Doc. A/52/38/Rev.1, Part II. New York: United Nations.
- Committee on the Elimination of Discrimination against Women. 2007. *Concluding comments of the Committee on the Elimination of Discrimination against Women: Namibia, Thirty-seventh Session, 15 January–2 February 2007*, para. 22–23. New York: Committee on the Elimination of Discrimination against Women.
- Committee on the Rights of the Child. 2003. *General Comment No. 4 (2003): Adolescent health and development in the context of the Convention on the Rights of the Child*. CRC/GC/2003/4, 1 July 2003. New York: Committee on the Rights of the Child.
- Committee on the Rights of the Child. 2005. *General Comment No. 7 (2005): Implementing child rights in early childhood*. CRC/C/GC/7/Rev.1, 20 September 2006. New York: Committee on the Rights of the Child.
- Dieden, C. 1994. "Draft study of teenage pregnancy". Unpublished report, Human Rights and Documentation Centre, University of Namibia, Windhoek.
- EMIS/Education Management Information System. 2008. *Education Statistics 2007*. Windhoek: Ministry of Education.
- FAWE/Forum for African Women Educationalists. 1994. *School drop-out and adolescent pregnancy: African education ministers count the cost. A report on the Ministerial Consultation held from 15–18 September 1994*. FAWE: Mauritius.
- Felton, S & C Haihambo-Muetudhana. 2002. *Girls' education in Rundu Educational Region: A report on a field assessment*. Windhoek: Ministry of Basic Education/ United Nations Children's Fund.
- GRN/Government of the Republic of Namibia. 2002. *Education for All (EFA): National Plan of Action 2002–2015* [Revised 16 July 2002]. Available at planipolis.iiep.net.

- unesco.org/upload/Namibia/Namibia%20EFA%20NPA.pdf; last accessed 21 September 2009.
- LAC/Legal Assistance Centre. 2007. *Rape in Namibia: Full report*. Windhoek: Legal Assistance Centre.
- LAC/Legal Assistance Centre. 2008. "School policy on learner pregnancy in Namibia: Background to reform". Unpublished paper prepared to the Ministry of Education by the Gender Research and Advocacy Project.
- MBEC/Ministry of Basic Education and Culture. 1995. *Ministry of Basic Education and Culture – Formal Education Circular 1/1995, Ref. No. 15/7/1*. Windhoek: MBEC.
- MBEC/Ministry of Basic Education and Culture. 1997. "Policy on pregnancy among learners in schools". Unpublished draft dated 25 May 1997.
- Meekers, D & G Ahmed. 1999. "Pregnancy-related school dropouts in Botswana". *Population Studies*, 53(2), July:195–209.
- MHSS/Ministry of Health and Social Services. 1993. *Namibia Demographic and Health Survey 1992*. Windhoek: MHSS.
- MHSS/Ministry of Health and Social Services. 2003. *Namibia Demographic and Health Survey 2000*. Windhoek: MHSS.
- MHSS/Ministry of Health and Social Services. 2001. *Health in Namibia: Progress and challenges*. Windhoek: MHSS.
- MHSS/Ministry of Health and Social Services. 2008. *Namibia Demographic and Health Survey 2006–07: Key findings*. Windhoek: MHSS.
- MICT/Ministry of Information and Communication Technology. 2008. "Policy on pregnancy amongst learners in school". Unpublished official version reconstructed from Cabinet Action Letters by the Director of Media Affairs, Ministry of Information and Communication Technology.
- Ministry of Basic Education, Sport and Culture. 2001. *Circular Formal Education 5/2001*. Windhoek: MBESC.
- Ministry of Education. 2009. "Education Sector Policy for the Prevention and Management of Learner Pregnancy". Unpublished draft approved by the Ministerial Planning and Coordinating Committee on 2 April 2009 and by Cabinet on 13 October 2009.
- New Era*, 25 October 2005.
- NPC/National Planning Commission. 2008. *Second Millennium Development Goals Report 2008: Namibia, Progress at mid-term*. Windhoek: NPC.
- OYO Young Latest and Cool*, 3(1), 2004, "Teenage pregnancy, unwanted pregnancy and abortion".
- Save the Children. 2005. *State of the World's Mothers Report 2005: The power and promise of girls' education*. Westport, Connecticut: Save the Children.
- The Namibian*, 20 October 2005; "Let's talk about sex, says WAD".
- Tjombonde, V. 2002. *Promoting girls' education through re-entry policy for adolescent mothers: A case study to provide an in-depth review of the implementation of the Teenage Pregnancy Policy in Namibian schools*. Windhoek: Forum for African Women Educationalists in Namibia.

- UN Commission on Human Rights. 1999. *Preliminary Report of the Special Rapporteur on the Right to Education, Ms Katarina Tomaševski, submitted in accordance with Commission on Human Rights Resolution 1998/33, E/CN.4/1999/49*. Geneva: Economic and Social Council.
- UN Commission on Human Rights. 2000. *Progress Report of the Special Rapporteur on the Right to Education, Ms Katarina Tomaševski, submitted in accordance with Commission on Human Rights Resolution 1999/25, E/CN.4/2000/6*. Geneva: Economic and Social Council.
- UN Commission on Human Rights. 2006. *Girls' right to education: Report submitted by the Special Rapporteur on the Right to Education, Mr V Muñoz Villalobos, E/CN.4/2006/45*. Geneva: Economic and Social Council.
- UNICEF/United Nations Children's Fund. 2006. *Knowledge, attitudes, practice and behaviour study in Namibia: Key findings*. Windhoek: UNICEF.
- UNICEF/United Nations Children's Fund. 2009. *A time of joy, a time of challenge: The health of mothers and newborns in Namibia. A supplement to the State of the World's Children Report 2009*. New York: UNICEF.
- Von Wietersheim, E. 2002. *Educationally marginalized children in Namibia: An inventory of programmes, interventions and data*. Windhoek: United Nations Children's Fund & Ministry of Basic Education, Sport and Culture.

Customary practices and children with albinism in Namibia: A constitutional challenge?

Ruusa N Ntinda¹

Introduction

In Africa, many people are affected by albinism, characterised by the lack of pigmentation. Namibia has one of the highest prevalence rates of albinism in the world, with a ratio of one albino in every 3,000 of the country's estimated 2 million people.² In addition to sight problems and cancer risks that come with the condition, albinos are subject to persistent beliefs. In spite of educational campaigns, human sacrifices still occur on the continent and it is not that unusual to find the murder of an albino in the columns of an African newspaper.³

In order for all citizens to embrace and enjoy a diverse cultural heritage, Namibia made provision for the protection of culture and customary law in its Constitution and other legislative acts. With specific regard to the rights of children with albinism, the question is whether they are regarded by law as the same as other children, whether they enjoy the same rights as them, or whether they should be treated in a category on their own.

This paper will focus on various cultural practices and superstitions surrounding children with albinism in Namibia, which stigmatise and discriminate against them on a daily basis. The intention of this article is to find an answer to whether the customary practices in question present a constitutional challenge. To answer this question, the validity of these practices under customary law will be examined and compared with obligations under the Constitution. Thus, the human rights of these children under customary law will be discussed in relation to their right to equality, freedom from discrimination, and affirmative action.

Cultural beliefs, superstitions and albinism

Albinism is a global phenomenon. It occurs in people of all races throughout the world, and involves a deficiency of the pigment melanin. Unlike other continents, however, the original inhabitants of African soil were dark in colour. Hence, if someone was born an

1 Ruusa Ntinda is a person with albinism.

2 *New Era*, 24 October 2008.

3 See <http://en.afrik.com/article13487.html>; last accessed 28 September 2009.

albino, his/her whitish skin and hair would stand out in stark contrast to those around them. Due to Namibia's diverse cultural heritage, many traditional names are used to refer to individuals with albinism. These range from *ekihi*,⁴ *otjihenyange*,⁵ *tsirende*,⁶ *ekishi*,⁷ *neyoolile*,⁸ *nghixupulasha*,⁹ *ndoomba ekutu*,¹⁰ *nambalakata*,¹¹ *ethithi*,¹² *etokatoka*,¹³ and *litokatoka*,¹⁴ just to name a few.

Like many other things in Africa's diverse cultures, albinism is surrounded by many cultural beliefs, superstitions and stereotypes. Some of these are as follows:

- Some see children with albinism as a gift or a blessing because such children are believed to have magical powers or can tell the future.
- Others believe children with albinism are a curse. They are seen either as being a punishment to a woman, man or family that has been wicked and angered god, or as being a result of a bewitchment in the family.
- In some parts of Africa, people with albinism are not perceived as human beings but as sacrificial lambs, wanted for their hands or their genitals which are considered as the body's strongest parts.¹⁵ Albinos are killed for their body parts for making fetishes or potions that witchdoctors' allegedly advise their clients to drink in order to obtain wealth.¹⁶ In the past, albinos in certain communities in Namibia were killed and were used for *muti*.¹⁷ Each part had its own use and meaning. For instance, if eyes were used in the muti, then your boyfriend, girlfriend, wife or husband will never cheat on you. If legs were used, then you will be a Casanova. If blood, hair, nails, sexual parts and breasts were used, then you will be rich.¹⁸
- If you are married to an albino, it is believed that you will be a very lucky man or woman.¹⁹

4 *Otjisherero*; plural = *omakih*.

5 *Otjizemba*.

6 *Khoekhoegowab*.

7 *Oshiwambo*; plural = *omakishi*.

8 *Oshiwambo*; literally, "long tooth"; originates from folk tales, where people with albinism were portrayed as cannibals.

9 *Oshiwambo*.

10 *Oshiwambo*.

11 *Oshiwambo*.

12 *Oshiwambo*; plural = *omathithi*.

13 *Rukavango*; plural = *matokatoka*. Actually, *Rukwangali*, *Rugciriku* and *Thimbukushu* are languages, whereas the glossonymic unit *Rukavango* does not correspond to a language, but to a cluster of languages. The phrase *Kavango languages* used by Möhlig (1997) could be more appropriate.

14 *Rukavango*; plural = *vatokatoka*.

15 See <http://en.afrik.com/article13487.html>; last accessed 28 September 2009.

16 For example, in east-central African countries, especially in Tanzania; <http://en.afrik.com/article13487.html>; last accessed 28 September 2009.

17 "Traditional African medicine, especially that based on the use of herbs or parts of animals" Concise Oxford English Dictionary (2002).

18 Interviewee from Nkurenkuru; 19 July 2009.

19 (ibid.).

- Albinos in some cultures are perceived to be cannibals. In many folk tales told to children, albinos are portrayed as evil cannibals. Sometimes, when a child misbehaves, s/he will be told that if they continue being naughty they will be devoured by an albino.
- Some believe that albino children are the result of inbreeding or racial mixing. For example, many believe that the child is white because its mother had sex with a white man. The woman will be accused of infidelity and be abandoned.
- Albinism is also thought to be very contagious. Some people believe that if one eats, sits, sleeps next to, drinks from the same cup or has any other physical contact with a person with albinism, you will also become an albino²⁰ or you will smell like them.²¹ Clearly, this is untrue: albinism is a genetic condition and can only be passed on to another person by genetic means, namely from parents to their offspring.
- Some people believe that people with albinism do not die in the presence of other people without albinism: they go into hiding and die elsewhere. The truth of this is questionable, because children with albinism are killed at birth in some African cultures, so they are not alive at some 'old age', when this 'slipping away' is supposed to happen. This is more likely to be why people have never seen funerals for people with albinism.
- In Zimbabwe, it is thought that having sex with a woman with albinism will cure a man of HIV. As a result, many women with albinism in the area have been raped. Clearly, this is another fallacy: having sex with an albino will not cure an HIV-positive man.²²
- Some believe that people with albinism are sterile. This, too, is a fallacy: albinos are as capable of reproduction as non-albinos.
- Many also believe that people with albinism do not live long. Could it be that this is the reason some albino children in Namibia are killed at birth, and are not allowed to enjoy their constitutional right to life?²³

It is evident that these traditional beliefs and practices are very wrong and are very harmful to the emotional, physical and psychological state of both children and adults with albinism. The issue needs to be dealt with in order to protect the rights of these children in particular.

A constitutional challenge?

Traditional cultural practices reflect the values and beliefs held by members of communities for periods often spanning generations. Whilst some practices are beneficial

20 This is my strong belief, based on the experience I had at school. I was tormented and beaten by other children, and if I drank from a tap, no one else would drink from it after me unless it had been washed with soap. In class and during break, I sat alone.

21 Some say that albinos have their own unique smell. It is believed to be a bad smell. If one sits next to an albino, one will smell so bad that others will vomit.

22 There is currently no cure for HIV/AIDS, although some drugs are showing promise.

23 See Article 6 of the Namibian Constitution.

to all members of a cultural group, others are harmful to certain individuals within that culture;²⁴ such is the case with persons with albinism. It is evident that children with albinism are particularly vulnerable to harmful customary practices. Are these practices a constitutional challenge? If so, what is Namibia doing about it? In order to answer these questions, one needs to look at the constitutional standing of customary law in Namibia.

Customary law and the Namibian Constitution

Customary law in Namibia is put on par as a source of law with other sources of law.²⁵ Article 66(1) of the Constitution declares as follows:

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

This is evident in the Traditional Authorities Act,²⁶ which expressly recognises the existence of customary law. *Customary law* is defined in section 1 of the Act to mean –

... the customary law, norms, rules of procedure, traditions and usages of a traditional community in so far as they do not conflict with the Namibian Constitution or with any other written law applicable in Namibia.

If one considers the above definition and application of customary law, can the customary beliefs and practices discussed earlier fall under this definition? One could argue that such cultural beliefs are a manifestation of the right to culture. But then, what exactly is *culture*? And to what extent does this right to culture prevail?

Article 19 of the Constitution provides the rudiments of a cultural approach to customary law:

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

With Article 19 the right to culture is guaranteed under the Bill of Rights in the Constitution as well as in Article 15(1)(a) of the ICESCR. In terms of these two legal obligations, the government is required to take legislative and administrative measures to ensure the fulfilment of these rights.²⁷

24 See LAC et al. (2008:9).

25 These include the Namibian Constitution, common law, juristic writings, international law and agreements, and other relevant legislation applicable to Namibia.

26 No. 25 of 2000.

27 Ruppel (2008:23, 45).

A *right to culture* can be juridically construed to mean the freedom – akin to the freedom of expression – to perform or practice the arts and sciences. But *culture* denotes a people's entire store of knowledge and artefacts, especially their language and system of belief.²⁸

However, various aspects of customary law have been identified as outmoded or contrary to human rights, and proposals have been made for them to be changed. According to Bennett,²⁹ –

[t]he application of customary law is subject to three provisions. One of the three is the so-called “repugnancy proviso”, a general reservation in favour of public policy and natural justice.

Namibia, after Independence, replaced the repugnancy provision with the constitutionality provision, which renders a particular customary law unenforceable on the grounds of its inconsistency with the Constitution or a provision of a statute.³⁰

However, for us to see whether the customary practices, beliefs and superstitions surrounding children with albinism are a constitutional challenge, we need to look at children's human rights under customary law and the policy of Affirmative Action in Namibia.

Human rights of children with albinism under customary law

Human rights were originally devised to protect citizens from arbitrary and oppressive treatment by the state: they were not conceived to be a ground of action by citizens inter se. Hence, whether constitutional rights override customary law or, conversely, whether customary law should be allowed to limit constitutional rights depends on the viewpoint and the situation at hand. Indeed, special provision is made in Article 21 of the Namibian Constitution for the limitation of human rights listed in Chapter 3 therein. An analysis that may overlap to some extent will include reference to the social conditions and cultural traditions of the country.

Unlike most other legal rights, human rights are of a high degree of abstraction; and because they are so broadly conceived, the process of interpretation becomes particularly important. Interpretation of human rights is an overt value judgement, amounting to an act of creation and imagination.³¹

28 Bennett (1999:23).

29 (ibid.:52).

30 The repugnancy provision appears to have been repealed in 1985, following the abolition of the Native Commissioners' courts by the Native Administration Proclamation Amendment Act, 1985 (No. 27 of 1985). See Hinz (2003).

31 *Matiso & Others v Commanding Officer, Port Elizabeth Prison & Another*, 1994 (4) SA 592, 597.

Namibia, a country of diverse cultures, is in no position to reject its indigenous cultural traditions. While the prominence given to so-called Western institutions in the Constitution might suggest that African cultures are to be swept aside whenever they are in conflict with the Bill of Rights, such a drastic reading would not be aspirational. Some form of accommodation can be found between customary law and Chapter 3 of the Constitution. Cultures, too, are amendable to compromise. Like Bills of Rights, they change constantly, both in reaction to extrinsic forces and through the dynamics of internal conflict. Opinion on African tradition is no monolith of uniformity: even those who might reject what they see as a menacing Western influence do not necessarily support all parts of their own heritage.³² In view of the aforementioned we are going to look at the right to equality and freedom from equality in order to discuss the subjectivity of children with albinism to customary law.

Right to equality and freedom from discrimination

Once the application of customary law is considered a constitutional right and not a precious freedom, it is thrown into competition with the other fundamental rights in Chapter 3 of the Constitution. What will ensue is a series of conflicts, especially between the right to equal treatment on the one hand, and the many customary laws on the other that subordinate the interests of women and children to senior males. Even if these contradictions are inevitable, the Constitution gives no indication whether fundamental rights supersede customary law or vice versa.³³ The fundamental rights are, therefore, not ranked. However, if a right to culture/customary law is to be read in the context of the Constitution as a whole, and if Chapter 3 rights are to be construed so as to give effect to underlying constitutional principles, there can be little doubt that customary law will be the loser.³⁴

The right of children with albinism to equality and freedom from discrimination is one of their most important rights. The Convention on the Rights of the Child has identified this right as a principle of fundamental importance to the implementation of the whole Convention. The term *discrimination* should be understood to imply –³⁵

32 See Bennett (1999:5).

33 Apart from Article 66(1) of the Namibian Constitution, the constitutions of other African states were careful to shield customary law from the norms of equality/non-discrimination. For example, section 23(3)(b) of the Zimbabwean Constitution (Order 1600 of 1979) provides that the application of African customary law is not subject to the prohibition on discrimination contained in section 23(1)(a) of that law. A similar provision is contained in section 23(4)(d) of the Constitution of Zambia (Act 1 of 1991); section 15(4)(b) of the Swaziland Constitution (Independence Order 1377 of 1968), and section 15(4)(d) of the Botswana Constitution (Independence Order 1171 of 1966), as amended by the Constitution (Amendment and Supplementary Provisions) Act 30 of 1969.

34 See Bennett (1999:43).

35 Hodgkin & Newell (2007:17).

... any distinction, exclusion, restriction or preference which is based on any grounds such as race, colour, sex, language, religious, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

Article 10 of the Namibian Constitution recognises this right, as follows:

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

Nevertheless, children with albinism in Namibia are still discriminated against on the basis of their colour. This rocks the very foundation of the human rights norm because, as a result of this discrimination, the fundamental rights of children with albinism seem to be pushed aside. For instance, if a child with albinism is discriminated against on the basis of his/her skin, the following can happen, amongst other things:

- Some school teachers cannot stand the sight of the child and, as a result, mistreat the child.
- Other children see the teacher's example and start behaving the same way or even worse.
- The child's self-confidence will be destroyed – to the extent that s/he drops out of school.
- The child's right to education and development is, therefore, pushed aside.
- These children are sometimes killed at birth.
- As a result, their right to life and protection is pushed aside.

In terms of their obligations of non-discrimination towards various international human rights treaties,³⁶ states parties are also obliged to remove the stigma associated with children with albinism. Especially the vulnerability of these children must lead to a more effective prevention of their maltreatment. One way of dealing with the discrimination against children with albinism is through what is known as *affirmative action*.

Affirmative action

The notion of *affirmative action* is controversial, even in countries where it has been in use as a strategy for equality for a longer period than it has in Namibia. Affirmative action is well known in international human rights law. Both the International Convention on the Elimination of All Forms of Racial Discrimination³⁷ and the Convention on the Elimination of All Forms of Discrimination Against Women³⁸ provide a basis for

36 See contribution by Oliver C Ruppel elsewhere in this volume.

37 Adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965; entry into force 4 January 1969.

38 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly, is often described as an international bill of

affirmative action.³⁹ Namibia is a party to both these treaties, and by virtue of Article 144 of the Namibian Constitution, the provisions in these treaties are part of the law of Namibia.

Affirmative action means that positive steps taken to increase the representation of women and minorities in areas of employment, education, and business from which they have historically been excluded.⁴⁰

However, in its particularity, affirmative action has fallen prey to muddled terminology and misconceived application. Has the term *affirmative action* become interchangeable with the term *reverse discrimination*? Indeed, affirmative action is criticised for contradicting the philosophy of non-discrimination: one form of discrimination appears to be substituted for another. However, preferential treatment in the form of 'reverse' or 'positive' discrimination (depending on where one stands on the issue) is not necessarily the same thing as affirmative action.

Affirmative action is necessary to translate the goals of equality from empty theory into concrete realities. Thus, this remedy aims to make up for the effects of a long heritage of bias by giving some preference to individuals who were historically disadvantaged.

In Namibia, affirmative action was portrayed as the principal instrument to redress the imbalances of the past. Article 23 of the Namibian Constitution provides as follows:

- (1) The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary Courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people at such practices.
- (2) Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in the Namibian society arising out of discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force, and the prison service.
- (3) In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.

rights for women.

39 See Tahmindjis (1997:44) for a discussion on affirmative action in a democratic society.

40 See <http://plato.stanford.edu/entries/affirmative-action/>; accessed 20 September 2009.

No particular group is identified by Article 23, although Article 23(3) recognises the special discrimination traditionally experienced by women. But what about children with albinism? Since no specific group was identified, do they not fall under the category of those discriminated against and previously disadvantaged?

Affirmative action, as a remedial concept, necessarily implies that inequalities first need to be identified, after which the appropriate strategies need to be put in place to secure equality. The concept does not so much solve problems as pose options: there is no obviously ‘correct’ policy. The problem is that, more often than not, one option or one group’s interest will have more value and worth than another. Affirmative action reflects – and its processes test – the principle of social justice which a particular society holds dear. In this regard, it can be a much more accurate indicator of true social value for that society than the most earnestly expressed sentiments in a Constitution. The goals of affirmative action policies and programmes can be as telling as the selection of the groups which are its objects or as the strategy for its implementation. For the purpose of enhancing the quality of life for children with albinism the aim must be to change a culture, because children with albinism face barriers in the enjoyment of their rights due to a combination of social and cultural attitudes.

Some complain that affirmative action can have a stigmatised effect on the very people whose interests it is meant to promote, i.e. in order to help these people effectively, sometimes they have to be singled out. However, some people with albinism are against the idea of the public being educated about them and their needs, because they believe this puts them under the spotlight – meaning they will be discriminated against even more than before. While some are of the opinion that affirmative action will bring about beneficial change and the rights of children with albinism will be given the recognition they deserve, in order for Vision 2030 to be given effect, affirmative action must be directed at achieving change.⁴¹

Affirmative action, however, is a process and not an end, and it brings with it no guarantees. Change to bring about equality cannot be brought about simply by the stroke of a legislative pen. Nevertheless, we must be sure what we need and mean by *equality*, so that we know it has in fact been achieved.

Article 19 of the Constitution supports the argument that, while all people have the right to participate in the cultural life of their choice, individuals are also free to opt out. It follows that no child can be compelled to undergo initiation or other practices against his or her will, especially if such cultural practices are prejudicial to the child’s health or life. Section 13 in the Children’s Act of 1998 in Ghana, for example, states the following:

41 Vision 2030 provides long-term alternative policy scenarios on the future course of development in Namibia at different points in time up until the target year 2030; see http://www.npc.gov.na/vision/vision_2030bgd.htm; accessed 25 September 2009.

No person shall subject a child to torture or other cruel, inhuman or degrading treatment or punishment including any cultural practice which dehumanises or is injurious to the physical and mental well-being of a child.

Other African countries, like Uganda, have similar provisions in their legislation concerned with the protection of children's rights. Namibia needs to be guided by what other countries have done to protect their children from harmful social and customary practices.⁴²

Conclusion

There are many cultural practices in Namibia which, by human rights standards, are difficult – if not impossible – to reconcile. But there are also many instances in which cultural arguments continue to be used today to justify the denial of children's rights, e.g. the right to culture. But these arguments should be tested against the values and the principles of the Namibian people.

Strategies are needed, in particular, to challenge traditional and other discriminatory attitudes and customs. For this purpose, all harmful cultural practices need to be identified. Traditional attitudes and customs that promote discrimination in our society also then need to be extinguished.

It is the state's responsibility to raise awareness in order to challenge discrimination against children with albinism. Therefore, it must increase its efforts to adopt a proactive and comprehensive strategy to eliminate the discrimination directed against these children by introducing legislation to protect their equal rights to life and protection from all forms of violence and discrimination. The Constitution not only has abundant reference to a desire to eliminate all forms of discrimination, but it also binds the state to the policy of affirmative action, a principle that obliges the state to uplift those who have previously been disadvantaged. Obviously, change does not happen overnight. It remains to be seen if the long expected Child Care and Protection Act will – at least on paper – do away with those traditional cultural practices – including those with regard to children with albinism – that are harmful and not beneficial to all members of the cultural group where they are being practiced.

References

- Bennett, TW. 1999. *Human rights and African customary law under the South African Constitution*. Cape Town: Juta & Co.
- Hinz, MO. 2003. *Customary law in Namibia: Development and perspective* (Eighth Edition). Windhoek: Centre for Applied Social Sciences.

42 LAC et al. (2008:9).

- Hodgkin, R & P Newell. 2007. *Implementation handbook for the Convention on the Rights of the Child* (Fully Revised Third Edition). New York: United Nations Children's Fund.
- LAC/Legal Assistance Centre, Ministry of Gender Equality and Child Welfare & United Nations Children's Fund. 2008. *The Draft Child Care and Protection Act: Issues for public debate. Booklet 2*. Windhoek: LAC.
- Möhlig, W. 1997. "A dialectometrical analysis of the main Kavango languages: Kwangali, Gciriku and Mbukushu". In Haacke, W & E Elderkin (Eds). *Namibian languages: Reports and papers*. Köln: Rüdiger Köppe Verlag, pp 211–234.
- Ruppel, OC (Ed.). 2008. *Women and custom in Namibia: Cultural practice versus gender equality?*. Windhoek: Macmillan.
- Tahmindjis, P. 1997. "Affirmative action in a democratic society". *Queensland University of Technology Law Journal*, pp 195–210.

Children in polygynous marriages from a customary perspective

Prisca N Anyolo

Polygyny

In Namibia, polygyny among traditional communities is traced back through the entire known history of the indigenous inhabitants. It is a marriage between one man and several wives, and is an unadulterated form in its own unique right.¹ In the Namibian context, *polygyny* means one man married to more than one wife.

Becker and Hinz² explain that all traditional marriages that take place under customary law in Namibia are potentially polygynous. The authors further state that a customary marriage is conceptualised as a union between two families or kinship groups, rather than between two individuals. However, they also see a growing trend for formal polygynous unions to be replaced by what they call “second house” relationships, where a married man sets up house with another woman without following any civil or customary formalities.³ Such kinds of relationships are not polygynous in the formal, traditional sense of the word, but rather involve adultery. A study carried out by the Centre for Applied Social Sciences⁴ in Caprivi and the *Oshiwambo*-speaking traditional communities indicated that around 62–95% of couples married according to customary law. The study found that polygyny was more commonly practised in patriarchal societies. Data from the southern communities suggests that couples may be reluctant to marry in situations where the men are not able to meet the social and financial demands of marriage.⁵

The following court decisions in the cases discussed below considered polygyny not to be a true or real marriage.

In the case of *Hyde v Hyde & Another*,⁶ a *true marriage* was defined as a voluntary union for life of one man and one woman to the exclusion of all others, which was equally adopted in the case of *Seedat’s Executors v The Master* (Natal).⁷ Moreover, the concept of *true marriage* as accepted in South African law did not include polygyny. This narrow

1 Anyolo (2008:2).

2 Becker & Hinz (1995:89).

3 (ibid.:90).

4 (ibid.:91).

5 (ibid.:100).

6 (1866) LR 1 PD 130 at 133.

7 *Seedat’s Executors v The Master* (1917) AD 302 at 307–308.

definition of *marriage* found its way into the laws of South Africa through the *Hyde* case⁸. In *R v Nalana*,⁹ the judge concluded by saying that, in his opinion, a polygamous¹⁰ marriage was inconsistent with the general principles of civilisation recognised in the civilised world.

Background

In the ordinary African community, life is hard and women have long seen the advantage of having co-wives to help share the burden of child-bearing.¹¹ Having many children in a polygynous marriage means household responsibilities are shared by the women, and more children can help to build and maintain the family home.

This system keeps the large families together and guarantees that children born of polygynous marriages are raised within their fathers' homes. Such children receive a lot of attention from their mothers and the other wives, despite not getting much from their father. Moreover, children born of these relationships are not only their biological parent's responsibility: everyone in the family is responsible for them.¹²

Studies in Ghana,¹³ for example, found that children from polygynous relationships were in better health than those in other family set-ups. Such studies also revealed that the children were taken care of better in terms of food, they were always protected by many elders, and were hardly ever neglected. It was also claimed¹⁴ that, even in instances where children had been abandoned by their fathers, they survived through the help of their multiple mothers and older half-brothers in the family. This is because polygyny has been practised to not only show one's marital status in society, but also to assure the continuation of the family.

The motivation to produce large numbers of children is prevalent in areas where population growth was desired, e.g. in agricultural societies, where many hands are needed to do the necessary work.¹⁵ In this context, a woman in a monogamous relationship found it harder to produce 12 children on her own, for example, compared with four polygynous wives

8 (ibid.).

9 (1907) TS 407.

10 In social anthropology, polygamy is the practice of being married to more than one spouse at the same time. Historically, polygamy has been practised as polygyny, which is one man having more than one wife; in other cultures, it is practised as polyandry, i.e. one woman having more than one husband. Less commonly, polygamy can be practised as group marriage by one person who has many wives as well as many husbands at the same time. Polygyny is practised in a traditional sense in many Middle Eastern and African cultures and countries today, including Namibia; see Ambunda & De Klerk (2008:69).

11 Stone (2006).

12 Mair (1971).

13 Diouf (2004:26).

14 Chigwedere (1989).

15 <http://www.warthog.co.za/dedt/family/polygyny.htm>; last accessed 26 August 2009.

each bearing three children. Polygyny is said to be advantageous to women's health, time, and energy, and was extremely helpful in keeping women's mortality rates within a normal range.¹⁶

This paper addresses the issue of children in polygynous marriages, and brings together the opinions that have been stated by numerous writers on the life of children in such marriages. It is important to state from the outset that Africa's customary marriage system favours polygyny. Bennett defines *customary marriage* as an agreement between two families.¹⁷ Children in a customary union belong to the community, and their upbringing involves the whole family.¹⁸ It should also be understood that raising children within a polygynous set-up is done in line with people's cultural beliefs; it need not conform with the principles of Western civilisation to be 'real' and 'right', because cultural beliefs are the true reflection of traditional communities, and they are true and real in their own right.¹⁹

Children from polygynous background are a special case²⁰ because traditional communities, especially in northern and north-eastern Namibia, still conduct their marriages in a traditional way, and most of Namibia's youth are products of polygynous relationships.

Inheritance

The rights of children born of polygynous marriages were not fully protected during the country's domination as a colony. Indeed, such children were treated as illegitimate. In keeping with colonial law on this topic, children from polygynous marriages were considered as being extramarital children; in terms of common law, therefore, they were unable to inherit from their fathers' estate. Since Namibia's Independence, however, court orders permitting inheritance can be issued, especially in accordance with the current statutory rules, subject to the Children's Status Act.²¹

Customary practices in polygynous marriages

Distribution of labour

Different cultures construct rules about different capacities and aptitudes of women and men and determine gender-differentiated roles and responsibilities accordingly. Ipinge

16 (ibid.).

17 Bennett (2004:178ff.).

18 Bennett (1999:96ff.)

19 Anyolo (2008:87).

20 (ibid.).

21 No. 6 of 2006.

and Williams²² state that cultures also underpin women's and men's differential claims, rights and obligations.

Nevertheless, almost all children born to polygynous marriages are involved in food production, largely by way of agriculture and domestic services. This is not to be seen as child labour. While looking after cattle is seen as a boy's chore, for girls it is preparing food. Food is even served according to one's gender status, meaning that boys and girls eat separately. Apart from looking after cattle, boys are also normally responsible for hunting for meat for family consumption.²³

Some writers have drawn attention to the serious problem of child labour, particularly in instances where teenagers have to give up school to look after their siblings and the family livestock.

Cultural ethics

Cultural ethics in the context of this paper are of special relevance. *Ethics* entails the philosophical analysis of human morality and conduct. Moral principles and their cultural adaptation can differ from one nation and one community to another.

When one gives or passes something on, the customary gesture in all *Oshiwambo*-speaking communities, Kavango, Herero, Damara>Nama (but not Caprivi) is to use the right hand, which is supported by the left at the elbow. To show respect, the manual gesture is accompanied by kneeling if it is a girl child, and nodding of the head in agreement by a boy child.

In *Oshiwambo*-speaking cultures, for example, there are also certain parts of meat like a bull's testicles that are only allowed to be eaten by boys. Apparently, if girls eat the testicles, they could face problems in childbirth.

Finally, in keeping with their gender-defined roles of preparing food, girls brew the traditional beer and cook for boys. However, only boys are permitted to drink the beer or get drunk from it. This tradition, in general terms, applies to all the cultural groups mentioned above.

Sex

As in Kavango culture, children in the *Oshiwambo*-speaking community are not permitted to talk about sex or sexuality with their parents or elders. They usually discover it while playing hide-and-seek games.²⁴

22 Ipinge & Williams (2000:3).

23 Anyolo (2007:22–25).

24 LaFont & Hubbard (2000:42).

Sex without penetration is widely accepted amongst young people in the above cultures. In other words, sexual contact between boys and girls is permitted, but penetrative sex before marriage is strictly prohibited. In fact, if penetration occurs, a girl's virginity is lost and this has to be kept secret; otherwise, no man will propose marriage to her. Moreover, an ox must be paid by the boy's family to the girl's father. Should the girl fall pregnant, it is she who bears the majority of the blame for her condition. In years gone by, unmarried pregnant girls were even at risk of being burnt alive.

In the Kavango and the *Oshiwambo*-speaking cultures, a boy's family would look for a suitable family for their son to marry into. They would often start looking when their son was still young. In the *Oshiwambo* culture, a wife was traditionally always much younger than her husband, and might even have been engaged to him before she was born. In Kavango, a man is allowed to marry a woman older than himself. It was said by the elders that women needed to be mature enough to make their relationships last.

The Damara communities share this sentiment. In Damara culture, a woman is defined as being the foundation of the home: the one whose character and efforts hold everything together. She is referred to as the one who keeps the fire burning, meaning that she is the keeper of all secrets.²⁵ In instances where a girl was engaged to be married before she was born or at an early age, the groom moves into the girl's household and performs domestic chores and supports his future in-laws. They would then be able to see how he behaves, and could make sure that he was the right choice for their daughter.

In Kavango communities, when a girl gets her menses for the first time, she immediately informs her grandmother. She will then be isolated, particularly from men. During this time, a girl will have many discussions with her grandmother, who explains her future duties as a wife and mother to her. She will also explain sex and sexuality to the girl, in terms of what to expect and the importance of obeying her husband. Depending on the culture, additional ceremonies will be performed as well. For example, in the *Oshiwambo*-speaking community, the girl will be given mahangu²⁶ to pound and will cook porridge from the flour. She will give it to the members of the household to demonstrate that she can cook for them and can feed a family.²⁷

To determine the fertility of the groom, the bride is expected to fall pregnant within two to three months of marriage. Regardless of the method used by different communities, the goal is said to be the same, that is, to determine if the husband can produce children. If he fails, the immediate family will send him away and arrange for a brother or uncle from his family to sleep with their daughter. If she falls pregnant, the child is deemed to belong to her husband.

25 Ambunda & De Klerk (2008:5).

26 Pearl millet.

27 Fieldnotes 17 and 19, Anyolo (2008:86ff).

If it is discovered that a wife has had sex with a man other than her husband, that man will have to pay compensation by way of cattle to the wife's husband; her husband is then permitted to divorce her.²⁸ In all polygynous marriages in all indigenous Namibian cultures, it is acceptable for men but not for women to have extramarital affairs. Women can also have extramarital relationships, but only if their husband proved worthless. However, the women have to make sure they are not discovered.

The picture in Caprivi does not differ substantially from the one in the *Oshiwambo*-speaking communities and Kavango. However, when a girl in Caprivi reaches a certain age, her grandmother usually asks her to undress. She points out parts of the girl's body to her, and tells the girl that she needs to prepare herself because she is growing up.²⁹ Unlike the Kavango and *Oshiwambo*-speaking cultures, here, the preparation involved is to pull the clitoris repeatedly. The purpose of the procedure is to reduce the entrance of the vagina to increase the husband's pleasure. Girls will do this in the evenings, either alone or in a peer group. It is said that the girls showed their progress to their grandmothers who decided when they were ready.³⁰

In most cultures in Namibia, boys do not need to go through any sort of initiation or ceremony. However, older boys often give tips to younger boys. In the *Otjiherero* and *Otjihimba* cultures, young children play games that mimic male and female goats, cattle, donkeys and horses engaging in reproductive acts.³¹ This is known as the *ouruwo* game. Playing the game also means 'mating', so there is a possibility of sexual intercourse with vaginal penetration.

This game is also played in other communities: it is known as *mantambo* in Kavango, *omadurini* in the Caprivi area, *iiyugo* in the *Oshiwambo*-speaking communities, and *tchia khoe* in San communities. In all these communities, the game is not considered as real sex.³²

Marriage

In the old days it was strictly forbidden for a girl to become pregnant before marriage. That was why marriages were arranged while girls were young, mostly shortly after their first menses. According to Tuupainen,³³ traditionally, pre-initiation pregnancy – especially among the *Ovawambo* – was considered a disgrace for the girls, their families, and the entire community. The underlying functions of the female initiation ritual³⁴

28 LaFont & Hubbard (2000:43).

29 (ibid.:45–48).

30 (ibid.).

31 (ibid.:63).

32 Ipinge & Williams (2000:9).

33 Tuupainen (1970).

34 Known as *ohango*.

were for the enhancement of female fertility, the recognition of full maturity, and the legitimisation of childbirth.

With particular regard to social contracts, early writers such as Tuupainen³⁵ claimed that girl children had limited capacities compared with their male counterparts. For example, upon marriage and through the whole system of marital affairs, girl children never gave their consent to marriage. This excluded parents consenting on behalf of their daughters, but it included forced marriages between under-age girls to old men.

Becker³⁶ states that only after the female initiation ritual were girls permitted to have a full sexual life and give birth legitimately, whether or not they were officially married.

Age of marriage

Customary laws in Namibia do not have any fixed age of legal majority for either women or men in respect of entering any type of contract, but marriage generally does not take place before puberty or before the attainment of an acceptable level of social maturity. Child betrothals have taken place in times gone by, but marriages were never consummated before puberty.³⁷ Research on polygynous marriages in Ombadja, which summarises marriage customs in various Namibian communities, show custom dictating that only initiated girls are marriageable.³⁸

The age of majority can be determined through a rite of passage such as puberty or childbirth, especially within marriage.³⁹ It is recommended that customary law specifies a fixed minimum age at which prospective spouses might be presumed mature enough to marry. This could supersede the African Charter on Rights and Welfare of the Child, which specifies a minimum age of 18 for both men and women, and which Namibia has ratified.

Consent

In certain cultures, such as the *Oshimbadja*, the parties to the marriage – i.e. the young couple – are to give their consent to the marriage. This is not a well-known cultural practice in many cultures, where families' consent is regarded to be sufficient, in the sense that they are acting in the common interest of their children's marriages.⁴⁰ In such communities the consent of the parties to a marriage is deemed unnecessary.

35 (ibid.:313).

36 Becker (1989).

37 Friesen (1998:40).

38 Anyolo (2008:32).

39 Becker & Hinz (1995:72).

40 See Fieldnote No. 22, Anyolo (2008:52).

Marriage of under-age (i.e. pre-pubescent) children is viewed as normal in most communities.⁴¹ However, Friesen⁴² notes that determining free and full consent might be difficult in the case of customary marriages where family influence may play a stronger role than that of the parties to the marriage. Suggested safeguards against undue influence or forced consent include asking the parties individually if they freely consent to the union, either orally at the marriage ceremony, but also at the time of registration.⁴³ Still, there is no way of ensuring that the parties are being truthful. The only way to check up on forced consent is to create legislation that will regulate customary marriages.

Bride wealth

This is the practice of compensating one's son's future father-in-law by way of cattle for the honour of marrying his daughter. If the wife is regarded by her husband as deficient in any way, the father-in-law is expected to refund some or all of the cattle.⁴⁴

The cattle are used to 'recompense' the father-in-law for his expenses in raising his daughter, and for the loss of her services to his household.⁴⁵

Dekker and Hoogeveen⁴⁶ note that, for cultures in which bride wealth payments are highly valued, they are usually a sine qua non for the customary recognition of the existence of a valid marital relationship between the married parties.

For example, the *Ovaherero* still practice, to some extent, the system of paying bride wealth, in that a man will give a certain amount of cattle or a certain sum of money to the bride's family. Once this is done, the woman is regarded as an extension of his 'property'. According to Abrahams,⁴⁷ all children born of such a marriage belong to the man. Should a woman want a divorce, her family is obliged to repay the bride wealth.

One can, therefore, assume that young *Ovaherero* women are told that they can only prove that they are proper women if they have babies. Conversely, a boy wants a girl to fall pregnant so that he can rest assured that he is a 'real' man.

In terms of all *Oshiwambo* customary systems, although bride wealth in the form of cattle would be given in exchange for a bride, such payments are not a major factor in determining the validity of a customary marriage, because the bride price varies

41 (ibid.:Fieldnote No. 23).

42 Friesen (1998:46).

43 (ibid.).

44 See Fieldnote No. 18, Anyolo (2008:31).

45 (ibid.).

46 Dekker & Hoogeveen (2002:5).

47 LaFont & Hubbard (2000:43).

in form, function and value from community to community.⁴⁸ In Kavango traditional communities, no marriage gift or bride wealth is given. Instead, bride service is expected, whereby the bridegroom will work in the home of the bride's family for a period of time prior to marriage.⁴⁹ Bride service is also reportedly performed in san communities of Namibia.⁵⁰

Custody of children

According to research conducted in 2008 by the University of Namibia's Human Rights and Documentation Centre on women and customs in Namibia,⁵¹ the issue of child custody after death or divorce is done in accordance with the particular community's kinship system. In matrilineal systems, custody is automatically with the mother; whereas in patrilineal systems, custody rests with the father.⁵² In *Oshimbadja* culture, women retain custody of their daughters, while custody of the sons is granted to a married uncle. The same applies in the case of divorce.⁵³

In accordance with Article 15 of the Namibian Constitution, as well as Article 3(1) of the United Nations Convention on the Rights of the Child, the child's best interests should govern all aspects of custody, guardianship and access to children. Because the 'best interests' principle has no specific content, any customary law or practice that professes children have no rights and should be compelled to do things in the name of culture would constitute a prima facie violation of children's rights. Although cultural expectations may be accommodated by any legal arrangement by the state to avoid unfair discrimination against culture, children born of polygynous relationships should be accorded the right to maintain contact with both their parents. The parent without custody statutorily entitled to automatic right of reasonable access to the child, unless a traditional court decides that such access would be contrary to the child's best interests. Safeguard measures should be developed to ensure that this right is not abused.

It is recommended that, as in a divorce case under statutory law, one parent should be made the primary custodian. If the parents cannot agree on who this will be, the court – the customary court in this case – must decide. The guiding principle should always be what is in the best interest of the child.

Inheritance

Every community follows its own customary inheritance practice. Thus, customs regarding the division of property as a result of a divorce vary from community to

48 Bekker et al. (2002).

49 Becker & Hinz (1995:59–62).

50 Malan (1995:107).

51 Ruppel (2008).

52 Ambunda & De Klerk (2008:46–48).

53 Anyolo (2007:56).

community. With regard to the division of property upon a person's death, this is usually negotiated between the surviving spouse and the deceased's relatives, without reference to any court. When property of the deceased husband in a polygynous union is distributed, the in-laws leave some of the livestock to his children.⁵⁴

Brotherhood

In spite of numerous problems among the family members in a polygynous relationship, there are certain benefits which, in principle, are available to the children of such marriages, both during the marriage and upon its dissolution. A telephonic interview conducted with three children from polygynous marriages confirmed this point: all respondents felt that polygyny was a good system because it promoted good morals and values.

Similarly, Becker and Hinz point out that the polygynous system is designed to benefit all parties, including the children, because everybody develops a sense of belonging and brotherhood. No stigmatisation of 'bastard' is attached to children in this type of family relationship.⁵⁵

A 20-year-old girl from the Oshangu village in the Oukwanyama District in the Ohangwena Region said the following during a telephone interview:

[W]e[,] the children of polygynous marriages[,] are not brainwashed, mistreated neither are we defective or dysfunctional, we are normal children just like any other normal born child.

Her elder sister grabbed the phone and said that, across the world, children remained vulnerable to exploitation and abuse, while they – the children of polygynous marriages – enjoyed mass protection. She believed that other children remained vulnerable to abuse, because they became trapped in the cycle of poverty. All this happens at the mercy of individuals who are often at the heart of institutions involved with vulnerable children.

A 15-year-old girl from the Ondonga District in the Oshikoto Region said that, because she came from a family with dozens of children and multiple mothers, she and her siblings were not malnourished, they were well looked after and encouraged to become educated, and they were free to make their own choices about the type of marriage they wished to enter.

A 17-year-old boy from the Ondobe-ye-fidi village in the Okalongo District in the Omusati Region stated that there were 36 children in his family. His siblings in were all free-thinking, independent people. Some had chosen polygyny themselves, while others had branched off to some other religions. He pointed out the underlying fact that they were all happy in their respective marital relationships. He further related that, in their

54 Ambunda & De Klerk (2008:49).

55 Becker & Hinz (1995).

culture, if the husband in a polygynous marriage died, his relatives allocated his house and land to his widows and children.

Recommendations

Legislative provision needs to be made for a minimum set of essential requirements for customary marriages. The main requirement for a valid customary marriage should be the consent of the spouses. In order to ensure that such consent is a duly informed one, a minimum age for marrying should be fixed for all persons in all marriage systems in the country.

Traditional wedding ceremonies and bride wealth should not be followed to the letter, but should instead serve to identify a union as one celebrated according to African rites.

Because customary marriage is uncertain and difficult to prove, the registration of all customary marriages should be made compulsory. To make things easier, traditional authorities should be tasked with functioning as registrars of such marriages. No marriages should be permitted to be terminated by private arrangement, i.e. all divorces in terms of customary law should be terminated by a competent traditional court.

In order to compensate for the lack of rules in customary law on the management of family estates, the common law rule governing a spouse's power to bind the other's estate for household necessities should be extended to customary law. The equitable distribution of the spouses' estates upon divorce should also be considered.

Certain authors on customary law, such as Bennett,⁵⁶ note that the Combating of Immoral Practices Act⁵⁷ in Namibia seems to discriminate against girl children born of polygynous unions. The Act made it a crime to have sexual intercourse with a girl under the age of 16, which does not seem appropriate under customary law.

References

- Ambunda, L & S de Klerk. 2008. "Women and custom in Namibia – A research overview". In Ruppel, OC (Ed.). *Women and custom in Namibia: Cultural practice versus gender equality?*. Windhoek: Macmillan Namibia, pp 43–82.
- Anyolo, P. 2008. "Polygyny among the *Ovambadja*: A female perspective". In Ruppel, OC (Ed.). *Women and custom in Namibia: Cultural practice versus gender equality?*. Windhoek: Macmillan Namibia, pp 83–92.
- Becker, H & MO Hinz. 1995. *Marriage and customary law in Namibia*. Windhoek: Centre for Applied Social Sciences.

56 Bennett (2004).

57 No. 7 of 2000.

- Bekker, JC. 1989. *Seymour's customary law in South Africa* (Fifth Edition). Cape Town: Juta & Co.
- Bekker, JC, JMT Labuschagne & LP Vorster (Eds). 2002. *Introduction to legal pluralism in South Africa: Part 1 – Customary law*. Durban: Butterworth Publishers.
- Bennett, TW. 1999. *Human rights and African customary law*. Cape Town: Juta & Co.
- Bennett, TW. 2004. *Customary law in South Africa*. Lansdowne: Juta & Co.
- Chigwedere, A. 1986. *Lobola: The pros and cons*. Harare: Books for Africa.
- Dekker, M & H Hoogeveen. 2002. "On bride wealth and household security in rural Zimbabwe". Unpublished paper presented at the Conference on Understanding Poverty and Growth in Sub-Saharan Africa, held at the Centre for the Study of African Economies, University of Oxford, 18–19 March 2002.
- Diouf, N. 2004. "Polygamy hangs on in Africa". *The Milwaukee Journal Sentinel*. Available at <http://en.wikipedia.org/wiki/Polygamy>; last accessed 24 October 2008.
- Friesen, T. 1998. *Reform of Namibia's customary marriage law: Issue paper*. Windhoek: Centre for Applied Social Sciences.
- Ipinge, E & M Williams. 2000. *Gender and development*. Windhoek: University of Namibia.
- Kilbride, P. 1994. *Plural marriage for our times: A reinvented option?*. Westport, CT: Greenwood.
- LaFont, S & D Hubbard (Eds). 2000. *Unravelling taboos*. Windhoek: Legal Assistance Centre.
- Mair, L. 1971. *Marriage*. Harmondsworth: Penguin.
- Malan, JS. 1995. *Peoples of Namibia*. Pretoria: Rhino Publishers.
- Ruppel, OC (Ed.). 2008. *Women and custom in Namibia: Cultural practice versus gender equality?*. Windhoek: Macmillan Namibia.
- Stone, L. 2006. *Kinship and gender: The Center for Research on Tibetan Marriage and Polygamy* (Third Edition). Tibet: Westview.
- Tuupainen, M. 1970. *Marriage in a matrilineal African tribe: A social anthropological study of marriages in the Ondonga tribe in Ovamboland*, Vol. XVIII. Helsinki: Westermarck Society.

“A man is not a man unless ...”: Male circumcision – A legal problem?

Manfred O Hinz and Moudi Hangula¹

Introduction

It is obviously a very common perception that more is needed for becoming a societally accepted human being than to be born. While the general law of modern states confirm legal personality with birth, and only limits the legal capacity before reaching the age of maturity determined by a clearly set year after birth,² societal practices reflect a different approach. All sorts of initiation rites have developed which a human being is expected to undergo before s/he reaches the status of societal acceptance.³ Some of the initiation practices are applied immediately after birth; others may follow at puberty or even later. Some do not touch on the physical integrity of the human being, such as the rite of baptism; others affect the physical status of the person to be initiated. Some are applied in a time-limited ceremonial act; others are projects that cover a certain period of time in which education is provided on matters of importance in the life of the adult – to which the initiated will belong after passing specific tests. Some are generally applied, i.e. irrespective of the gender of the person, such as the mentioned rite of baptism; some are gender-specific, informed by an often very stereotyped role a woman/man is expected to fulfil in the society concerned. Thus, that a female human being has to safeguard her virginity until given to marry requires measures to protect virginity. That a male human being has to learn to be brave in the struggle of life requires exercising the exposure to physical pain.

The reaction of law to the various initiation practices differs from society to society. In a society based on religion, for example, the fact that a human being is born into the religion of that society is not seen to be in conflict with the rights of that person.⁴ Secular societies, on the other hand, provide for the possibility for persons below the age of maturity to

1 The following contribution is based on research by Moudi Hangula, who is currently completing her LLB at the University of Namibia in Windhoek. The research on male circumcision in Namibia formed part of her LLB dissertation being supervised by Prof. Manfred Hinz. It was during the discussion of Hangula's research project that the idea arose to write an article on male circumcision for the current volume. Hangula agreed that Hinz would write the article based on her research. In this sense, Hangula is the co-author of this article, although the responsibility for its content lies with Hinz. Hangula conducted her interviews referred to in this paper in June and July 2009.

2 Cf. Davel & Jordaan (2005:1ff); Robinson (1997:1ff).

3 Cf. Barfield (1999).

4 On the contrary: to be born into the religion may even be qualified as a God-given act.

decide whether or not they want to be associated with a religious denomination in which they were made to participate. While perceptions in some societies leave no doubt that female circumcision is obligatory for young females, there are others which have laws in place in accordance with which the application of female circumcision – or, to be more precise, female genital mutilation – is a criminal offence.

Indeed, female circumcision is widely assessed as a violation of the rights of women, while male circumcision is seen by many as legally irrelevant. Practised “since time immemorial”, as people say, and indeed, in communities with very different cultural backgrounds, male circumcision is basically accepted as a cultural normality that offers no need to consider it in legal terms.

However, a closer look reveals that male circumcision can also have legal implications, particularly when the decision to circumcise does not come from the person to be circumcised, but from somebody else – the family, the parents, the community – who may put immense pressure on the parties involved to conform and leaves no room for a decision not to follow the norm. “A man is not a man unless ...” expresses this kind of pressure, which awards the need to circumcise the quality of law – with which one just has to abide.

Moreover, there is evidence that male circumcision may lead to physical – and with this, to mental – harm, which may be beyond what law can tolerate. However, the assessment of the evidence is burdened by the fact that male circumcision is not a topic that is freely spoken about. The problem is not to argue whether or not circumcision may protect men from HIV infection,⁵ but rather to talk about practices – or, rather, malpractices – in conducting male circumcision. A very extraordinary exemption to the tabooing of male circumcision as an applied practice is the recently published book, *A man who is not a man*, by Thando Mgqolozana, a South African Xhosa man who decided to write about his failed circumcision.⁶ “This story is about I came to have an abnormal penis” is the sentence with which Mgqolozana opens the prologue to his book.⁷

So what is the situation in Namibia? It is common knowledge that some communities here, mainly the *Otjiherero*-speaking ones, still practise male circumcision, while others practised it in the past, but have abandoned it. Not much is known beyond this. Nor is much known about cases of failed circumcision, probably because not many people are ready to speak about it. It was, therefore, not easy to collect information about the state of affairs in Namibia. Some of the informants, even some who were medical doctors,

5 An issue also being explored in Namibia. For example, a study on male circumcision in Namibia commissioned by the Ministry of Health and Social Services is so far the only recent resource on the topic (PWC 2008). A Male Circumcision Task Force was established to coordinate the further exploration relating to the use of male circumcision as a means of protection against HIV infections.

6 Mgqolozana (2009); see here also Meintjies (1998).

7 Mgqolozana (2009:1).

requested anonymity. Health administration officials were similarly reluctant to allow access to statistical materials in their possession.⁸ This limitation has to be taken into account when reading the content of this submission.

The next part of the article will give an account of male circumcision in Namibia, while the third section will draw preliminary legal consequences from this account. The final part will draw some conclusions for the way ahead in Namibia.

The practice of male circumcision in Namibia

Circumcision in traditional perspective

The question as to when male circumcision started being practised is still open for discussion. Some writers state that the practice can be dated back by some 4,000 to 5,000 years, to the time before Abraham’s covenant with God to circumcise. The Old Testament, in Genesis 17:11, reads as follows:

And ye shall circumcise the flesh of your foreskin; and it shall be a token of the covenant betwixt me and you.

The preliminary results of the 2006 Demographic Health Services of Namibia⁹ inform us that approximately 21% of males between the ages of 15 and 49 have been circumcised.¹⁰ The majority of circumcisions take place amongst the *OvaHerero*. In 2007 an assessment at four hospitals, namely at Andara, Oshikuku, Nyangana and Rehoboth revealed that circumcision was a very limited practice, amounting to some 20 circumcisions per annum, applied to people between 1 and 68 years of age.¹¹ No information was available on the number of traditional circumcisers in Namibia.¹²

Several interviews revealed that there were quite a number of cases of failed circumcisions. One interviewee, a social worker at the Ministry of Gender Equality and Child Welfare, was very clear in demanding that circumcision should not be allowed on the basis of parental consent, but on the basis of the consent of the child.¹³ The reason for this view was that the interviewee claimed to have been “mutilated” when circumcised.

8 The reluctance to give information was certainly also caused by the fact that many men did not feel comfortable discussing problems affecting their masculinity with a female researcher.

9 As quoted in PWC (2008:4).

10 (ibid.). It is interesting to note that highest number of circumcisions occur in the Kunene and Omaheke Regions, followed by Otjozondjupa. Next in line are the Erongo, Kavango, Khomas and Oshana Regions. At a relatively low level are the Caprivi, Hardap, Karas, Omusati and Oshikoto Regions, The Ohangwena Region shows a figure close to zero.

11 (ibid.:27).

12 The government project to regulate the profession of traditional healers and the treatments applied by them has not produced results, even after the preparation of a Traditional Healers Bill some years ago. It is not known why this important project has not been pursued.

13 Interview by Moudi Hangula; interviewee requested anonymity.

Another interviewee, of Himba origin,¹⁴ stated that he was “deformed” owing to a failed circumcision. He said that although his private parts were functional, the shape of his penis had been affected. He said he felt quite embarrassed when bathing with other males. This interviewee, who is now about 23 years old, estimated that he was between 7 and 13 when he was circumcised.

A medical doctor in the Roman Catholic Hospital in Windhoek¹⁵ informed the investigating author that he had had two cases of boys who had not been properly circumcised by a medical professional. The interviewee had re-circumcised the two boys. A urologist in Windhoek¹⁶ focused his comments on mistakes committed by traditional circumcisers. He stated that if a traditional circumciser lacked experience, complications could arise. The doctor referred to one particular traditional practitioner, who had circumcised children around Okakarara; he retired and was replaced by an inexperienced circumciser. As a result, several children suffered from complications caused by the latter practitioner. Among the medical complications was a child developed a fistula. According to the interviewee, the penis of a circumcised man was less sensitive because certain nerves were removed with the foreskin upon circumcision.

The same doctor also explained that the removal of the foreskin by circumcision had a purpose. Its removal may lead to dysfunction – even as far as affecting the capacity for sexual intercourse. The doctor therefore suggested that, if circumcision were to be carried at all, it should be performed as it is practised in the Philippines. There, the practice is known as the *dorsal slit*, and results in a very limited removal of skin. This ensures that all nerve endings remain, especially in the very sensitive areas of the penis. The Philippine method also reduced other health risks, according to the interviewee, in that it did not affect the blood vessels at the base of the penis. He explained that only a very minimal part of the skin was cut from the foreskin of the penis. The urologist also expressed his reluctance to circumcise any man that had not yet had sexual intercourse. It was also the specialist's view that parents should not be given the authority to decide whether or not a child should be circumcised.

A nurse at the Rundu State Hospital submitted to the investigating author¹⁷ that there had only been a few reported cases of failed traditional circumcision. According to this interviewee, only one or two cases a year occurred where male children came to hospital because of bleeding after being circumcised. The interviewee conceded that failed circumcisions might happen more often, but that people were reluctant to take problems of this nature to the hospital. The hospital also did not keep a record of failed

14 Interview by Moudi Hangula; interviewee requested anonymity.

15 Dr BS Haufiku; interviewed by Moudi Hangula.

16 Dr Hagen EA Förtsch; interviewed by Moudi Hangula.

17 Mr A Tukondjele; interviewed by Moudi Hangula. The Rundu Hospital was contacted because circumcision is still practised in the Kavango Region, albeit not too often. Attempts to get information from the Gobabis Hospital – which lies at the centre of *OvaHerero* so-called cattle country – were not successful.

circumcisions. In 2009, the interviewee reported that he had encountered one case, the case of an adult male of 20 or 21 years of age, who had been traditionally circumcised and suffered abnormal bleeding as a result.

What are the reasons behind this very widely accepted practice? Is there a general answer possible that applies universally? Circumcision is seen by some as a way to ‘purify’ individuals.¹⁸ Interviews conducted for this research revealed other views as well. The following is an attempt to shed some light on the traditional practice and perception of male circumcision. The primary focus will be on the *OvaHerero* communities, where circumcision is still very prominent. A secondary focus will be on *Oshiwambo*-speaking communities, where circumcision is basically no longer practised.

Circumcision in the *OtjiHerero* tradition

Male circumcision has a very particular spiritual meaning for the *OvaHerero*. The *Omusukarise* or *Onganga yo mbazu* – the traditional doctor who performs the operation according to custom – takes away evil spirits away from the boy being circumcised.¹⁹ Evil spirits hinder the development of knowledge of oneself and of God.²⁰ They also hinder self-control and the understanding of the role of suffering.²¹

Tjitavi Kambausuka, a traditional circumciser, stated in an interview that he became a practitioner after the death of his uncle. He explained that he was committed to practising circumcision in an “undiluted” manner, “unspoilt” by modern technology.²² He stressed that the pain the child endured during circumcision was intended to teach and prepare it to face “greater dangers” in life.²³ Kambausuka said he complied with the demands of hygiene by washing his hands with salt water and using different blades for each child.²⁴ Katuutire Kaura, a Member of Parliament and of *OtjiHerero* origin, is reported to have stated that –²⁵

... the circumcision of the Herero children under those circumstances and those rituals is what makes the Herero people a people. If you remove them, they will be like an elephant without a trunk.

Uncircumcised boys will, according to Kaura, not easily be accepted into society and will have difficulty bonding with playmates. Uncircumcised men, according to Kambausuka,

18 Mapaure (2005:75).

19 (ibid.:78).

20 (ibid.:78).

21 (ibid.:75).

22 Ntinda (1997:13).

23 (ibid.).

24 However, medical advice is that this is not enough to prevent HIV and bacteria. Cf. Ntinda (1997:14).

25 Quoted in Ntinda (1997:13).

may find it difficult to have sex with *OvaHerero* women because women reportedly fear pain from sex with such men.²⁶

In his research on male circumcision in Otjimbingwe, Mapaure noted that the practice of circumcision had been observed “since time immemorial”.²⁷ *Okusukara*, which is the *OtjiHerero* term for circumcision, is usually performed below the age of 5. The child's parents take him to the traditional circumciser, where he is placed on a table with his extremities fastened or held down. A variety of surgical instruments – probes, clamps, a scalpel – are used to grasp the foreskin, separate it from the glans, slit it, stretch it, crush it, and eventually amputate it.²⁸ In the olden days, a knife known as an *okuruuuyo* was used in the surgical removal of the foreskin. Nowadays, a knife or razor is used.²⁹

According to the literature,³⁰ traditional circumcisers know certain trees with properties that assist the healing process after a circumcision. It is said that, when the wound starts healing, it needs to be wiped with warm water and *ekara romugondo* – a paste made from the leaves of certain trees – is to be applied. If one uses the *ekara romugondo* paste, the child's wound will not become septic. Should the wound nevertheless become septic, another medication called *omujapu* is applied to absorb the fluid in the wound. As a general rule, however, *ekara romugondo* is used in winter, whilst *omujapu* is used in autumn.

In conducting the research on the practice and perception of circumcision amongst the *OvaHerero*, additional attention was paid to the *Ovahimba* of the Kunene Region. Almost all male *Ovahimba* have undergone circumcision. Circumcision is usually performed between the age of 1 and 2 years. In exceptional cases one may find a Himba boy having been circumcised at an older age, for example, if he did not grow up with his father or grandfather. Circumcisions among the *Ovahimba* are carried out at an isolated place during the winter. A well-known Himba traditional leader who preferred to remain anonymous summarised the reasons for circumcision, as follows:³¹

- Circumcision served a health purpose: It prevented the spread of sexually transmitted diseases
- Circumcision served a hygienic purpose: The *Ovahimba* were semi-nomadic, and spent up to a month in the wilderness just herding their livestock; as a result, they did not always have access to water, and
- Circumcision served a personal purpose: It assisted in prolonging the sexual experience, as the nerves on the foreskin had been removed.

26 As reported in PWC (2008:19f).

27 Mapaure (2005:76).

28 (ibid.:77).

29 (ibid.:78).

30 Ntinda (1997:14).

31 The interview requested by Moudi Hangula had to be conducted by a male assistant, as the chief was not prepared to speak to a woman about circumcision.

The Chief did not appreciate³² being asked whether it would not be appropriate to consider the need of consent by the person to be circumcised. He responded that the practice of circumcision had to be maintained in the way that had been done by their forefathers. He said that circumcision was “compulsory”: there was no room for consent or dissent, especially “when you reside with your father or grandfather; ... Himba custom tells you, *You are not a man until you are circumcised*”.

Circumcision in the *Oshiwambo* tradition

Owambo communities used to practise circumcision. The German writer Hermann Tönjes informs us that circumcision was applied to adults, but only to the nobility, the wealthy, and to those in high office serving the King.³³ Traditional circumcisers used to charge substantial fees for their services. There were also some cases of death due to circumcision. Young men who qualified for circumcision (*etanda* in *Oshiwambo*) were escorted by their fathers to the place where the circumcision was to take place, known as *oshombo* or *ontanda*. Circumcision was seen to be a physical and spiritual intervention. In terms of the latter, circumcision linked the young man to the spiritual world of his ancestors to secure his fertility.

The various *Owambo* communities gradually abandoned the practice of circumcision, however.³⁴ The first to discontinue the practice were the Ondonga community, with the rest following later. In Oukwanyama, the last King to be circumcised was *Ohamba* Haimbili ya Haufiku. King Haufiku died around 1860.³⁵ His successor, King Mweshipandeka, refused to undergo circumcision – with the result that the members of his community followed his example.³⁶ In other parts of Owambo, the practice of circumcision was more or less abandoned, partly due to colonial intervention, and partly to the instruction by missionaries, who objected to the practice.³⁷ Looking at the statistical data available, the practice of circumcision has practically disappeared in Oukwanyama, whereas it has survived in other parts of Owambo at a relatively low level.³⁸

Legal observations

The information on the practice of circumcision in Namibia gives rise to a number of legal questions:

- Is circumcision as such a treatment that would qualify as “cruel” in terms of Article 8 of the Namibian Constitution, or does it enjoy constitutional acceptance

32 His initial response was, “Why are you asking me these questions?”

33 Tönjes (1911:47), but also PWC (2008:22ff) and also a report in *The Namibian*, 2 February 2001.

34 Cf. PWC (2008:22ff).

35 Nampala & Shigwedha (2006:49).

36 (*ibid.*:50).

37 (*ibid.*:92).

38 See PWC (2008:13).

in terms of Articles 19 and 66(1) of the Constitution, meaning that, although circumcision is an intervention in terms of the physical integrity of a person, such intervention would be of minor relevance compared to the importance of the right to culture?

- Are rules of customary law with the compulsory obligation to undergo circumcision – at whatever age – acceptable under the Constitution?
- Is parental consent a requirement, thus overruling compulsory customary practices?
- Would the legal principle of the best interest of the child require that consent of the person to be circumcised is a condition for the application of circumcision?
- Should such condition be the case, what would this mean for children who cannot yet express themselves?
- What possibility exists to change the relevant customary laws, and what are the chances of implementing such changes?
- What could be done to limit the risks of failed circumcisions, in particular with respect to improving the traditional circumciser's knowledge of sanitary requirements?

This article is not the place for the comprehensive analysis required for gaining convincing answers to the above questions or others that could be added to the list.³⁹ Instead, the paper will concentrate on one issue that appears to be central – and, to some extent, also underlies the listed questions, i.e. the issue of consent of the person to be circumcised. Should we come to conclude that consent is, indeed, central in assessing the practice of circumcision, the ground will be prepared to approach the rest of the questions.

In investigating the relevance of consent, we will first look at consent in general terms before turning to the application of circumcision at an age where the person to be circumcised does not have the capacity to express himself.

Courts of law have increasingly emphasised the strong interest which human beings have in being free from a non-consensual invasion of their bodily integrity. Exceptions are cases of emergencies posing threats to life or danger of grievous bodily harm, self-defence, and other comparable situations. If no consent exists, even minor physical contact may give rise to liability. This ensures the bodily integrity as outlined in Article 8 of the Namibian Constitution, as was discussed by the Supreme Court of Namibia in the case of *Namundjepo & Others v Commanding Officer, Windhoek Prison*.⁴⁰

39 There is a vast amount of literature available with arguments against male circumcision. For information on references, see the National Organisation of Circumcision Information Resource Centre (www.noirc.org); Doctors Opposing Circumcision (www.doctorsopposingcircumcision.org); Male Circumcision Guide for Doctors, Parents, Adults and Teens (www.circinfo.net). Cf. also Bennett (1999:108ff), who discusses initiation practices in general in terms of human rights.

40 2000 (6) BCLR 671 (NmSC).

What is *consent*? It is an act of reason, accompanied by deliberation: the mind weighing the good and the evil side of an event. This dimension of consent is what the legal concept of *informed consent* entails. Informed consent is a requirement in medical treatment and surgery. *Informed consent* is an agreement a medical patient gives to a procedure after the risks involved have been disclosed to him/her. Thus, consent presupposes physical and mental power and their free exercise. Informed consent protects the patient by providing him or her with the required information to make an informed decision; informed consent also protects the doctor from financial liability, provided that the treatment is done in accordance with the prevailing standard of care.

Who gives consent? To what extent can persons below the age of maturity be expected to consent to something? The general rule is that when patients are incapable of giving their consent, parents or guardians are there to consent on behalf of the incompetent person and, in the case of children, in their best interest.⁴¹

The South African Children’s Act⁴² appears to be a piece of legislation that comes closest to applying the concept of *informed consent* to the practice of circumcision. Section 12(8) of the Act prohibits the circumcision of children under the age of 16, except when the circumcision is performed for religious purposes and in accordance with the practices of the religion concerned and in the manner prescribed, or for medical reasons on the recommendation of a medical practitioner. Section 12(9) states that a male child over the age of 16 may only be circumcised after he has given consent to the circumcision in the prescribed manner, and after proper counselling. In consideration of the child’s age, maturity and stage of development, every child has the right to refuse circumcision.⁴³

In other words, the Act concedes to Muslims and Jews the right to perform circumcisions at birth or immediately thereafter, while circumcision for customary and cultural reasons as practised by, for example, *Otjiherero*-speaking communities, would not be permitted, at least not when following the widely accepted distinction between religious practices in terms of Christianity, Islam or Judaism on the one hand, and African customary practices, called *cultural practices*, that are distinct from religion – the latter, of course, being debatable – on the other.⁴⁴

The Application of Health Standards in Traditional Circumcision Act (Eastern Cape)⁴⁵ introduced certain health standards to be maintained in the performance of circumcision according to the customs applied in the Eastern Cape Province of South Africa. This Act appears to be of significant importance as it is one of the few, if not only, to attempt to

41 The concept of *best interest of the child* also enjoys constitutional recognition; see Article 15(1) of the Namibian Constitution.

42 No. 38 of 2005.

43 Section 12(10) of the Act.

44 Here, see the approach on non-state law in South Africa in Bekker et al. (2006).

45 No. 6 of 2001.

provide for certain requirements to be met before a person can legally be circumcised.⁴⁶ The Act applies to traditional practices of circumcision in the broadest possible sense, as is apparent from the definition of *traditional practice* in the definition section of the Act. According to the Act, *traditional practice* includes “any practice according to custom, religion or any rules of similar nature”.⁴⁷ Only medical practitioners have the authority to perform circumcisions: others need permission from medical officers.⁴⁸ In determining the requirements for such permissions, the Act focuses on the need to use appropriate instruments in performing circumcision, and the need to meet certain conditions before permission to circumcise is granted by a medical officer.⁴⁹ These conditions include establishing that the person to be circumcised has reached at least the age of 16. If the person is 16 years of age but not yet 18, parents are required to give their consent. In addition to this, the Act regulates the conducting of circumcision and initiation schools.⁵⁰

In accordance with the South African National Health Act,⁵¹ the competent minister may make regulations prescribing the conditions relating to traditional medicinal practices to ensure the health and well-being of persons subjected to such health practices. Health officers are appointed to monitor and enforce compliance with the Act. These officers are empowered to enter premises, including circumcision schools, and to conduct inspections to ensure compliance with the Act. Non-compliance is an offence.⁵²

Does the South African example show the way forward? Does it also provide for a solution to the case of Namibia?

Conclusion – or: Where do we go from here?

The concept of *children's rights* is a new one – at least for African societies.⁵³ The emphasis is on rights: challenging the authority of parents and the care they administer to their children in the latter's best interests, as they define it. Without investigating the amount of legal force this new trend has in terms of binding Namibia domestically to international law, it is obvious that such a trend will face reservations comparable to those experienced when the Married Persons Equality Act⁵⁴ was introduced some years ago.

46 For ease of reference, selected parts of the Act appear in the Appendix to this paper. The research could not trace any other legislative instrument of comparable importance.

47 Section 1 of the Act.

48 Section 4(1) of the Act.

49 See Section 4(2)–(5) of the Act.

50 Section 5.

51 No. 61 of 2004.

52 See sections 86–89 of the Act.

53 See Davel & Jordaan (2005:55ff).

54 No. 1 of 1996; parts of the debate are documented in Hinz (1998:139ff).

Legal provisions such as those enacted in the South African Children’s Act will, in all probability, probably fall on deaf ears in Namibia. This is particularly likely because the culturally determined circumcision practised by *Otjiherero*-speaking communities is applied at an age when rules relating to the consent of the person to be circumcised cannot apply. The Namibian Child Care and Protection Bill, still under revision by the Ministry of Gender Equality and Child Welfare,⁵⁵ will change the legal situation in Namibia at least in so far as it emphasises the rights of the child. However, as it currently stands, the Bill has no provision on circumcision. Moreover, the last available version of the Traditional Healers Bill is also silent on this issue, and it is not known how far the latter legislation has progressed.⁵⁶

It is the purpose of this article to plead that such silence be reconsidered. Granted, South Africa’s approach to regulate circumcision as set out in its Children’s Act may not be a viable alternative to what is currently applied in Namibia. However, rules to protect children against any indisputably unhealthy consequences of circumcision – like those against which the National Health Act of South Africa and the Eastern Cape Application of Health Standards in Traditional Circumcision Act seek protection – should be viable in Namibia without affecting the deep cultural foundations of circumcision.

In addition to this, a more open handling of the pros and cons of circumcision could contribute to an increasing awareness about the practice.⁵⁷ Heightening awareness could also influence the lawmaking by traditional communities in terms of section 3(3)(c) of the Traditional Authorities Act.⁵⁸ Instead of waiting for health-related rules in traditional healers’ legislation, traditional authorities would have all the rights they needed to amend customary law, along with the required provisions to secure the professional conduct of traditional healers and surgeons.⁵⁹

The debates that can be expected to start around issues of this nature may well go beyond that on the hygienic conditions in which traditional circumcision is practised, and extend to the broader challenge of recognising the rights children have, including the right to decide about their bodily integrity. Progress in this respect could prompt changes in perceptions of masculinity according to which “A man is not a man unless ...”, as well as changes in law.⁶⁰

55 Here, see Hinz & Mapaire (2009:323f).

56 For the sociocultural complexity which governs the background of the project to regulate traditional healers, see Hinz & Patemann [Forthcoming]; LeBeau (2003); Lumpkin (1994).

57 Increased awareness will also be important in view of the attempt to assess male circumcision as a means of protecting oneself against HIV infection.

58 No. 25 of 2000.

59 We refer here to what is currently being pursued in the project to ascertain customary law in Namibia; cf. Hinz (2009a). Phase Two of the project will include the ascertainment of *Otjiherero* customary law.

60 This is what Hinz suggests is a “soft human rights approach”; cf. Hinz (2009b).

References

- Barfield, T (Ed.). 1999. *The dictionary of anthropology*. Oxford: Blackwell.
- Bekker, JC, C Rautenbach & NMI Goolam. 2006. *Introduction to legal pluralism in South Africa* (Second Edition). Durban: Butterworths.
- Bennett, TW. 1999. *Human rights and African customary law under the South African Constitution*. Reprint with addendum. Ndabeni: Juta
- Davel, CJ & RA Jordaan. 2005. *Law of persons* (Fourth Edition). Cape Town: Juta.
- Hinz, MO. 1998. "Family law in Namibia: The challenge of customary and constitutional law". In Eeklelaar, J & T NHLapo (Eds). *The changing family: Family forms and family law*. Oxford: Hart, pp 139–152.
- Hinz, MO. 2009a. "Phase 1 of the Namibian Ascertainment of Customary Law Project to be completed soon". *Namibia Law Journal*, 2:109–119.
- Hinz, MO. 2009b. "Human rights between universalism and cultural relativism? The need for anthropological jurisprudence in the globalising world". In Bösl, A & J Diescho (Eds). *Human rights in Africa: Legal perspectives on their protection and promotion*. Windhoek: Macmillan Education, pp 3–32.
- Hinz, MO & C Mapaire. 2009. "Legal pluralism and the apartheid past: Challenges to Namibian family law reform and development". In Atkin, B & F Banda (Eds). *The international survey of family law*. Bristol: Jordan Publishing, pp 301–327.
- Hinz, MO & H Patemann. [Forthcoming]. "Healing – Beyond formal conflict resolution". In Hinz, MO (Ed., in cooperation with C Mapaire). *In search of justice and peace*. Windhoek: Namibia Scientific Society.
- LeBeau, D. 2003. *Dealing with disorder: Traditional and Western medicine in Katutura (Namibia)*. Köln: Rüdiger Köppe Verlag.
- Lumpkin, TW. 1994. *Traditional healers and community use of traditional medicine in Namibia*. Windhoek: Ministry of Health and Social Services.
- Mapaire, C. 2005. *Jus non scriptum: Otjimbingue customary law – II. Research report*. Windhoek: Faculty of Law, University of Namibia.
- Meintjies, G. 1998. *Manhood at a price: Socio-medical perspectives on Xhosa traditional circumcision*. Grahamstown: Institute of Social and Economic Research, Rhodes University.
- Mgqolozana, T. 2009. *A man who is not a man*. Pietermaritzburg: University of KwaZulu-Natal Press.
- Nampala, LT & V Shigwedha. 2006. *Aawambo kingdoms: History and cultural change. Perspectives from northern Namibia*. Basel: Schlettwein.
- Ntinda, A. 1997. "Circumcision: Traditional or barbaric?". *Namibia Review*, 6(3):13–15.
- PWC/PriceWaterhouseCoopers. 2008. *Desk review on male circumcision in Namibia. Final report*. Windhoek: Ministry of Health and Social Services.
- Robinson, JA. 1997. *The law of children and young persons in South Africa*. Durban: Butterworths.
- Tönjes, H. 1911. *Ovamboland. Land – Leute – Mission*. Berlin: Martin Warneck.

Appendix

Application of Health Standards in Traditional Circumcision (Eastern Cape) Act, 6 of 2001

[Extract]

Powers and functions of medical officer

3. The medical officer must, in addition to any other power and functions entrusted to him or her by this Act, exercise and perform the following powers and functions:
 - (a) Issuing of permissions to circumcise or treat an initiate;
 - (b) Keeping of records and statistics pertaining to circumcision and reporting thereon as prescribed, to the Department; and
 - (c) A right of access to any occasion or instance where circumcision is performed or an initiate is treated.

Permission to perform circumcision

4.
 - (1) No person, except a medical practitioner, may perform any circumcision in the Province without written permission of the medical officer designated for the area in which the circumcision is to be performed.
 - (2)
 - (a) A person may apply as prescribed for permission to perform circumcision and such permission may not be given unless all the conditions set out in Annexure A of the Schedule have been complied with.
 - (b) A medical officer may, as part of the condition provided in item 7 of Annexure A of the Schedule –
 - (i) disallow the use of a surgical instrument that the traditional surgeon intends to use; and
 - (ii) prescribe or supply a proper surgical instrument where the use of a particular instrument has been disallowed in terms of subparagraph (1).
 - (c) Where a proper surgical instrument has been prescribed or supplied in terms of paragraph (b)(i), the medical officer concerned must demonstrate to, or train, the traditional surgeon as to how the instrument should be used.
 - (3) A medical officer must, in the following manner, present the conditions set out in Annexure A, to the person applying for permission in terms of subsection (2)(a):
 - (a) The medical officer, or any other person assisting such medical officer, and in the presence of the medical officer, must read the conditions in the official language understood by the person applying for permission;

- (b) both the medical officer and the person applying for permission to perform a circumcision, must write their full names and signatures, and the date, on the document containing the conditions.
- (4) A person who has applied must within one month of the date of such application, submit proof of compliance with the conditions referred to in subsection (2), failing which the application of such person shall lapse.
- (5) A person whose application has lapsed as contemplated in subsection (4), is eligible to make a new application for permission to the medical officer concerned, and the provisions of this Act Apply to such person as application for permission is made for the first time.

SCHEDULE

ANNEXURE A

CONDITIONS FOR OBTAINING PERMISSION TO PERFORM CIRCUMCISION

1. There must be proof in the form of a birth certificate or an identity document that the prospective initiate in respect of whom permission is requested is at least 16 years old, or if the parents of the initiate so specifically request, at least 16 years old.
2. Parental consent must be obtained in respect of a prospective initiate who is under 21 years of age or who has not acquired adulthood, and such consent must be given either by a parent or a guardian of the prospective initiate concerned.
3. A prospective initiate must undergo a pre-circumcision medical examination by a medical doctor. The medical certificate must indicate as to whether the prospective initiate, based on the examination by the medical doctor who must have considered amongst others the medical history of the prospective initiate, is fit to undergo circumcision or not.
4. The traditional surgeon must be known to the parents of the prospective initiate, and must use instruments approved by such parents, or in the case of an orphan by his family, guardian or relatives, unless a medical officer has prescribed another surgical instrument.
5. A traditional surgeon, who is to perform a circumcision within an area falling under a traditional authority, must inform such traditional authority thereof.
6. Where a traditional surgeon does not have the necessary experience to perform a circumcision, he must perform it under the supervision of an experienced traditional surgeon.
7. An instrument used to perform a circumcision on one initiate must not be used again to perform a circumcision on another initiate, and the traditional surgeon must use the instruments supplied by the medical officer where the traditional surgeon has to perform more than one circumcision on more than one initiate but does not have sufficient instruments.

8. The traditional surgeon must keep instruments to be used by him to perform circumcision clean at all times before a circumcision, and shall use any substance prescribed by a medical officer for the sterilisation of the instruments.
9. The traditional surgeon must cooperate at all times with the medical officer concerned in respect of any directive given or decision made by the medical officer under the powers vested in the medical officer by this Act.

Traditional surgeon

Medical officer

Name

Signature

If initiate is under the age of 21 years

Parent or guardian

Date

Restorative justice: The case for a Child Justice Act¹

Stefan Schulz

One of the major dilemmas we face both as individuals and as a society is simplistic thinking – or the failure to think at all. It isn't just a problem, it is the problem ... [An] all-too-common flaw is that most believe they somehow instinctively know how to think and to communicate. In reality, they usually do neither well.

M Scott Peck, *The road less travelled and beyond* (1997:1–2)

Introduction

Juvenile justice, sometimes called *child justice*, is often perceived as the natural playground for restorative justice. Justice concerns the proper ordering of things and persons within a society. In this respect restorative justice refers to the implementation of a theory of justice that focuses on crime and wrongdoing as perpetrated against the individual or community rather than the state. The wide and deep implementation of restorative justice principles, in particular when dealing with young people, has been recognised as the 'green' way to go. This is so, because the principles of restorative justice do not, either actually or symbolically, reduce incidents otherwise recognised as offences/crimes and, which give rise to societal reaction and censure, to a bundle of predefined and pre-structured rights relations. A broader focus, which includes as the case may be the perspective of individuals, encompasses the social environment from which a conflict emerged.² In this process, in which young people are recognised as persons in formation, and where the emphasis is on reparation, also with regard to victims, the full potential for personal development is maintained.

The term is, however, an anathema in the adversarial legal process of the criminal justice system, possibly because the courtroom working group, consisting predominantly of lawyers, following the necessarily distorting and abstracting concepts of the criminal law and procedure, seeks to reduce issues between offenders and victims to only legally relevant ones, whereas it is the very nature of restorative justice to expand issues beyond

1 This paper makes use of adapted passages from a paper co-authored by Schulz and Hamutenya (2004) entitled *Juvenile justice in Namibia: Law reform towards reconciliation and restorative justice*; available at <http://www.restorativejustice.org/>; last accessed 1 November 2009.

2 See Legal Assistance Centre (2002).

those that are legally relevant.³ But whereas the law represents a particular distortion of the social world through abstraction from reality, this does not necessarily entail the exclusion of restorative justice principles, because the legal framework could make use of opening clauses, which leave normed/regulated space for the application of restorative justice. And so, the world over,⁴ where nations overhaul their criminal justice systems with regard to the ways in which these systems handle young persons (juveniles) in conflict with the law, they put forth far-reaching restorative justice principles, and often opt procedurally for a dual track, i.e. one system for adults and another system, detached from the operations of the adult system, for young persons.⁵

The situation is different in Namibia. Soon entering its 21st year of Independence, Namibia is coming of age. But this may not mean much when it comes to law reform, since Namibia still has to develop a comprehensive juvenile justice system. Namibian juveniles caught up in the criminal justice system do not have a real lobby⁶ and it is thus no wonder that almost 20 years into national Independence there are only very limited legal provisions providing for the management of young offenders, spread throughout a number of separate statutes, which often stem from the pre-Independence era.⁷ Apart from a small number of statutory provisions addressing specifically young offenders, the law applies uniformly to adult and juvenile offenders, and adults and young offenders are put through the same system, are tried by the same courts, and by the same officials.⁸

The current Namibian Criminal Justice System conforms most closely to the so-called justice model.⁹ General features include 'due process', crime control and retribution.¹⁰ The present system, as far as criminal justice is concerned, is firmly based on the notion of retributive justice. It reflects a moralising, though individualistic world view, where for purposes of coercion and conformity the deviant actor is perceived as independent author of his/her actions, endowed with a degree of free will. If a rule has been contravened, the balance of the scale of justice has been disturbed and can be restored only if the offender

3 Braithwaite (2002:249).

4 A number of international legal instruments, in particular the UN Convention on the Right of the Child, the Beijing Rules, the Riyadh Guidelines and the UN Rules for the Protection of Juveniles deprived of their liberty guide UN member and signatory states in their endeavours.

5 Winterdyk (2002).

6 Schulz (2004).

7 Criminal Procedure Act 51 of 1977; Children's Act 33 of 1960; Prison Act 17 of 1998

8 In some Magistrate's Courts administrative provisions ensure that adult courts double up as juvenile courts (e.g. Windhoek), but there is no legal division of courts into adult criminal and juvenile criminal courts. The fact that such division is not peremptory also leads to a different treatment of juveniles, depending on which Magistrate Court has jurisdiction in the specific case.

9 Schulz (2002b:357, 362).

10 Snyman (1995:24f).

is punished: “[t]he extent of punishment must ... be proportionate to the extent of the harm done or of the violation of the law”.¹¹

However, since the system makes little distinction between adult and young offenders, it ignores pivotal criminological research: Moral intellectual development theory,¹² complemented by considerations on information processing, suggests that the younger the actor, the less probable it is that the sense of right and wrong informs the actor’s behaviour. When Piaget hypothesised on moral and intellectual development, he believed that people’s reasoning processes develop in an orderly fashion, beginning at birth and continuing until they are 12 years or older.¹³ According to Kohlberg,¹⁴ people move through stages of moral development, during which their decisions and judgements on right or wrong are made for different, not always the same reasons. As children mature they are able to make use of cues from their environment in action control and become increasingly capable of handling all kind of situations in line with the normative societal expectations. Many countries, including Ghana, South Africa,¹⁵ Uganda,¹⁶ Cuba, Russia and China¹⁷ have adjusted their justice systems to meet requirements derived from an ever increasing knowledge base. The ramifications of the prevailing Namibian criminal justice system, however, do not reflect these insights in terms of distinct requirements and procedures.

11 (ibid.:20). Otherwise, the criminology of our criminal law is fairly simple. It is based on a number of utterly unsophisticated assumptions as to the cause-effect-relationship between punishment/absence of punishment and the prevalence of crimes, which comes with a number of equally limited and rather formalised corollaries regarding developmental, socio-economic and other aspects in the context of criminality. The system denies, or when it comes to the application of the law, denies largely the relevance of society with regard to the commission of crimes. A prime example for the prevailing paradigm is the Stock Theft Amendment Act, Act No 19 of 2004, where a minimum sentence of 20 (twenty) years imprisonment for a conviction on stock theft of a pecuniary value of more than N\$500 has been prescribed. How harsh sentences and retributive justice can impact prevalence and incidence of stock theft has not been shown yet. The legislator follows here as much as elsewhere, the classical conception of crime according to Bentham, that “Nature has placed mankind under the governance of two sovereign masters, pain and pleasure” (Bentham 1970 [1789]:11), without being ready to take note of the huge shift in understanding and representation of this truism since then.

12 Kohlberg (1969).

13 Piaget (1932); see also Albrecht (2002a).

14 Kohlberg (1969).

15 After about ten years of discourse and political wrangling over this law reform project, the South African Child Justice Act, 2008 (No. 8 of 2008) was finally gazetted on 11 May 2009; section 7 of the Act raises the age of criminal capacity to 10 years of age.

16 Super (1999).

17 Winterdyk (2002).

A short history of law reform on juvenile/child justice in Namibia

Under the heading 'Juvenile Justice in Limbo: Quo Vadis Namibia?' Schulz¹⁸ reasoned as follows: "The development since 2003 suggests ... that Namibia at no point in time has truly appropriated, neither the way nor the objectives of the Juvenile Justice programme ...", and further that it was high time for role players and stakeholders in the Namibian Criminal Justice System "to reinvigorate the process which had been so promising some time ago, the process towards a real system to manage young people in trouble with the law". This call for action was made three years after a workshop on juvenile justice in Namibia, which aimed at bringing the topic of "Law Reform on Juvenile Justice in Namibia back on the agenda".¹⁹

The above suggests that Law Reform on Juvenile Justice in Namibia has a lengthy history, however, without happy ending so far. Indeed, the early beginnings can be traced back to the early hours of the Republic of Namibia. But Schulz's critique may have been too much a blanket condemnation.²⁰ The efforts made since 1990 have been tremendous, and the reconfiguration of the system is a Herculean task. In September 1990, the then President of Namibia, Sam Nujoma, led the country's delegation to the World Summit for Children (New York). The World Summit adopted the Declaration on the Survival, Protection and Development of Children and a Plan of Action for its implementation. Together with the Convention on the Right of the Child, this Plan of Action formed the agenda to be achieved by the year 2000 by all countries. Following the World Summit, an Inter-ministerial Policy Committee was established, tasked to draft a National Programme of Action for the Children of Namibia, and "to consider steps to implement the Convention on the Rights of the Child".²¹ Namibia submitted its first report in January 1994 to the UN Committee on the Rights of the Child. The Committee noted the existence of "political commitment within the country to improve the situation of children".²² The Committee acknowledged the legacy of war and Apartheid in Namibia, the constraining influence of poverty, and the inherited mire of colonial legislation which is at odds with international standards. In considering Namibia's country report submitted in terms of Article 44 of the CRC, the UN Committee on the Rights of the Child concluded the following:²³

[A]s regards the system of juvenile justice in place in Namibia, the Committee is concerned as to its conformity with the Convention on the Rights of the Child, namely its Articles 37 and 40, as well as with relevant international instruments such as the Beijing Rules, the Riyadh Guidelines, and the United Nations Rules for the Protection of Juveniles Deprived of their liberty ...

-
- 18 Schulz (2007).
19 Schulz (2004).
20 Schulz (2007).
21 Ministry of Women Affairs and Child Welfare (2000).
22 UN Committee on the Rights of the Child (1994).
23 (ibid.).

The Committee then recommended:²⁴

[T]he system of the administration of juvenile justice in the State Party must be guided by the provisions of Articles 37 and 40 of the CRC as well as the relevant international standards in this field, including the Beijing Rules, the Riyadh Guidelines and the United Nations Rules for the Protection of Juveniles deprived of their Liberty.

In its 2000 National Report on the Follow-up to the World Summit for Children, Namibia reported that a National Inter-ministerial Committee on Juvenile Justice (IMC) had been established in 1997, with the purpose to create a sustainable and comprehensive juveniles justice system in Namibia, and that an increasing number of juvenile offenders were being treated according to international instruments and guidelines.²⁵ Following the 2000 report, the IMC undertook substantial activities pertaining to the transformation of the juvenile justice system. A detailed plan of action was crafted, and set in motion. The programme description towards a structured and holistic juvenile justice system contained a number of project interventions, namely –

- Law Reform
- Training
- Structures
- Service Delivery System
- Evaluation and Monitoring, and
- Advocacy and Child Crime Prevention.

The authors of the programme wrote the principles of restorative justice deeply into the programme description. This spirit propelled the implementation of the programme enormously, and progress was made regarding all project interventions.²⁶ There was a common understanding that the envisaged system as a preventative and remedial tool came with its own inherent limitations, and that its instrumental value would depend in the first place on a well developed service delivery system. This in turn required a legislative structure, which would ensure that the future system would not depend anymore on the goodwill of donor organisations or countries, but become sustainable on the basis of annual budget appropriations for the legislated purpose.

It was against this background that in 2000 the IMC commissioned the drafting of the Juvenile Justice Bill. The drafter²⁷ incorporated the shared views, ideas and perceptions submitted by the various stakeholders, and the outcome was discussed at workshops and conferences for consensus-building. These consultations, together with the parallel collection of statistical data, execution of pilot studies etc, led to a stable perception

24 (ibid.).

25 Ministry of Women Affairs and Child Welfare (2000:26f).

26 The Legal Assistance Centre had started its Juvenile Justice Project in 1995, which got a boost when the IMC got operational, Juvenile Justice Forums were established, and the Austrian Development Corporation agreed to arrange for the finances of a comprehensive Juvenile Justice Programme for initially 18 months.

27 The Child Justice Bill was crafted by Adv. Bill Corbett.

of feasibility and desirability of certain legal contents, structures and procedures as appropriate. Such outcomes were integrated into the Layman's Draft Bill on Child Justice,²⁸ which the IMC received in December 2002. On 8 May 2003, the then chairperson of the IMC, Dr T Huaraka submitted the draft document to a follow-up meeting of government ministers, including five members of the Cabinet Committee of Legislation. Whereas the document drew considerable support from this meeting, it also occasioned some few but important changes.

The technical experts under the stewardship of the IMC had wrangled until the very last moment about age and criminal capacity. The common law rule, still in force today, reads as follows: "It is irrebuttably presumed that a child under the age of 7 years lacks criminal capacity". But encouraged by international tendencies to increase the age of criminal capacity, the IMC accepted a non-rebuttable assumption that criminal capacity should only begin at the age of ten years. The aforementioned meeting of ministers resolved, however, that the common law would stand as is.²⁹

The age of criminal capacity has always sparked intense arguments. Already at the 27th Deutscher Juristentag 1904, it had been pointed out that any legal practitioner would confirm having come across very young persons who warranted the proverbial phrase *malitia supplet annos*.³⁰ Some scholars held, therefore, that due to the experienced and obvious variation in maturity of different persons a fixation of age limits for criminal capacity could not be deemed appropriate. This view did not however, change the course of the law, and whereas the age of criminal capacity was initially 12 years of age, the age barrier was raised to 14 years in 1923.

The rejection of the proposed new age limit for criminal capacity by government ministers was considered as a serious setback for the law reform process. But whoever thought at the time that the development of a genuine juvenile justice system in Namibia would be unstoppable, and that a novel law, in whatever form and shape, would sooner or later emerge from the process, was seriously misguided. Notwithstanding the enthusiasm displayed by most role players there and then, when the funding of the Juvenile Justice Programme, Namibia Project D granted by Austria and facilitated through the Institut

28 In the following referred to as *Child Justice Bill* or *Bill*.

29 Already during the negotiations at technical level it appeared already that the change of the *doli incapax* rule was not palatable to everybody. In particular lawyers, and here first and foremost prosecutors did often not appreciate the raise of the age limit. One argument, which attracted some interest was, that in the past there had been cases, where young offenders (children) became authors of violence, sexual violence and even murder, who in the view of the court did in fact not lack criminal capacity, and that if the age limit for criminal capacity would be changed, such offenders could not be brought to justice anymore. It is perhaps not guessing too much, to suggest that a quasi ubiquitous reflex, connecting social order intrinsically with the existence and performance of a criminal justice system, might indicate that different views on age limits for criminal responsibility reflect different individual needs in terms of control, visibility of control, and feelings of security.

30 Albrecht (2002a).

für Internationale Zusammenarbeit (IIZ) dried up, and the Juvenile Justice Project run by the Legal Assistance Centre expired, there was a marked reduction in the volume and coordination of juvenile justice activities. More than six years later, the IMC appears to be defunct, no law reform project has found its way to Parliament, and no such project is currently on the agenda of the Namibian Law Reform Commission. One is tempted to say that the once so promising juvenile justice reform project was aborted with effect from the meeting of 8 May 2003.

But law reform may be a long-winded enterprise. Skelton and Potgieter reported at the beginning of the decade “it is envisaged that the (SA) draft bill will be debated and considered by the Parliamentary Portfolio Committees during the course of 2002”.³¹ Yet, before the South African Child Justice Bill was adopted, it had travelled a long way. Originally drafted in 2002, the Bill was withdrawn in 2003 and completely overhauled because, in the view of many, including state welfare bodies, its compilation and stated objectives were considered too narrow and did not involve sufficient consultation with the many stakeholders involved.³² The Child Justice Act³³ was eventually signed on the 7 May 2009, and gazetted on 11 May 2009.

The failed attempt to reform the Namibian system gives rise to the question about the chief factors which contributed to the demise of the IMC and the Child Justice Bill as the main part of the law reform project. At the professional and academic level, there may be misconceptions regarding the purposes of punishment and the sentencing goals, which have contributed to a weakening of the political will to change the law.³⁴

Constitutional limits for law reform on criminal justice

Namibia as a representative democracy, based on a Constitution where the rule of law strengthened by a strong bill of rights reigns, law reform has to remain within defined limits. Criminal Justice by its very nature comes with far-reaching restrictions on the exercise of rights and freedoms of offenders and others affected by its operations. In this respect, the Namibian Constitution requires the observation of specific caveats, for instance Article 21(2) regarding the Freedoms granted in Article 21(1), and directly criminal justice related, Article 7, Article 11 and Article 12, with regard to a number of specifically guaranteed Individual rights. Through constitutional jurisprudence a number

31 Skelton & Potgieter (2002:498).

32 In 2005, a second Bill with the same name was approved by Cabinet and tabled before Parliament. The newer version more broadly aligned South Africa’s criminal system with international practices and agreements in respect of children accused of committing offences; established new assessment procedures; maintained the principle that prison is the last resort for *children* as redefined; and established better cooperative systems in all state undertakings to deal with the young in order to better handle an effective child justice system.

33 No. 75 of 2008.

34 Politically, the message to remain ‘tough’ on criminals has always been a formidable weapon in many countries.

of intrinsic principles have been derived from the Namibian Constitution, of which the principle of proportionality is paramount in respect of legislation intended to impose restrictions on fundamental rights and freedoms. From this follows that the legislator in particular when dealing with criminal law and procedure has to keep its endeavours within the remits of proportionality; after all criminal punishment is the strongest invasion of liberty, which the constitutional state has to offer. At the same time, the legislator finds itself here in a peculiar situation.

When it comes to criminal justice, the legal situation is somewhat different, because it is the very Constitution which operates with concepts and notions like *criminal charge; accused; criminal cases, juvenile persons, innocent until proven guilty, cross-examination; defence; convicted; acquitted; criminal offence; penalty*.³⁵ All these concepts, the practices behind them, the notions and their interrelations have existed long before they have been translated in to positive constitutional law.³⁶

The constitutional presupposition of the criminal law, however, resulted in a complacency, which has already lasted too long. Depending on a particular and perpetuated notion of criminal justice, tacitly upheld under reference to the constitutional status of the system, social problems, in particular if it appears that their origins can be attributed to individual action, are increasingly dealt with as criminal justice matters. Although often nothing more than empty actionism as in the case of the Stock Theft Amendment Act,³⁷ futile legislative activity creates the impression that something has been done to solve a problem. But notwithstanding trite constitutional positivism regarding criminal law and procedure, the legislature, and for purposes of law reform the government at large, is held to ensure continuously that the legal order, and ancillary to it, legal practice are in line with constitutional precepts.

In this respect, there are sufficient reasons for testing at least the consequential side of the criminal law against the constitutional principle of proportionality, because it becomes more and more evident that the instruments the criminal justice system has at its disposition are not capable of achieving the objectives or meeting the intended purposes.

35 Article 12, Namibian Constitution.

36 Having taken such concepts over into the Constitution the *pouvoir constituant* constituent, i.e. the original constitutional power has accepted the existence of the criminal justice system and its operations as a historical legacy. To the extent that the above terms, ideas, notions and concepts have become positive constitutional law, they exempt the legislature, the judiciary and by logical extension anybody who is held to apply these tools from questioning their constitutionality. This is fundamentally logical, because the Constitution is the final yardstick for policy-making, and to question the wisdom entrenched in the Constitution would amount to the claim that there is an oxymoron like 'unconstitutional' constitutional law.

37 No. 19 of 2004.

Punishment and the interests of society – Proportionality issues in criminal justice

Under the constitutional principle of proportionality, the state may encroach on individual rights and freedoms only to the extent that it is indispensable for the protection of the public interest. The principle of proportionality requires a reasonable relation between a legislative act, its objectives and the domain it intends to regulate.³⁸ Article 21(2) of the Namibian Constitution presupposes the validity of this principle by stating "... so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms ..., which are necessary in a democratic society and are required in the interest of ...". The fact that the Namibian Constitution presupposes the existence of the criminal justice system is a *prima facie* indication for that punishment as a legal instrument is in the interest of society. From there it takes however another step to conclude that particular operations of the system are or are not in the interest of society.

Punishment, the imposition of harm (penalty) on a person convicted of a crime following judicial proceedings during which criminal responsibility is ascertained, rests on a number of different, not always reconcilable sentencing goals and principles, namely retribution, incapacitation, deterrence, rehabilitation and restoration.³⁹ It is a historical legacy.⁴⁰ Underlying sentencing philosophies, and the justifications on which various sentencing strategies are based, are manifestly intertwined issues of religion, morals, values, and emotions. Philosophies that gained prominence at a particular point in time usually reflected more deeply held social values.

Although the ideas relating to punishment are ancient, it is intriguing to find out that their relative or absolute importance, and whether any one of these sentencing goals should find application in the law⁴¹ as purposes of punishment, has never been "decided, not even obiter".⁴² In effect, the courts have simply "taken judicial notice of these facts".⁴³ More interesting even is the fact, that hitherto no evidence has been required regarding the purposes of punishment. In particular the question, whether a sentence, the punishment meted out and eventually inflicted upon the convicted offender, has such effects, or how effective these purposes are as objectives, has not yet reached the judicial stage. From a legal perspective this may be all too understandable. As has been pointed out above, the existence of the criminal law with its definitions of crimes and offences, be it at

38 For a deeper discussion of the topic, compare De Waal et al. (2001:144ff).

39 Schmallegger (2007:403).

40 Terblanche (2007:171).

41 Terblanche (*ibid.*) refers here to the South African law. Although the Namibian law split from the South African law with the advent of Namibian Independence, the application of these principles dates back long before South Africa ended its role as Namibia's oppressor.

42 (*ibid.*:156).

43 Davis AJA in *R v Swanepoel*, 1945 AD 444: "The ends of criminal justice are four in number, and in respect of the purposes so served by it, punishment may be distinguished as (1) Deterrent, (2) Preventive, (3) Reformative, and (4) Retributive"; (*ibid.*).

common or statutory law, is a constitutional law presupposition.⁴⁴ This exonerates the judiciary legally from the duty to test lawfulness of the instruments it uses. However, the operations of the criminal justice system, as much as the application of the legal framework which constitutes it and provides its orientation, eventually the very legal provisions which are applied by the system, are not exempted from the observation of those constitutional principles, which guide any of the sectors of government otherwise. As will be set out in more detail in the following it is in particular imprisonment as the standard carrier of social censure, which misses the target.

Technically, i.e. with regard to the constitutional mechanics, the case of the criminal law requires a handling which is comparable with cases, where the legislature adopted a law which, although negatively affecting fundamental rights or freedoms, is initially justified in terms of Article 21(2) of the Namibian Constitution on the basis of a prognosis regarding the intended effects. In particular where the envisaged outcomes of a law depend on the assessment of the effect of multiple factors in the social environment, it emanates from an initial notion of democracy that the judiciary respects the legislative prerogative, and does not lightly substitute its own prognosis for the prognosis of the legislature. Testing such law against the principle of proportionality would see the application of judicial self-restraint, and content itself as the case may be, with an evidential analysis of the obvious. However, logic would have it that in the event that the prognosis turns out to be incorrect, the legislature comes under a constitutional obligation to adapt the law and adjust it to the better insights gained in the meantime. In the event that the legislature would not recognise such an emerging obligation, the courts with original jurisdiction⁴⁵ would have the power and authority to order the necessary corrective legislative measures.

Given that this paper is not on the explication of constitutional precepts, I will content myself in the following with a short discourse on some of the “purposes”⁴⁶ of punishment against the backdrop of the constitutional requirement that government’s authority to legislate is always placed under the principle of proportionality. I shall further limit the discussion of the principle of proportionality to the element of adequacy/suitability, i.e.

44 The Namibian Constitution has carried over the notion of a criminal justice system with its constituent components, i.e. Police (Article 115ff), Prisons (Article 121ff) and Judiciary (Article 78ff), without questioning the assumptions which underpin its existence.

45 In countries which have a constitutional court, e.g. South Africa, this jurisdiction would be vested in such a court; in the case of Namibia the High Court and ultimately the Supreme Court “have the power to overrule legislation where legislation is inconsistent with or *ultra vires*” the Constitution (Amoo 2008:183).

46 That is, deterrence, and although considered to be less ‘purpose’ than legitimation and measurement of punishment, retribution. The penal purposes of incapacitation, rehabilitation and restoration do not need to be scrutinised here particularly in terms of the principle of proportionality. Incapacitation/prevention is only required in particular cases where the dangerousness of the offender to society is obvious. Incapacitation/prevention is therefore no independent, no residual penal purpose which requires punishment, namely imprisonment in all cases. The same is true for rehabilitation and restoration, which are not intrinsically bound to imprisonment.

the requirement that the means the law intends to apply must be of such a nature that it may reasonably achieve, at least significantly contribute, to the achievement of the envisaged aim.⁴⁷

Purposes and principles of punishment revisited

The criminology of today's criminal law stems basically from the time when Cesare Beccaria (1738–1794) and Jeremy Bentham (1748–1832) established a new school of thought in breaking with what can be identified as a previously 'archaic', 'barbaric', 'repressive' or 'arbitrary' system of criminal law. This new school was to become known as the classical school of criminology. For thinkers like Beccaria and Bentham the question of crime was predominantly the question of punishment. Their programme was to prevent punishment from being in Beccaria's terms, "an act of violence of one or many against a private citizen"; instead it should be essentially "public, prompt, necessary, the last possible in given circumstances, proportionate to the crime, dictated by laws".⁴⁸ Classical thought on crime and criminality, inspired by the philosophical underpinnings of enlightenment, presented a model of rationality with a liberal state imposing the fair and just punishment that must result if social harm has been perpetrated. Theirs were the purposes of deterrence and retribution, and that this perspective has been handed down until our day becomes more than obvious when reading Snyman, for instance, on criminal law.⁴⁹

Since Beccaria's script,⁵⁰ *Dei delitti et delle pene* ("On crime and punishment"), published in 1764, more than 200 years have passed, and the last century covers an increasingly more intensive period of scientific exploration of human behaviour and action. This justifies a critical revision of those principles of which not only our courts have taken notice, but which have been axiomatically accepted as unquestioned and unchallenged, and therefore possibly ideological foundations of (Westernised) societies at large. The quality of the nexus between punishment and penal purposes will be scrutinised hereafter.

The instrumentality of punishment

Among the basic principles according to which sentence is imposed, Terblanche⁵¹ lists, inter alia, "[i]n the interest of society the purposes of sentencing are deterrence,

47 The principle of proportionality is based, apart from the requirements that the desired end and the intended means must be constitutional, on the two sub-principles adequacy – also discussed under the term *suitability* – and *necessity*.

48 Schulz (2006:2).

49 Snyman (2002).

50 Beccaria, then only 26 years of age, published his essay anonymously; this small monograph of approximately 100 pages has been heralded as a masterpiece and the foundation of the classical school of criminological thought.

51 Terblanche (2007:137).

prevention, and rehabilitation, and retribution".⁵² Yet, the instrumentality of sentencing – which Terblanche uses as synonymous with punishment – regarding any of these purposes is doubtful.

Deterrence

The notion of *deterrence* goes back to the already mentioned authors Beccaria and Bentham. Beccaria, perhaps more than anybody else except Bentham, is responsible for the contemporary belief that actors have control over their behaviour, and that they can be deterred by the threat of punishment, because they choose to act in the way they act.⁵³ "To prevent the happening of mischief",⁵⁴ which means to reduce crime, the pain of crime commission must outweigh the pleasure to be derived from criminal activity. Bentham's claim rested upon the belief that human beings are fundamentally rational and that criminals to be will take into account, at least intuitively, the pain of punishment against any pleasures thought likely to be derived from the commission of crime. This approach has been termed hedonistic calculus or utilitarianism because of its emphasis on the worth any action holds for an individual undertaking it. Rabie et al. set out the meaning of deterrence as follows:⁵⁵

The idea is that man, being a rational creature, would refrain from the commission of crimes if he should know that the unpleasant consequences of punishment will follow the commission of certain acts. It is thus the inhibiting effect of the threat of punishment, or the imposition of punishment on others, which should cause a person to think twice before he could commit a crime.

From these assumptions, two forms of deterrence emanate. The first is known as general deterrence and operates against society as a whole. The second form has become known as special or individual deterrence and operates against the offender.

General deterrence

It is widely assumed that punishment will deter other potential offenders and that the higher the sentence the greater the deterrent value.⁵⁶ In the context of this paper it is of

52 In *S v Zinn*, 1969 (2) SA 537, Rumpff JA coined what can be called the 'sentencing triad': "[w]hat has to be considered is the triad consisting of the crime, the offender and the interests of society". The first two elements of the sentencing triad, i.e. the crime and the criminal are of limited interest at this point of the discourse. The offender will however come into perspective when discussing retribution (see below).

53 Bentham (1789).

54 (ibid.).

55 Rabie et al. (1994:39).

56 This is, at least partially, the underlying reason for courts often to impose heavy sentences for rather 'petty' crimes, mainly on the basis of the offender's previous convictions. *Fleming* DJP in *S v Sibeko* 1995 (1) SACR 186 (W) at 191 d–e, referred to Magistrates who often complain that crime goes unabated despite increased sentences.

interest that despite the widely held belief, that the threat of similar punishment will cause potential offenders to refrain from committing crime, this cannot be supported by research. To the contrary, there is an ever-growing body of research showing that deterrence works in ways which are quite different from what our beliefs tells us. In order to appreciate the research findings, it is necessary to have a deeper look into the demographics of offender populations.

In their study entitled *Delinquency in a birth cohort*, Wolfgang et al.⁵⁷ could demonstrate that whereas 18.7% of juveniles of the sample had more than one crime record, only about 5% of the cohort accounted for more than 50% of all delicts committed. Similar results have been produced in follow-up studies.⁵⁸ Complementary to the outcomes of these studies, Gottfredson and Hirschi revealed that the degree of criminality among offenders is highly correlated with what they have termed a “lack of self-control”, where self-control would be the ability to take note and rationally consider positive and negative, long-term and short-term consequences of one’s behaviour.⁵⁹ Since its publication in 1990, the self-control perspective has generated critical analysis⁶⁰ and a growing body of empirical studies of the theory’s central proposition that self-control is the individual level predictor of involvement in crime and analogous behaviour. The results of existing studies, beginning with Grasmick et al. in 1993,⁶¹ empirically support the central proposition that low self-control increases involvement in crime. The mechanics of self-control – the theory presupposes an action theory in form of an expectancy x utility (EU) Model⁶² – can be illustrated by means of an example which contrasts a presumed high

57 Wolfgang et al. (1972).

58 Wolfgang et al.’s (1972) study was also later replicated with a second study. Tracy et al. (1990:280) demonstrated that “7.5% of cohort members ... These chronic offenders accounted for ... 61% of all offenses”.

59 Gottfredson & Hirschi (1990).

60 Goode (2008).

61 Grasmick et al. (1993); see also Benson & Moore (1992); Brownfield & Sorenson (1993); Keane et al. (1993); Nagin & Paternoster (1993); Wood et al. (1993); Burton et al. (1994); Polakowski (1994); Gibbs & Giever (1995); Piquero & Tibbets (1996); Cochran et al. (1997); Evans et al. (1997); Avakame (1998); Burton et al. (1998); Longshore & Turner (1998); Longshore et al. (1998); LaGrange & Silverman (1999); Junger & Tremblay (1999).

62 The *expectancy x value* theory of action provides a causal explanation. Actors act according to a law of action against their subjective objectives and causal hypotheses about how to reach these objectives. In this regard the action is the variable to be explained and/or predicted, whereas evaluation and expectations are the peripheral conditions of the explanation. The theory is in a formal sense a variant of rational action theory. However, in the context of selection, i.e. framing, orientation and script selection, we do not deal with rational choice in a substantial sense. Actors do not necessarily (or even seldom) ‘consciously’ calculate, and they are not perfectly informed either. Human beings do not perceive – and in this sense rational choice theory is contra-factual – the world ‘as is’ in its complexity; instead, they dispose only of certain memorised mental representations, which are necessarily simplifications. These simplifications reflect partly the limited, the ‘bounded’ rationality of the actor. The basic assumptions of *expectancy x value* theory are as follows: (Esser 1999b:248):

- Any action represents a decision for enactment among alternatives

self-control actor and a low self-control actor with regard to quite different deviant acts, namely rape and tax evasion.

*Example*⁶³

In the following we compare Rape (A) and Tax-evasion (B) from the hypothetical perspective of first, a low and second, a high self-control actor. The example is extremely simplified since we want to consider only the utility side and, therefore, assume an expectancy term for all utilities of 1 (100%). According to self-control theory the example attends to the difference in the calculation of EU weights between high and low self-control actors. The grey marking in A and B refers to the utilities supposedly not recognised by low self-control actors. Otherwise, the example is rather self-explicatory.

A. RAPE

Perspective: Low self-control actor

DSt -1	DLt -5
ASt 2	ALt 0

DSt = Disadvantage short term: Risk of assault by victim (-1)
 DLt = Disadvantage long term: Risk of imprisonment (-5)
 ASt = Advantage short term: Domination/sexual gratification (2)
 ALt = Advantage long term: None (0)
EU weight (Rape) = ASt (2) + DSt (-1) = 1

Perspective: High self-control actor

DSt -1	DLt -5
ASt 2	ALt 0

DSt = Disadvantage short term: Risk of assault by victim (-1)
 DLt = Disadvantage long term: Risk of imprisonment (-5)
 ASt = Advantage short term: Domination/sexual gratification (2)
 ALt = Advantage long term: None (0)
EU weight (Rape) = 2 + (-2) + (-5) = -4 [sic!]

-
- Selected action always has consequences/outcomes
 - Consequences may be perceived as positive, negative, or neutral by the precise actor
 - Consequences occur with different probabilities, which the actor has stored as expectancies
 - Alternatives for action are evaluated/weighted, and
 - Actors choose and enact the alternative which offers the maximal/highest weight.

63 Example taken from Schulz (2006:209ff).

According to the *expectancy x value* model only the low self-control actor arrives at a positive EU weight for rape/sexual assault, because he will not consider the negative EU value of DLt. The high self-control actor, however, will arrive at a negative EU weight for rape/sexual assault, since he has to consider $DLt = (-5)$. The situation is, however, different if we look at the following tax-cheating case. We want to assume that the actor has rendered a service which has not been entered in the books, since it was a cash transaction without invoice. The risk of detection is virtually zero, but there is a short term and a long term positive utility. First, the saving on tax increases liquidity; second, in the long run the money saved generates more money.

B. TAX EVASION

Perspective: Low self-control actor

DSt -1	DLt 0
ASt 2	ALt 3

DSt = Disadvantage short term: Withholding the truth (-1)
 DLt = Disadvantage long term: None (0)
 ASt = Advantage short term: Improved liquidity (2)
 ALt = Advantage long term: Improved capital basis (3)
EU weight (Tax evasion) = ASt (2) + DSt (-1) = 1

Perspective: High self-control actor

DSt -1	DLt 0
ASt 2	ALt 3

DSt = Disadvantage short term: Withholding the truth (-1)
 DLt = Disadvantage long term: None (0)
 ASt = Advantage short term: Improved liquidity (2)
 ALt = Advantage long term: Improved capital basis (3)
EU weight (Tax evasion) = 2 + 3 + (-1) + (0) = 4 [sic!]

For both actors the logic of the EU weight commands the criminal act. In the case of the high self-control actor the imperative is even stronger, because he takes cognisance of the indirect advantage, whereas this presumably escapes the low self-control offender.

Self-control is the non-technical redefinition of a phenomenon otherwise known as *myopia/akrasia*, which denotes the fact that human beings are attracted in respect of their goals and attention by proximate aspects of the situation and have only limited power to withstand temptation, even if non-action or other action alternatives probably yield long-

term advantages. This phenomenon belongs to a group of anomalies/paradoxes related to the rationality of human decision making. People do not take the alternatives available to them as binding: some objectively impossible alternatives are considered, whereas other alternatives that are possible are disregarded.⁶⁴ The above provides us with insights, which point towards the necessity of revising our views on deterrence:⁶⁵

- Human beings as actors have different propensities to commit crime
- A small group with a high propensity, i.e. low self-control, is accountable for the majority of all crimes committed, and
- Propensities to commit crime are largely not informed by external factors but partially immune against the threat of punishment (self-control develops in the first 3–8 years of human development).

It is only one logical step from there to conclude that sentences and increased sentences are ineffective, because the 5–7% of chronic offenders are not susceptible to the threat of punishment. This conclusion tallies with an almost exclusively held academic position, and few people who have studied this topic have different views. Tonry states the following:⁶⁶

No one doubts that having some penalties is better than having none. What is widely doubted is the proposition that changes in penalties have any significant effect on behaviour. Most crime-control scholars are doubtful because that proposition is refuted by the clear weight of the research evidence, and because every non-partisan expert body in the United States, Canada, and England that has examined the evidence has reached that same conclusion.⁶⁷

64 Frey and Heggli (1999:196) call this phenomenon the *ipsative limits to human behaviour*: “Under many circumstances people’s actions are not constrained effectively by the objective conditions (objective possibility set OPS) but rather by the set of possibilities which they consider relevant for themselves, that is, by the ipsative possibility set (IPS).” They distinguish between underextension and overextension of the ipsative set: “The underextension of the ipsative set is not restricted to mentally disturbed people but is a common phenomenon among perfectly rational actors. It seems that most people consider only a rather small part of what is objectively possible. To an outside observer, the life of these people appears to be rather narrow and moving along a trodden path, and that obvious possibilities for improving the situation are disregarded” (ibid.:197). Their observation as to overextension is, however, of more interest in our context: “Overextension is particularly relevant when considerable uncertainty exists. In this setting, a person always finds it possible to associate him or herself with another domain so that the experience of others becomes irrelevant from his or her personal point of view. This *ipsative probability* may deviate systematically and in the long run from what is known in the literature as objective and subjective probability ...: there is a tendency to *underestimate negative events* and to *overestimate positive events*. Under some circumstances, people stubbornly refuse to learn, there is “a surprising ... failure of people to infer from lifelong experience ...”. Rather, there is a “judgmental bias: people [have a] predilection to view themselves as personally immune to hazards” (1999:207).

65 The ever-growing body of research is showing that the acceptance of deterrence is counter-factual; research supporting the opposite is virtually non-existent.

66 Tonry (1996:8).

67 And further, on the movement in England from the deterrence model to the just-desert model brought about by the Criminal Justice Act of 1991, and which was explained by the Home

The response is of course pointing towards the remaining offenders who do not demonstrate a low level of self-control, and by extension the rest of society. And this is a legitimate undertaking. Rethinking the orthodox notion of deterrence does not mean that sentencing can or should be generally abolished. But it is rather the mere existence of a criminal justice system and its visible operations which exerts a deterrent effect than the extent of punishment; the deterrent effect is already inherent in the whole process.

In fact there is a considerable deterrent value in the criminal- justice process itself, even if that process results in an acquittal. The uncertainty of the outcome of a trial, the discomfort involved in any arrest, the waste of time, and the experience of the awesome power of the court are sure to have most people thinking "I would not like to experience that again".⁶⁸

Terblanche, implicitly so, holds that the threshold level for effective deterrence regarding ordinary citizens, and even non-chronic offenders, is so low that the quantum of punishment becomes secondary. But, so it seems, to the extent the review of topical research should be convincing, our societies appear immune against better insight. And against the behaviour of our judiciary, which when taking note of the virtual absence of research which would support the belief that sentencing has (any) noticeable deterrent effect, enters a state of denial, there may be little which can offset the effects of ideological priming.⁶⁹

For those who allow themselves an open mind, there are practical examples which demonstrate impressively that raising the thresholds against punishment does not lead to significant increases in crime. One of such examples is the case of Finland. Starting from the late 1960s Finland started a set of over twenty law reforms with the overall aim of reducing the number and length of prison sentences. The reforms dealt with specific offences, specific offender group, different forms of sanctions, sentencing principles and enforcement practices. The development in the Finnish criminal justice system was radically different from other Organisation for Economic Cooperation and Development

Office (UK) as such: "Deterrence is a principle with much immediate appeal ... But much crime is committed on impulse ... by offenders who live from moment to moment; their crimes are as impulsive as the rest of their feckless, sad, or pathetic lives. It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up the possibilities in advance and base their conduct on rational calculation".

68 Terblanche (2007:157).

69 It appears that the judiciary contents itself with the common belief, that at least some people have to be deterred from criminal activities through the sentences imposed by the courts. The term ideological priming is not farfetched considering that the deeply ingrained belief that punishment has some deterrent effect, is a strong political weapon. Many a time governments have presented themselves to the electorate as being serious about crime by announcing additional statutory measures, despite the lack of evidence that such measures actually work. Admittedly, deterrence and retribution are mostly conjured-up in one argument, and in the USA we are thus talking about the 'just deserts era', which began around 1995 (Schmallegger 2007:496). Interestingly however, punitive attitudes among the citizenry are weaker than ideological arguments in political battles suggest.

(OECD) countries. The developments in the United States of America and Finland, and even in European comparison, serve as an example of diametrically opposite trends. Whereas between the mid 1970s and early 2000s the prisoner rates in the USA increased five-fold, Finnish prisoner rates fell to one third of their original level. By the mid-1990s Finland had the lowest figures within the European Union. What is important in the context of deterrence is, however, that research of the dynamics between imprisonment rates and crime rates revealed that the correlation between imprisonment and crime is either plain zero or a negative one.⁷⁰ In other words, the radical reduction of sentencing to imprisonment does not change the deterrence of the system.⁷¹

Individual deterrence

Deterrence with a focus on the individual, i.e. the expectation that the offender will be deterred from re-offending because he has learnt from the unpleasant experience of his punishment or he is fearful of what may happen if he re-offends, does not fare any better than general deterrence. Research on the effect of increased sentences after re-conviction brought to light that the escalation of sanctions provided on recidivists cannot be justified on account of any preventive effect.⁷²

Deterrence: Conclusion

The answer to the question whether the nature and amount of the sentence imposed in a particular case will add to the deterrence exerted inherently by the whole trial process is in the light of the above discourse at best “doubtful”. Terblanche, and I concur, holds that a very good answer to the question stems from Walker and Padfield; he quotes:⁷³

Naïve claims that deterrent policies are effective – or totally ineffective – have been replaced by the less exciting realisation that some people can be deterred in some situations from some type of conduct by some degree of likelihood that they will be penalised in some ways; but that we do not yet know enough to enable us to be very specific about the people, the situations, the conduct, or the likelihood or nature of the penalties.

If there is any ‘purpose’ of punishment, any sentencing goal which stands out from the rest, this is certainly retribution. I would even go so far as to claim that the constitutional presupposition of the criminal justice system rests foursquare on the premise of retribution.

70 Lappi-Seppälä (2008:27ff).

71 The full picture of this success story cannot be delivered here; for more detail see Mohell et al. (2004).

72 Albrecht (1982). Albrecht studied the preventive effects of day fines in comparison with imprisonment. Conceptual analysis of the data revealed that recidivism differentials could be attributed to prevalent differences in social variables between offender samples; see also Kerner (1996:6–7).

73 Terblanche (2007:161).

Retribution⁷⁴

The dictionary meaning of retribution covers repayment, vengeance and punishment. And indeed, retribution is the earliest known rationale for punishment; it is fundamentally a call for punishment based on a perceived need for vengeance;⁷⁵ it serves largely the satisfaction that the crime did not go unpunished. But in the process of the state as the central authority taking over the self-help, revenge and vengeance by the victim, vengeance became retribution. And so, even though the underlying motive for punishment may be the perceived (or ascribed) need for vengeance, retribution as objective, ordered state activity, cannot be equated with vengeance or revenge any longer.⁷⁶

Within the remit of this paper it is hardly possible to discuss the complicated and abstract issue of retribution in any detail. But this is also not necessary. It may suffice here to explicate the concept by means of reference to some views held in this regard, which can be related to the offender as criminally responsible actor:

- Du Toit puts the satisfaction of society as an important aspect of retribution, in the sense that society is satisfied that its disapproval of the offender and his offences is expressed in an appropriate sentence⁷⁷
- Van der Merwe understands retribution as a judicial expression to the offender, as a judgment of condemnation of his conduct on society's behalf, because it is done "not out of emotional reaction to hurt or wrong ..., but *to indicate to the offender that his behaviour falls below an expected standard* and cannot be tolerated by the particular society" [Emphasis added],⁷⁸ and
- The Viljoen Commission (1976) held that "[r]etribution means ... that act of requiting or paying in return for evil done. In the criminal justice system it means the act of inflicting upon the convicted person, by means of the sentence, loss, suffering as punishment".⁷⁹

Although this does not come out so clearly when reducing retribution to punishment, what all statements have in common⁸⁰ is that they hinge upon the presupposed rational,

74 The right locus of a systematic discourse on retribution might lie elsewhere, since retribution is by now largely considered the legitimation and measurement of punishment. Yet, it is still in the interest of society, which provides sufficient reason to discuss it in this context of purposes.

75 Schmallegger (2007:403).

76 As has been set out earlier, since sentencing, punishment and retribution, at least implicitly so, have been constitutionally accepted as an historic legacy, there is virtually no discourse on the compatibility of these notions with constitutional principles otherwise. This has the unfortunate effect that, any external critique against the underlying assumptions is ignored.

77 Du Toit (1981).

78 Van der Merwe (1991 [1998]).

79 Viljoen Commission (1976).

80 An additional aspect is provided in *S v Nkambule*; here Harms AJA found that retribution is a consideration which should be seen in connection with denunciation, which is condemnation of the offender.

and more importantly so, accountable actor. Terblanche puts it graphically:⁸¹

Retribution = deserved punishment.

In the words of the Viljoen Commission,⁸² this “accords well with the philosophical principle of balancing the debt which the perpetrator owes to the community with the suffering meted out to him”. It is important to note that this equation abstracts from the systematic build-up the Zinn ‘sentencing triad’ suggests, and the intricate relationship of criminal and retribution as an emanation from the last leg of the triad, the interests of society, gets lost. This abstraction may be harmless for the purposes of discussing sentencing as a criminal justice operation, because there it epitomises the notion that every sentence should be appropriate, and beyond this foundational meaning, retribution is not a matter that should concern the sentencing court. But it is important for any consideration of law reform dealing with youth in trouble with the law, namely juvenile justice because it easily becomes the basis for circular reasoning. Often overtly, and more often covertly, the argument goes along the lines that We cannot reduce the age of criminal capacity because punishment is deserved. Together with the ubiquitous claim regarding the differential in maturity of young offenders (see earlier herein), we quickly forget that law is always an abstraction from reality, and that law reform’s first duty must be to cut through these abstractions. If this was not true, societies would become eternally slaves to their laws, where the abstractions are being held to constitute the whole and the truth through the eyes of the law and philosophical or ideological spectacles becomes more important than the social reality. We will, therefore, in the following pages shed light on some realities regarding the environment in which the ontogenesis of most young persons who come into conflict with the law occurs.

Young person's debts to society and retribution

Some may consider the heading as an impossible statement, at least a provocative one. But taking an upfront stance vis-à-vis this question comes with its own prejudice, and assumptions regarding the ontogenesis of a person, and the relationship between individual and society.⁸³ Somebody who considers the statement ‘impossible’ would in all likelihood doubt that young persons may have, on balance, been able to accumulate any debt to society, and that, on the contrary, society – also represented to the young person through parents and other significant others – is rather indebted to the young person. Piaget and Kohlberg have demonstrated that the ontogenesis of the person is

81 Terblanche (2007:170).

82 Viljoen Commission (1976).

83 We are dealing here, against the backdrop of the common invocation (however doubtful in terms of logic and consistency from an academic point of view) of the need for retribution, in the case of incidents which meet the requirements for serious offences; referred to for instance in *S v Skenjana* 1985 (SA) 51 (A); and Harms AJA in *S v Mafu* 1991 (2) SACR 494 who held that in the case of horrendous crime, retribution can be the only moral justification for the sentence.

facilitated by the social environment of the person.⁸⁴ In the same vein we find Gottfredson and Hirschi's research,⁸⁵ which points towards a deficit ridden social environment being causally connected to personality trait, which is characterised essentially by short-sightedness and a risk-taking attitude.

Criminological research since Glueck and Glueck⁸⁶ has produced evidence for the fact that young persons who persistently come into conflict with the law, have huge deficits in the build-up of social capital,⁸⁷ in their personal, cognitive and intellectual development, and last not least in their moral development, which is usually stalled, lagging behind the average.

All this is ignored if one is inclined to look at the individual event only, something which is similar to looking at the balance of a particular ledger, thereby ignoring the overall balance sheet. Those who are ready to dispense with a holistic analysis of the situation and the actor, in particular the relevance of a positive facilitation of the healthy development of a person in the early ontogenetic stages,⁸⁸ are proponents of an extreme theoretical individualism, which posits the contra-factual existence of a pre-social individual. This position presumes something (the person), which is however only emergent in the social process.⁸⁹

But even if we were to accept the claim that at an individual level the young person had the legally required criminal capacity, punishment according to just-desert principles would reduce the essence of the person to this capacity, which enforced through imprisonment, would exclude most opportunities for personal development, and cut-off most of the social relations so vital for mental and moral health of the person. From a holistic perspective it must, however, be doubtful whether it should be in the interests of society to damage seriously valuable human material through long-term incarceration, in order to satisfy just-desert policies which have been established for another purpose.⁹⁰

84 Piaget (1932); Kohlberg (1969).

85 Gottfredson & Hirschi (1990)

86 Glueck & Glueck (1950).

87 Gottfredson & Hirschi (1990:272). Coleman (1994 [1994]) describes social capital in terms of social relationships, which may be seen, beyond their quality as components of social structures, also as resources for the individuals.

88 Also Sampson & Laub (1993:11ff).

89 A model to describe the genesis of social order, and importantly so, subjective reality, has been provided by Peter Berger and Thomas Luckmann in *The social construction of reality* (1991 [1966]). They posit as a prerequisite of subjective reality the becoming of a member of society. Here, the starting point is a process termed *internalisation*: the immediate apprehension of interpretation of an objective event. They further maintain that “[t]his apprehension does not result from autonomous creations of meaning by isolated individuals, but begins with the ‘taking over’ the world in which others already live” (ibid.:150).

90 It is interesting to notice that the higher courts have often expressed similar views even regarding adult offenders: *Nicholas JA in S v Skenjana* 1985 (SA) 51 (A) at 331F “It is the experience of prison administrators that unduly prolonged imprisonment, far from contributing towards reform, brings about the complete mental and physical deterioration of

Conclusion: Purposes of punishment

From the foregoing discussion it does not appear that protagonists of the status quo of the ways in which the law dealing with young offenders operates emerge strongly. The premises, on which the analysis is based, may be the same which have consciously or unconsciously driven the international legal documents; the challenge is, however, always to transcend the truth we feel, which is often contrasting the truth we know.

The international community – Juvenile justice in the world perspective

The international community has largely moved towards the application of restorative justice principles when dealing with young offenders. At times, it seems hard to simply follow this orientation and oblige. This may have to do with the impression of being delivered to forces far away from home, which together with the imperatives of growing world integration gives rise to unease regarding one's own identity. But against the backdrop of the first part of the discussion, there is no need to only gallantly give in to the normative pressure from CRC, the Beijing Rules, the Riyadh Guidelines and the UN Rules for the Protection of Juveniles Deprived of their Liberty. Taking into consideration and recognising the communal approach to social life as an essential feature of our cultural identity should make it easier to detach and distance the treatment of young offenders from the current criminal justice system. In local terms a person is a person because of other persons,⁹¹ a perspective which clearly mirrors the analytically derived social construction of reality approach by Berger and Luckmann.⁹²

The case for the Namibian Child Justice Bill

Some may argue that the adoption of a Bill into a Law is not necessary because by joining hands with the IMC since the mid-1990s, the Namibian government has set in motion development of a juvenile justice practice, albeit within the remits of the single track system under the CPA 51 of 1977, which has considerably improved the plight of the children in Namibia in conflict with the law. There is no doubt about an improvement following the forming of the IMC as an umbrella body for juvenile justice activities.⁹³

the prisoner"; also Harms AJA in a minority judgement *S v Mafu* 1991 (2) SACR 494 (A) at 496h–497a "The sentencing judicial officer ... is not only obliged to protect society against the accused but also to protect the accused against society".

91 In Namibia the notion *ubuntu*, which embraces the key values of group solidarity, compassion, respect and dignity, and marking a shift from confrontation to conciliation, has never become a term for our own peace-making orientation. However, the Zulu expression *Umuntu ngumuntu nagabantu* ("A person is a person because of other persons") is understandable to many. In another context, Isaak and Lombard have put forth the view that reconciliation is an underlying theme pertaining to nearly all cultural groups in Namibia (2002:93f).

92 Berger & Luckmann (1991).

93 It appears that following the comprehensive study undertaken by Super (1999), no follow-

Law reform is necessary if a restorative juvenile justice approach is to be given breathing space; without legislation peremptorily imposing the application of restorative justice principles, the application of these principles will remain haphazard, and thus provide an uneven application. Without a comprehensive legislative effort, there is no guarantee that all children in Namibia receive the same treatment. This should in itself give rise to constitutional challenges. All this could be avoided if the Namibian government would rekindle the aborted process towards a comprehensive child justice legislation. The profound Bill, which has found the approval of the IMC, is ready for tabling in Parliament. The merits of the core elements of this document will be briefly discussed now.

The Child Justice Bill

The most important provisions of the Child Justice Bill⁹⁴ (hereafter referred to as the *Bill*) pertain to age and criminal capacity, police procedures and release policies, diversion, juvenile courts and sentencing.

Section 6: Age and criminal capacity

- (1) It is conclusively presumed that a child under the age of ten years cannot commit an offence.
- (2) There is a rebuttable presumption that a child who is 10 years of age or older but not 14 years of age is incapable of committing an offence because the child does not have the capacity to distinguish between right and wrong.
- (3) Prosecution of a child referred to in subsection (2) for the alleged commission of an offence may only be conducted if the Prosecutor General, after a preliminary inquiry, has issued a certificate confirming an intention to prosecute.
- (4) If the certificate referred to in subsection (3) is not issued within 7 days after the preliminary inquiry, the charges against the child must be withdrawn.
- (5) In deciding whether or not a certificate referred to in subsection (3) should be issued the Prosecutor General must have regard to –
 - (a) a child worker's assessment report;
 - (b) the appropriateness of diversion of the child alleged to have committed an offence;
 - (c) the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child;
 - (d) the nature and seriousness of the alleged offence;
 - (e) the impact of the alleged offence upon any victim of the offence; and
 - (f) any other relevant information.
- (6) The common law pertaining to the criminal capacity of children under the age of 14 years is repealed.

up baseline study regarding the unfolding realities on the ground has been conducted. Occasionally, the public learns through the media that a minor was held in pre-trial detention by the Police, but there is no recent systematic analysis of the situation countrywide.

94 Accessible at http://www.polytechnic.edu.na/academics/schools/comm_legal_secure/legal/research.php; last accessed 1 October 2009.

According to the proposed structure of the draft, a child who has not attained the age of ten years “cannot commit an offence”, whereas a child, at the time of the alleged commission of the offence ten years of age or more, but under the age of 14 years, would be rebuttably presumed not to “have the capacity to appreciate the difference between right and wrong” and to act in accordance with that appreciation. For any person 14 years or more the common law on age and criminal capacity is intended to remain unchanged.⁹⁵

The Bill addresses the issue that in the past the presumption of innocence of many a young offender had been practically ignored, which led in a huge number of cases to a presumably unlawful infringement on the right to fair trial.⁹⁶ There is a tendency to focus on whether the child knows the difference between right and wrong and not whether the child had the ability to act in accordance with the knowledge of that unlawfulness.⁹⁷ Through continuous training, this problem might have been corrected, but the debate about age, stage of maturity and criminal responsibility is a complex and controversial one. Whatever age is chosen will always be somewhat arbitrary. However, the decision to exempt young offenders under the age of ten from criminal liability reflected the commitment to a more sophisticated, holistic view of a ‘just’ society. This commitment embraces a broader perspective on social justice.

In this context the findings of developmental psychologists are of note. Usually, notwithstanding a cognitive comprehension of the difference between right and wrong, a young offender lacks the full appreciation of significance and impact of his/her offence. It could be shown that children at an early age (pre-primary school) acquire an understanding for moral norms with regard to their formal and universal applicability. Also, it appears that it is not only anxiety, and a conditioned reflex in connection with reward and punishment, or compassion for others’ suffering, which informs children’s behaviour. Nevertheless it became evident that this cognitive capacity did not correspond with the

95 The decision to establish a specific age limit for criminal liability is based on the consideration of a number of aspects besides the so-called crime control model. In the second half of the 20th century law Packer outlined the crime control model as one of two competing “models of the criminal process” (Packer 1993). The alternative model, known as the so-called due process model, and the crime control model, reflects the tensions of crime control in a democratic society. The crime control model’s key issues are the apprehension and punishment of offenders and punishment of criminals. In contrast, in Packer’s terms, the due process model’s assumption is that the detection and prosecution of suspects are unreliable and fraught with error. Some of these errors may manifest bias, or prejudice triggered, as the case may be, by the seriousness of the act, other errors may be honest mistakes. According to the due process model, the criminal justice system’s primary purpose must be to protect suspects from such errors. The due process model emphasises procedural justice above anything else. As Packer put it: “The Due Process Model insists on the prevention and elimination of mistakes to the extent possible; the Crime Control Model accepts the probability of mistakes up to a level at which they interfere with the goal of repressing crime” (ibid.:21–22).

96 Article 12, Namibian Constitution.

97 Super (1999:56).

ability to act accordingly. Research also revealed that access to the moral knowledge base alone is not sufficient for norm-abiding behaviour, but that a positive norm-affirmative environment that caters for the developmental needs of children, contributes, and importantly so, to the establishment of behavioural barriers against deviant behaviour. Sociological research, but also the experience of social field work, has shed light on the fact that in the overwhelming majority of cases where children come into conflict with the law, the children have been brought up in an environment of relative, and most often even absolute, economic deprivation. In such situations, where life is deprived of much meaning, many are left in dire need. This means less guidance, less control, less personal and less cultural continuity, which in accordance with Gottfredson and Hirschi's General Theory of Crime lead to low levels of self-control and subsequently to more crime.⁹⁸ The above should be compelling reasons for the raising of the age limit in comparison with the common law *doli capax/doli incapax* rules.

With the Child Justice Bill the Namibian society would align itself with Rule 5.1 of the Standard Minimum Rule for the administration of Juvenile Justice, under which the UN advocates the use of (modified) welfare models⁹⁹ because it will strengthen the role of primary crime prevention, and go hand in hand with the law reform project, which is under way with regard to the Children's Act.¹⁰⁰

Under section 6(5) of the Child Justice Bill an evaluation of the child in terms of his/her cognitive, emotional, psychological, and social development must be carried out. The intention of the drafter in this respect is clear. In practice, the presumption had been reversed, with the effect that children were held criminally liable and the absence of criminal capacity had by and large become the exception. Under the new law, the

98 Gottfredson & Hirschi (1990:89).

99 Winterdyk (2002:XXI).

100 No. 33 of 1960, hitherto the (unsatisfactory) instrument governing the administration of "children in need of care or protection", will soon be substituted by Child Care and Protection legislation; the law reform project has produced a Bill (1994), which for two years had been waiting to be introduced by the Minister of Gender Equality and Child Welfare. After extensive revision of the 1994 Bill, the Ministry may now be ready to introduce the Child Care and Protection Bill (2009). This law reform project will give child care a new basis, and a new understanding. Whereas the interventionist character of the present Children's Act caused often inadequate measures being taken, and often too late, the new framework provides for an earlier intervention, but from different perspective. Under the current dispensation the question *What is in the interest of the child?* is largely answered against the backdrop of a white middle-class, bourgeois worldview, with a strong paternalistic moment. In line with international development of a person-centred understanding of rights, in particular children's rights consistent with the UN Convention on the Rights of the Child, the envisaged Child Care and Protection Act will introduce a different notion of the best interest of the child: In order to ascertain the best interest of the child, it will be required to take a number of aspects into consideration (section 4(1) and (2), Child Care and Protection Bill). Section 5 requires that "[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration".

presumption will be effectively revived. Against the background of international experience this should exempt the majority of young offenders from the application of the child justice law. Very often a large element in the offence by young offenders is their lack of judgment, their lack of experience, their lack of forethought. But also peer pressure or the controlling influence of adults, as well the significance of a conflict situation, play a role, and in many such instances one would conclude that the child was not capable of acting in a different, law-abiding way.¹⁰¹

Eventually, the presumption of criminal capability in respect of the age group 14 and older seems to establish a low age limit too. On the other hand, in countries, for instance Germany, where the (rebuttable) presumption of lack of capacity is extended to young offenders under the age of 18 years, in practice the duty to establish criminal capacity in each and every single case has always been considered as cumbersome, superfluous and negligible. In the overwhelming majority of cases the establishment of criminal responsibility does not take place, or is a token activity, and unless there are obvious reasons for doubt, judges, prosecutors and also defence counsels, work on the assumption that the accused had the required capacity. This might not always be in line with the purpose of the law, but to follow the law to the last letter, would in the less serious cases mostly seem inappropriate. Besides, the normative acknowledgement of criminal responsibility for persons of the age group 14 and older reflects a general expectation in terms of developmental aspects of independence and participation of young persons. In this respect, the result that a young person lacks criminal capacity can even be stigmatising, and because of its symbolic nature contra-productive.¹⁰²

International comparison

With a retained minimum age of 7 years Namibia is currently amongst those countries with the lowest age requirement. Most of the developed countries define the age limit at about 13 to 14 years.¹⁰³ But there are countries like for instance Ireland, or Switzerland and the United States of America, where criminal liability may also be imputed as from the age of 7 years. And there are countries, where movements lobby for decreasing the age of criminal responsibility, for instance Germany.¹⁰⁴ On the other hand, recent legislative reform in Africa follows clearly the trend towards increasing the age of criminal capacity in line with the majority of developed countries. In the Uganda Children's Statute, the age of criminal capacity has been fixed at 12 years (Article 89); it had been 7 years previously. In Ghana, the proposals for a Children's Code recommended that "the minimum age of criminal responsibility shall be fourteen years".¹⁰⁵

101 Albrecht (2002a:53).

102 Albrecht (2002a).

103 Winterdyk (2002:xii-xiii).

104 Albrecht (2002b:173).

105 Report by the Ghana National Commission on Children 1996, Part VII, Article 1.

Namibia would do better if it were to follow countries, having established higher age limits, because it is only then that it will comply with the Beijing Rules (Rule 4), which recommend that when states establish such an age of criminal capacity, “the beginning of that age shall not be fixed at too low an age level bearing in mind the facts of emotional, mental and intellectual maturity”. That the age limit of 7 years is not in line with Rule 4, may be derived from the frequent criticism of the Committee on the Rights of the Child against countries that have established minimum age of criminal capacity as 10 years or younger.

Police procedures and release policies

The way in which the Bill addresses police procedures and release policies tackles burning issues of the current criminal justice system at large.¹⁰⁶ This refers to the problem of timeous conclusion of criminal proceedings, the problem of lengthy periods of pre-trial detention, and the manner in which pre-trial detention is carried out. Arrest and detention have been the primary methods of the current system of securing the attendance of children in court.

Section 12: Arrest of a Child

- (1) A police official may not arrest a child for offences referred to in Schedule (1) and must consider any of the alternative methods of starting a proceeding referred to in section 11.

International rules provide that children awaiting trial should be detained only as a last resort. Although Namibia is signatory to these international instruments, detention of arrested children has been the norm in Namibia. The current law also does not make provision for all arrested children to be kept separate from adults. Consequently, although there is a standing order that all arrested children are to be kept separately from adults, this only happens at some police stations, and especially not where and when police cells are overcrowded.

In the past extended periods of pre-trial detention of several months could be observed.¹⁰⁷ The adverse results of institutionalisation and the undesirability of separation of children from their families, which inhibits reintegrating of the child into society linked with long pre-trial detention periods are even reinforced with most, if not all of the police stations in the country not running any programme with the children. Under the current system police may release an accused only in terms of section 56 of the Criminal Procedure Act

106 *The Namibian* of 22 May 2009 had the following to report under the heading “Iyambo visits decrepit cells” on page 3:

Standing up to free space in their cramped cells, prisoners surged to the bars as Safety and Security Minister Nickey Iyambo ... toured the cells. ... Various reports over the last few years, including by the Office of the Ombudsman, have highlighted the issue of overcrowding and the human rights infringements of prisoners associated with it. ... Overcrowding has forced the Police to use any and all available space as holding areas.

107 Albrecht (1997).

on written notice to appear in court, or in terms of section 59 of the Act on bail. Both sections are, however, only of very limited application. A notice is primarily meant for minor offences, i.e. offences for which the court would not impose a fine in excess of N\$300, and release on bail may only be considered in respect of specific offences, in particular not with regard to offences referred to in Part II, III or IV of Schedule 2 of the Criminal Procedure Act.¹⁰⁸ Although this leaves still a considerable margin of discretion, in practice extensive use of both provision have not been made. The Bill, in line with the diversion options discussed later, tends to reverse this practice. The power of police to arrest a child has been considerably modified, if not curtailed.

The Bill provides not only for the administering of a caution to the child instead of starting a proceeding against the child. A police official may also not arrest a youth for an offence referred to in Schedule 1 of the Bill, such as assault without grievous bodily harm being inflicted, malicious injury to property, trespass, or ordinary theft, conspiracy, incitement or attempt to commit any of the offences mentioned here, anymore. Schedule 1 in particular, refers to offences, which constitute the core area of child delinquency. Even in cases where the child is suspected to have committed an offence referred to in Schedule 2, this schedule includes most of the remaining offences, but excludes murder, rape and certain cases of robbery, a police must consider alternative methods. A police may arrest the child only if s/he believes on reasonable grounds that arrest is necessary to prevent a continuation or a repetition of the offence or the commission of another offence, to prevent concealment, loss or destruction of evidence relating to the offence, or that the youth is unlikely to appear at a preliminary inquiry before a juvenile justice court in response to a summons or an attendance notice.

Should the child have been arrested, the Bill provides peremptorily, that further detention must be carried out in such a way that a child must be detained separate from adults and separate from persons of the opposite gender. However, in principle police shall release a child accused of an offence referred to in Schedule 1, before the child's appearance at a preliminary inquiry (see below), from police custody into the custody of the child's parents or an appropriate adult. In consultation with the Prosecutor General a police may also release a child from police detention, who is accused of an offence referred to in Schedule 2.

With regard to the gross violations of children's rights during detention, the Bill states authoritatively that the child must, whilst in detention have access to adequate food and water, medical treatment, reasonable visits by parents, guardians legal representatives and the like, reading and educational material, adequate exercise, and, importantly, that the child must be provided with adequate clothing, sufficient blankets and bedding.¹⁰⁹

108 No. 51 of 1977.

109 These requirements have at least at theoretical level, become common knowledge of the Police, which since 1997 form part of the curriculum of the Namibian Police Training College; absolute limits in terms of human resources, number of cells, adequate catering etc, make this however an almost impossible endeavour for any station commander.

International comparison

The Child Justice Bill places Namibia directly in line with international principles regulating police powers and duties in relation to juvenile justice. Article 37(b) of the CRC stipulates that arrest, detention and imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. The Bill emulates the CRC and goes even a step further because according to section 12(1) of the Child Justice Bill the police may not arrest a child for an offence referred to in Schedule 1 (see above). To the extent that, for any other case, the Bill orders that consideration be given to any alternative methods of starting proceedings at a preliminary inquiry, the envisaged law will turn around the assumption, deeply entrenched in the Namibian criminal justice system, that the alleged commission of an offence always warrants in principle the arrest of the suspect. Not only the adverse results of institutionalisation, and further step into delinquency will be averted, the constitutional presumption of innocence will eventually be taken seriously.

Diversion and preliminary inquiry

Diversion is understood as the “channelling of prima facie cases away from the criminal justice system on certain conditions”.¹¹⁰ Under the current Namibian system, no specific provision for diversion and no guidelines ensuring uniformity of diversion in Namibia exist. Although, the General Prosecutor as dominus litis in terms of section 6 of the Criminal Procedure Act is given permission for diversion in October 1997, a lack of uniformity in the way children are assessed in preparation for decisions concerning diversion led in the past to a situation where not all children in Namibia receive the same treatment, and where available, diversion options, as the case may be, were not recognised.

Section 46: Object of this Chapter

The object of this Chapter is to set up diversion options to deal with a child of 10 years or older who is alleged to have committed an offence in order to divert the child from the court’s criminal justice system.

Section 47: Purposes of Diversion

The purposes of diversion under this Part are to –

- (a) ...
- (h) facilitate dealing with unlawful behaviour of a child within the community and without government intervention or criminal proceedings.

The Bill strives to remedy most of the shortcomings of the current system. In terms of the Bill a child may be considered for diversion provided certain requirements are met. The voluntarily acknowledgement of responsibility for the alleged offence is one of the prerequisites for the child entering the diversion process. The most important aspect of the Bill, however, is that each and every child has a right that diversion must be considered, if the formal requirements are given.

110 South African Law Commission (1997:139).

Whether the child actually enters the diversion process, depends on the outcome of a preliminary enquiry, presided over by an inquiry magistrate, which has the objective to establish whether the matter is appropriate for diversion and to identify a suitable diversion option. Through the preliminary enquiry the state appropriates the process of diversion, or at least channels the itinerary in a formal way. This must not be seen as directed against diversion per se, rather to safeguard against the effect of net-widening with its possible encroachment on due process rights of the child. The envisaged procedural sequence entails that an assessment of the child precedes the preliminary inquiry. Upon apprehension of a child suspected of the commission of an offence, a police official has to notify a youth/child worker so that an assessment of the juvenile can take place as soon as possible. One of the purposes of assessment is to establish the possibility of diversion of the case. The assessment report informs, together with other data introduced into the preliminary inquiry, the basis for the decision whether the matter can be diverted. It is, however, envisaged that the inquiry magistrate may only make an order regarding an appropriate diversion option or options if the prosecution indicates that the matter can be diverted; in the final analysis the prosecutor remains *dominus litis*.

Based on the experience with diversion options available in Namibia since the permission from the Prosecutor General to implement diversion, the Bill provides a range of diversion options, set out at three levels. Different diversion options allow for an individualised process, with best prospects for success. Level one diversion options are for instance a formal caution with or without conditions, referral to counselling or therapy, the symbolic restitution, or the restitution of a specified object to the victim/s of the alleged offence. Level two diversion options include community service of some kind or other, but also the payment of compensation, the provision of some service or benefit to a specified victim, the referral to appear at a family group conference (FGC), or a victim–offender mediation (VOM). Level three diversion options are more onerous, applicable only in respect of a child 14 years and older. Here referral to programmes with a so-called residential element is also possible.

The FGC and VOM allow for inclusive ways of dealing with the matter. In both procedures, victim and offender may become involved. This allows not only the offender to be forgiven for his/her apology and repentance, but also the victim to get a better understanding of their victimisation. The FGC is an example of “reintegrative shaming”.¹¹¹ The conference serves as a reintegration ceremony. As in the case of VOM, victims and offenders are put in a central place in trying to right the wrong that has been caused by the offence.

International comparison

The significance of the UN Convention on the Rights of the Child with regard to juvenile justice is that it has elevated diversion to a legal norm,¹¹² which is binding on Namibia

111 Braithwaite (1989).

112 Article 40(3)(b), CRC.

since ratification. With the proposed Bill Namibia undertakes to introduce basically the full range of diversion options currently suggested by professionals and experts. With the introduction of the FGC model, which had been in use for some time in New Zealand, and VOM, Namibia eventually recognises that the etiological process towards deviant behaviour has its roots very often in the immediate social environment of the offender, and has to be given meaning not only in relation of the offender and the state.

The child justice court

Chapter 8 provides for the establishment of the Child Justice Court at district court level, apart from ordinary magistrate's courts, a *novum* in Namibian legal history.

Section 85: Designation and Jurisdiction of Child Justice Act

- (1) A child justice court is a court at district court level which must adjudicate on all cases referred to that court in terms of this Act,
- (2) ...
- (5) The child justice court and the presiding officer of the court must be designated by the Chief Magistrate of each magisterial district and such court must, as far as is possible, be staffed by specially selected and trained personnel.

The prerogative of the prosecution to determine the court, which shall hear the case, is curtailed under the Bill, and it is envisaged that preference must be given to referral to the child justice court. One provision of the text deserves particular attention. It is planned that child justice courts, as far as possible, be staffed by specially selected and trained personnel. In practice the provision will be rather of a programmatic nature. But the clause is commendable, because it is an acknowledgement in principle that young persons are not just little adults. Young persons have special needs in respect of communication, but also participation in the proceedings. Often such needs are not acknowledged by ordinary persons, who are not sensitised to such issues.

International comparison

A wide variety of models which establish juvenile court systems are to be found in international literature. Over the last two decades, however, most international examples of juvenile justice legislation are characterised by the creation of a separate court system for children in trouble with the law. Examples in point are Canada, India, New Zealand, and Uganda.¹¹³

Sentencing

Sentencing is linked to diversion as well as to the principles and values underlying a juvenile justice system. The draft includes restorative justice, proportionality and

113 Germany (DVJJ Juvenile Justice Reform Commission Final Report 2002:27) has experienced the advantage of the establishment of a special youth court, where in principle judges and prosecutors, specially trained in youth matters, are responsible for the youth adequate process (Roessner & Bannenberg 2002:71).

limitations on the restriction of liberty. Restorative justice has been described as a theory of reconciliation, rather than a theory of punishment. The decision for restorative justice informs the whole Chapter 10 of the draft. Apart from the necessity of a pre-sentence report, a court may impose a sentence involving a compulsory detention in a residential facility only under very narrow conditions. In section 107, the draft provides that if a restorative justice sentence fails or is not carried out, the child must “appear before court in order to impose an appropriate sentence”. The excerpt which follows here a recommendation by the South African Law Commission in respect of the South African law reform project.¹¹⁴ The advantage would be not only to encourage, but also ensure maximum consideration of alternative sentencing.

Section 103: Convicted Children to be sentenced in terms of this Chapter

Upon conviction of a child a court must impose a sentence in accordance with the provisions of this chapter.

Section 104: Pre-sentence reports required

Upon conviction of a child a court must request a pre-sentence report from a child worker or any other suitable person before imposing a sentence in terms of this Act. ... A child justice court is a court at district court level which must adjudicate on all cases referred to that court in terms of this Act ...

Section 105: Purposes of sentencing

The purposes of sentencing in terms of this Act are to -

- (a) Encourage the child to understand the implications of and be accountable for the harm caused;
- (b) Promote an individualized response which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the harm caused by the offence;
- (c) Promote the reintegration of the child into the family and the community; and
- (d) Ensure that any necessary supervision, guidance, treatment or services, which form part of the sentence can assist the child in the process of reintegration.

Section 108: Sentences with a compulsory residential requirement

- (1) A sentence involving a compulsory residential requirement may not be imposed upon a child unless the presiding officer is satisfied that the sentence is justified by –
 - (a) the seriousness of the offence, the protection of the community and the severity of the impact of the offence upon any victim; or
 - (b) the previous failure of the child to respond to non-residential alternatives....

An analysis of a random selection of closed cases, which were dealt with at the Windhoek Magistrate's Court from 1995 to 1997, revealed that in many instances there was no correlation between offence committed and sentence imposed.¹¹⁵ Without normative guidance in terms of legislation there is the continuing danger that the personal

114 South African Law Commission (1997:60).

115 Super (1999:58).

circumstances of an accused young offender are often not taken into account when sentencing, and that the decision on sentencing is based on the nature and seriousness of the offence alone. This is partly due to the fact that presiding officer, prosecutor, and, if the child is legally represented, the defence lawyer, are not trained, and do not have a pedagogic background. Another factor contributing to this kind of sentencing is the fact that a pre-sentence report is not always requested, or within the time limit allocated for its compilation, not available. This means that the magistrate is not in a position to properly assess the case before him/her. For the envisaged system the Bill stipulates imperatively, that upon conviction a court may only dispense with a pre-sentence report if the conviction is for an offence mentioned in Schedule 1.

Application of the Child Justice Bill

According to the Bill the normal point of transition from the juvenile to adult justice system should occur at the age of 18. Only in respect of a person who is 18 years or more but not over the age of 21 years, and who is alleged to have committed an offence jointly with others, the majority of whom are younger than 18, may the prosecution direct that the proceedings be followed in terms of the Child Justice Bill.

Section 2: Application of this Act

- (1) This Act applies to any child in Namibia, irrespective of nationality, country of origin or immigration status, who –
 - (a) is alleged to have committed an offence; and
 - (b) was under the age of 18 years at the time of the alleged commission of the offence
- (2) The Prosecutor General or a designated prosecutor may direct that the proceedings in terms of this Act be followed in respect of a person who is over the age of 18 years but not over the age of 21 years, and who is alleged to have committed an offence jointly with others, the majority of which are children; ...

This provision is, however, purely based on procedural considerations, and is supposed to protect the interests of the young person allegedly having committed an offence jointly with an adult. Under the current system, and in the absence of a similar provision, in most cases where adults and young persons were suspected, the proceedings are conducted jointly against both adult and young offender at the same time. Amongst professionals working with young offenders, lawyers, social workers etc. there is a consensus that the transition between the envisaged juvenile system and the adult criminal justice system is too abrupt. Whether an accused is under the age of 18 years is often accidental. In particular when a group of young persons approaching the age of 18, act together, the one or other amongst them will cross the age bridge earlier than his/her peers. It appears arbitrary to apply in the one case the juvenile justice law, but not in the other depending on the age of the majority. Although the symbolic meaning of coming of age may have an impact on the maturation process of the young adult, the age barrier of 18 does not correspond with the beginning of adulthood otherwise. The law as it stands, section 1 of

the Age of Majority Act,¹¹⁶ states: "All persons, whether males or females, attain the age of majority when they attain the age of twenty-one years". Whereas this is a decisive and significant age barrier for the Namibian society, which occasions celebrations, to attain 18 years of age has no specific connotation.

Other bills currently under construction, also define a child being a person under the age of 18, but provision for flexible handling on the merit of the case is made. In terms of section 47 of the Child Care and Protection Bill (see above), orders for the benefit of persons of 18 years and older, but not older than 20, may remain in effect, or even be renewed or modified, provided that the grounds for the order, renewal or modification exist. In respect of the treatment of young offenders the view that a case by case management would be more appropriate is not necessarily shared by all stakeholders, in particular not by protagonists of a strong crime control model. This seems to be another indication that whenever society has to deal with a breach of presumably unswerving social standards, it reverts to reductive theories, and here in particular deterrence and just desert theories. If the abrupt transition from juvenile to adult justice is unsatisfactory, different solutions are thinkable:

- First, we may think of a model, which treats young adults in accordance with the legal consequences of the child justice law only, if the offender shows clear signs of maturational retardation, or the offence can be considered as typical for juveniles (section 105, Jugendgerichtsgesetz ("Youth Court Act", Germany)).¹¹⁷
- Another model might suggest the application of the legal consequences, provided with the draft, to all offenders under the age of 21 (inclusive model).
- Still another model prefers the exclusive application of child justice law to young offenders under the age of 18 years (exclusive model), but suggests the acknowledgement of young adulthood as a mitigating factor for sentencing; this model has been followed by the Greek criminal law, Article 133 of the Greek Penal Code, stipulates that the court may impose on young adults 18 years of age and older but not older than 20 years a lesser sentence than for adults.¹¹⁸

The underlying arguments for the one or other solution are different. The first grounds in the consideration that young adults are sometimes, still, subject to developmental forces which are characteristic for adolescents, who are deemed to be malleable by those interventions which the juvenile justice system provides. This, however, should not be a sufficient reason to extend the application of the child justice law to all offenders under the age of 21 years. Developmental psychology holds that the development of behavioural patterns, and their underlying motives is usually not completed with attainment of the age of majority, and that the period between 18 and 21 years does not mark the transition from youth to adulthood.¹¹⁹ From a social perspective the attainment of adulthood would coincide with economic independence, and/or founding of a family, thus incidents which

116 No. 57 of 1972.

117 Albrecht (2002b:192).

118 Chaidou (2002:195, 197).

119 Roessner & Bannenberg (2002:73).

may often only occur somewhere during the third decade of life.¹²⁰ The transitional periods, also in developing countries, have been prolonged under circumstances of modernity, and the entrance to the adult world has become more difficult for certain subgroups of juveniles.¹²¹ The second and third model take the difficulties which may arise from the application of such vague concepts like maturational retardation or typical for juveniles into consideration. To the extent that they include or exclude young adults from the application of the juvenile/child justice law, they do not only allow for a more uniform application of the law. In this respect they are more in line with constitutional requirements of the rule of law. The difference between them is, however, that the inclusive model opens the way for a more individualistic reaction. In our view this should be the preferred model. Under circumstances, where young people are largely affected by social exclusion and poverty¹²² the societal reaction needs to take into consideration the developmental impact of the offender's reality. This can only be secured if the more flexible sentencing range of the juvenile/child justice system is applicable.

Law reform in perspective: Reconciliation and restorative justice

During recent years the binary of due process guarantees given by Article 12 of the Namibian Constitution (and previously by various principles under the common law) and the CPA on the one hand, and the crime control model on the other hand, has come under strong criticism. Not only because some people believed that the balance had moved far too much in favour of due process and at the expenses of crime control. It was repeatedly held that rights of offenders and rights of victims had to be brought into balance. Whereas some held that this meant simply a shift towards the application of retributive theories on punishment (O'Linn) and a re-emphasis on crime control, others felt with Christie,¹²³ that the state who has stolen the conflict between the offender and victim, should return the conflict as much as this is possible under the circumstances of the modern state. The latter view opened the way towards an idea of restorative justice.

Restorative justice

Restorative justice programmes address important criticisms levelled against the prevalent binaries of due process and crime control, or more precisely, it refers to the functional aspects of cognitive self-regulation.¹²⁴

120 (ibid.:74).

121 Albrecht (2002b:194).

122 Mufune (2002:179ff).

123 Christie (1977).

124 This view on personality assumes that people take up goals and try to move towards them. To ensure that they are moving in the right direction, people monitor their progress. Life is a continuing flow of decisions, involving sensing, checking, and adjusting towards a network of (self-defined) goals (Carver & Scheier (2000:436ff, 497ff).

The most important components of a restorative justice system are usually life skills programmes (LSPs), community service, VOM, and FGCs. Assuming that law-breaking incidents reflect often distorted views of the offender on the cognitive triad, i.e. his/her self, the world and the future, a system of restorative justice aims at reducing cognitive distortions and resulting distress. The surface arguments for the above-mentioned components sometimes seem to be different, but a closer look reveals that they all contain an element, which allows cognitive restructuring or reframing.

LSPs address the child offender, and aim at assisting the child in making correct choices, even in difficult situations. LSP principles thus correspond strongly with the social cognitive perspective. Amongst others, these principles cover the following:

- LSPs comprise an interactive and participatory process, involving all participants
- LSPs are based on reality, i.e. they take into account the socio-economic and cultural circumstances within which the participants find themselves
- LSPs do not aim to blame or judge, but rather aim to create something positive about past events.

Community service is said to be not interchangeable with LSPs, because the primary function of community service should be “punishment by taking away leisure time”.¹²⁵ However, the integration of this measure in the social context of communities reconfirms also symbolically the ties between the individual and the social.

VOM, as one of the central planks of restorative justice, means facilitating a dialogue (talk) between the victim and the offender. In as much as the objective is to work out an agreement between victim and offender, it requires intuition and skills on the side of the mediator. The dialogue places the incriminated action in perspective for both, victim and offender. It is this contextualisation of an incident, which opens ways to mutual understanding and subsequently healing. One of the principles of VOM is to give the victim, and the offender, an opportunity to speak. To be able to talk about emotional feelings and experiences around the offence openly, allows the reintroduction of victim and offender to each other as persons in social context. The recognition of the other as a person rehabilitates victim and offender as actors, who are not powerless, but who are deemed to be capable of managing their (social) lives. This means in part restructuring/reframing in the sense mentioned above.

The same principle applies to the FGC in a more complex setting. It involves not only victim and offender but also their families and relevant community members. Disapproval of the offence is communicated, but the identity of the offender is preserved (or as the case may be restored) as good. Again, the (antisocial) act is placed in a historical, social and personal narrative, to which all participants contribute.

125 Mutingh (1994:51).

The Juvenile/Child Justice Bill – A paradigm shift

The discourse about a new juvenile justice system for Namibia has brought about a Bill, which goes along with the principles of restorative justice. The Bill makes provision for LSPs, community service, VOM, and FGCs. Therefore, once passed into law, a paradigm shift will have taken place. Admittedly, the Prosecutor General remains *dominus litis*, and without her approval diversion may not take place. This could be understood as counter-productive, because it leaves the system in the hands of the prosecution, traditionally inclined to value crime control and retribution more than restorative justice. Theoretically, the whole system could be suspended under the command of a reluctant protagonist of crime control and retribution. However, even after conviction of the child offender, the system remains foursquare within the coordinates of a restorative justice system. As was shown above, the purposes of sentencing are mainly to encourage the offender to understand the implications of and to be accountable for the harm caused, to promote an individualised response, and to reintegrate the offender into the family and/or community. Schedule 1 offences may not lead to a sentence of imprisonment, and ‘community-based sentences’ and ‘restorative justice sentences’ (see above) do not seem to require approval by the prosecution.

Conclusion and outlook

The manifest objective of the proposed Child Justice System is a sustainable reduction of child/juvenile delinquency in Namibia. The service delivery system, which needs to be put in place upon future promulgation of a Child Justice Act, will have to address pressing problems arising from the sphere of primary crime prevention. The now envisaged tabling of the Child Care and Protection Bill is reassuring in this regard. But what lies ahead for the administration of child justice depends on uncertain dimensions.¹²⁶

126 The most challenging factors seem to be adverse effects of the current demographic development and subsequent economic decline. The question to be answered will then be whether the Namibian state can afford its child justice programme. The probable increase of HIV/AIDS related death rate of the age group 15–49 would not only leave behind more orphans with devastating effects on their upbringing, but also deprive Namibia’s economy of a significant part of its workforce. The 2008 update of the UNAIDS/WHO *Epidemiological Fact Sheet on HIV/AIDS* for Namibia reported an estimated number of adults and children living with HIV/AIDS for the end of 2001 of about 150,000, and an adult rate, referring to men and women aged 15 to 45 of 14.6.5%, estimations for September 2008 about 200,000 adults and children, with an adult rate of about 15.3% (see also *The Namibian*, 27 November 2002). A persistent patriarchal and conservative culture has at least partly led to a situation where “apparently well organized health campaigns in the country ... had only partial or no impact on the spread of HIV/AIDS ...” (Fox 2002:319). Namibia will, therefore, with a high probability, face a rupture of economic structures and a steady deconstruction of the social and cultural fabric (Jackson 2002:22–36). In terms of any sociological theory that emphasises social structure, this means that society becomes a prime breeding-place for crime and deviance. Even if the negative impact of HIV and AIDS can be curbed, the new system is ambitious and requires a structural readjustment of government spending. The transformation of constitutional directions and obligations derived from international

In this paper no more than an aperçu of a new child justice system could be given. However, the discussion on diversion, juvenile courts and sentencing, contextualised the Bill against the backdrop of cutting-edge criminological and sociological knowledge, own constitutional precepts, and international obligations. The Child Justice Bill has not only borrowed from the South African law reform project on juvenile justice, but admittedly, it derived main ideas from the South African Law Commission's proposed Child Justice Bill. In as much as the Commission has been able to "consider the experiences of other countries as well as the approaches of various international instruments and initiatives adopted in the field of child/youth justice",¹²⁷ the Child Justice Bill follows suit: once adopted, the new system would satisfy internationally recognised standards.

The proposed child justice system strives for a limited autonomy from the adult judicial system. It is evident that with regard to the establishment of a performing service delivery system as a centre piece for diversion, and the provision of a shifting exit point for the conversion of a case into a children's court inquiry at any time, aid and assistance to children and families are not only considered in terms of crime prevention, but also in terms of youth welfare. The application of the suggested system offers chances under different headings:

- First, the dignity of young offenders as persons may be restored. As has been said above, under the current system, no consideration had been given to the specific circumstances informing youth delinquency. Young offenders had been treated against the backdrop of a concept of societal order and its instruments to safeguard this order, which was virtually disconnected from the life-world of young offenders. This would change with the Child Justice Bill, which would allow, and prescribe, to deal with the child offender in accordance with his/her personality, and, with such needs in terms of personal development and welfare, as indicated by the incriminated act, and identified on occasion of the said act.
- Second, the introduction of a system which departs from the tenets of classical theory, and which is based on the notion of restorative justice, revives the traditional local concepts of reconciliation and peace-making. Notwithstanding the fact, that there may be an abrupt transition from the application of the child justice system to the adult justice system at the age of 18 years, the notion may cause repercussions beyond the coordinates of the child justice system.

instruments (see above) into positive law must not be confused with a strong determination to enforce the law. A prime factor for the well functioning of the law is its manageability and the support by the institutions, which have to enforce it. It is here where the Service Delivery System is anchored. The maintenance of a variety of diversion options, and the adherence to the principles of restorative justice require more than enthusiastic youth workers. It requires dedicated, skilled, and trained professionals endowed with and backed by a corresponding infrastructure. If we only have a look at the guidelines for the application of VOM and FGC, which are both based on practical experience, it becomes obvious that the requirements for success are resource intensive. In other words, if the service delivery system does not perform, the Act becomes meaningless.

127 Skelton & Potgieter (2002:498).

The general application of the system across the country may result in a significant reduction of youth delinquency. This may be seen as contradictory in respect of the expectation that due to the impact of declining socio-economic conditions a net increase in youth crime will occur in the long run. However, the envisaged system is expected to perform better than the orthodox system under any ecological and environmental conditions. As a consequence youth crime rates may be significantly lower than under the prevailing system.

References

- Albrecht, Hans-Jörg. 1982. *Legalbewährung bei zu Geldstrafe und Freiheitsstrafe Verurteilten*. Freiburg i.Br.: Eigenverlag Max-Planck Institut für ausländisches und internationales Strafrecht.
- Albrecht, Hans-Jörg. 1997. *Crime, criminal justice, and law reform*. Windhoek: Ministry of Justice.
- Albrecht, Hans-Jörg. 2002a. *Ist das deutsche Jugendstrafrecht noch zeitgemäß? Bedarf es und wenn ja welcher Veränderungen? - Gutachten D für den 64. Deutschen Juristentag*. Muenchen: CH Beck.
- Albrecht, Hans-Jörg. 2002b. "Juvenile crime and juvenile law in the Federal Republic of Germany". In Winterdyk, John A (Ed.). *Juvenile justice systems: International perspectives* (Second Edition). Toronto: Canadian Scholar's Press, pp 172–205.
- Amoo, Samuel K. 2008. *An introduction to Namibian law*. Windhoek: Macmillan.
- Avakame, Edem F. 1998. "Intergenerational transmission of violence, self-control, and conjugal violence: A comparative analysis of physical violence and psychological aggression". *Violence and Victims*, 13(3):301–316.
- Benson, Michel, L & Elizabeth Moore. 1992. "Are white collar and common offenders the same? An empirical and theoretical critique of a recently proposed General Theory of Crime". *Journal of Research in Crime and Delinquency*, 29(3):251–272.
- Bentham, Jeremy. 1970 [1789]. *An introduction to the principles of morals and legislation*. London: The Athlone Press.
- Berger, Peter & Thomas Luckmann. 1991 [1966]. *The social construction of reality – A treatise in the sociology of knowledge*. London: Penguin Books.
- Braithwaite, John. 1989. *Crime, shaming and reintegration*. Cambridge: Cambridge University Press.
- Braithwaite, John. 2002. *Restorative justice and responsive regulation*. Oxford: Oxford University Press.
- Brownfield, David & Anne Sorenson. 1993. "Self-control and juvenile delinquency: Theoretical issues and an empirical assessment of selected elements of a theory of crime". *Deviant Behavior*, 14:243–264.
- Burton, Velmer S Jr, Francis T Cullen, T David Evans & R Gregory Dunaway. 1994. "Reconsidering Strain Theory: Operationalization, rival theories, and adult criminality". *Journal of Quantitative Criminology*, 10(3):213–239.

- Burton, Velmer S Jr, Francis T Cullen, T David Evans, Leanne Fiftal Alarid & R Gregory Dunaway. 1998. "Gender, self-control, and crime". *Journal of Research in Crime and Delinquency*, 35(2):123–147.
- Carver, Charles S & Michael F Scheier. 2000. *Perspectives on personality* (Fourth Edition). Boston/London: Allyn and Bacon.
- Chaidou, Anthozoe. 2002. "Griechenland". In Albrecht, Hans Jörg & Michael Kilchling (Eds). *Jugendstrafrecht in Europa. Kriminologische Forschungsberichte aus dem Max-Planck Institut fuer auslaendisches und internationales Strafrecht, Band 100*. Freiburg i.Br.: edition iuscrim.
- Christie, Nils. 1977. "Conflicts as property". *British Journal of Criminology*, 17(1):8–23.
- Cochran, John K, Peter B Wood, Christine S Sellers, Wendy Wilkerson & Mitchell B Chamlin. 1997. "Academic dishonesty and low self-control: An empirical test of a general theory of crime". *Deviant Behavior*, 19:227–255.
- Coleman, James S. 1994 [1990]. *Foundations of social theory*. Cambridge, MA/London: Harvard University Press.
- De Waal, Johan, Ian Currie & Gerhard Erasmus. 2001. *The Bill of Rights handbook* (Fourth Edition). Lansdowne: Juta.
- Du Toit, E. 1981. *Straf in Suid-Afrika*. Cape Town: Juta.
- DVJJ Juvenile Justice Reform Commission. 2002. *Final Report (DVJJ-Extra No. 5)*. Hannover: DVJJ eV.
- Esser, Hartmut. 1999a. *Soziologie – Allgemeine Grundlagen* (Second Edition). Frankfurt/M: CAMPUS Verlag.
- Esser, Hartmut. [Various]. *Soziologie – Spezielle Grundlagen*. Frankfurt/M: CAMPUS Verlag. [Volume 1, *Situationslogik* (1999b); Volume 2, *Die Konstruktion der Gesellschaft* (2000); Volume 3, *Soziales Handeln* (2000); Volume 4, *Opportunitäten und Restriktionen*; Volume 5, *Institutionen*; Volume 6, *Sinn und Kultur* (2001)].
- Evans David T, Francis T Cullen, Velmer S Burton, Gregory R Dunaway & Michael L Benson. 1997. "The social consequences of self-control: Testing the general theory of crime". *Criminology*, 35(3):475–504.
- Fox, Tom. 2002. "The culture(s) of AIDS – Cultural analysis and new policy approaches for Namibia". In Winterfeldt, Volker, Tom Fox & Pempelani Mufune (Eds). *Namibia – Society – Sociology*. Windhoek: University of Namibia Press, pp 317–332.
- Frey, Bruno S. 1999. *Economics as a science of human behaviour: Towards a new social science paradigm* (Extended Second Edition). Boston/Dordrecht/London: Kluwer.
- Gibbs, John J & Dennis Giever. 1995. "Self-control and its manifestations among university students: An empirical test of Gottfredson and Hirschi's General Theory". *Justice Quarterly*, 12(2):231–255.
- Goode, Erich (Ed.). 2008. *Out of control*. Stanford: Stanford University Press.
- Glueck, Sheldon & Eleanor Glueck. 1950. *Unraveling juvenile delinquency*. Cambridge, MA: Harvard University Press.

- Gottfredson, Michael R & Travis Hirschi. 1990. *A general theory of crime*. Stanford, CA: Stanford University Press.
- Grasmick Harold G, Charles R Tittle, Robert J Bursik Jr & Bruce J Arneklev. 1993. "Testing the core empirical implications of Gottfredson and Hirschi's General Theory of Crime". *Journal of Research in Crime and Delinquency*, 30(1):5–29.
- Gusfield, Joseph, R. 1968. "On legislating morals: Symbolic process of designating deviance". *California Law Review*, 56:58–59.
- Heckhausen, Heinz. 1990. *Motivation und Handeln* (Second Edition). New York/Heidelberg/Berlin: Springer.
- Hinz, Manfred O. 1998. *Customary law in Namibia: Development and perspective* (Fourth Edition). Windhoek: Centre for Applied Social Sciences.
- Hinz, Manfred O. 2002. Two societies in one: Institutions and social reality of traditional and general law and order. In Winterfeldt, Volker, Tom Fox & Pempelani Mufune (Eds). *Namibia – Society – Sociology*. Windhoek: University of Namibia Press, pp 197–224.
- Isaak, John Paul & Christo Lombard. 2002. "Religion and its impact on Namibian society". In Winterfeldt, Volker, Tom Fox & Pempelani Mufune (Eds). *Namibia – Society – Sociology*. Windhoek: University of Namibia Press, pp 87–124.
- Jackson, Helen. 2002. AIDS Africa – Continent in crisis. Harare: SAfAIDS.
- Junger, Marianne & Richard E Tremblay. 1999. "Self-control, accidents, and crime". *Criminal Justice and Behaviour*, 26(4):485–501.
- Keane, Carl, Paul S Maxim & James J Teevan. 1993. "Drinking and driving, self-control, and gender: Testing a General Theory of Crime". *Journal of Research in Crime and Criminology*, (1):30–46.
- Kerner, Hans-Jürgen. 1996. "Erfolgsbeurteilung nach Strafvollzug: Ein Teil des umfassenderen Problems vergleichender kriminologischer Sanktionsforschung". In Kerner, Hans-Jürgen, Gabriele Dolde & Hans-Georg Mey. *Jugendstrafvollzug und Bewährung – Analysen zum Verzugsverlauf und zur Rückfallentwicklung*. Bonn: Form Verlag Godesberg.
- Kohlberg, Lawrence. 1969. *Stages in the development of moral thought and action*. New York: Holt, Rinehart and Winston.
- Kuhl, Julius. 1987. "Motivation und Handlungskontrolle: Ohne guten Willen geht es nicht". In Heckhausen, Heinz, Peter M Gollwitzer & Franz E Weinert. *Jenseits des Rubikon – Der Wille in den Humanwissenschaften*. Berlin/Heidelberg/Tokyo: Springer.
- Kuhl, Julius & Arno Fuhrmann. 1998. "Decomposing self-regulation and self-control: The volitional components inventory". In Heckhausen, Jutta & Carol S Dweck (Eds). *Motivation and self-regulation across the life span*. Cambridge: Cambridge University Press, pp 15–49.
- LaGrange, Teresa C & Robert A Silverman. 1999. "Low self-control and opportunity: Testing the General Theory of Crime as an explanation for gender differences in delinquency". *Criminology*, 37(1):41–72.

- Lappi-Sepälä, Tapio. 2008. "Global examples in dealing with increased prison populations – A case study of Finland". In Ministry of Safety and Security. *National Conference on Community Service Orders (Conference Proceedings)*. Windhoek: Ministry of Safety and Security.
- Legal Assistance Centre. 2002. *Restorative approach to juvenile justice in Namibia – A guide for juvenile justice workers*. Windhoek: Legal Assistance Centre.
- Longshore, Douglas. 1998. "Self-control and criminal opportunity: A prospective test of the General Theory of Crime". *Social Problems*, 45(1):102–113.
- Longshore, Douglas & Susan Turner. 1998. "Self-control and criminal opportunity: Cross-sectional test of the General Theory of Crime". *Criminal Justice and Behavior*, 25(1): 81–98.
- Mohell, Ulla, Tapio Lappi-Sepälä & Aarne Kinnunen. 2004. "Adult corrections in Finland". In Winterdyk, John A (Ed.). *Adult corrections: International systems and perspectives*. Monsey, NY: Criminal Justice Press.
- Mufune, Pempelani. 2002. "Youth in Namibia – Social exclusion and poverty". In Winterfeldt, Volker, Tom Fox & Pempelani Mufune (Eds). *Namibia – Society – Sociology*. Windhoek: University of Namibia Press, pp 179–196.
- Mutingh, L. 1997. *Community Service Orders: An evaluation of cases supervised in Cape Town between 1993 and 1994*. Pretoria: Human Sciences Research Council.
- Nachtwei, Winfried. 1976. *Namibia – Von der antikolonialen Revolte zum nationalen Befreiungskampf (Geschichte der ehemaligen deutschen Kolonie Suedwestafrika)*. Mannheim: Verlag Juergen Sandler.
- Nagin, Daniel S & Raymond Paternoster. 1993. "Enduring individual differences and Rational Choice Theories of Crime". *Law & Society Review*, 27(3):467–496.
- Packer, Herbert L. 1964. "Two models of the criminal process". *University of Pennsylvania Law Review*, 113:1–64.
- Packer, Herbert L. 1968. *The limits of the criminal sanction*. Stanford, CA: Stanford University Press.
- Packer, Herbert L. 1993. "Two models of the criminal process". In Cole, George F (Ed.). *Criminal justice: Law and politics*. Belmont (CA): Wadsworth, pp 14–27.
- Paternoster, Raymond & Robert Brame. 1998. "The structural similarity of processes generating criminal and analogous behaviours". *Criminology*, 36(3):633–669.
- Piaget, Jean. 1932. *The moral judgment of the child*. London: Kegan Paul.
- Piquero, Alex & Stephen Tibbetts. 1996. "Specifying the direct and indirect effects of low self-control factors in offender's decision making: Towards a more complete model of rational offending". *Justice Quarterly*, 13(3):481–509.
- Polakowski, Michael. 1994. "Linking self- and social control with deviance: Illuminating the structure underlying a General Theory of Crime and its relation to deviant activity". *Journal of Quantitative Criminology*, 10(1):41–78.
- Rabie, MA & SA Strauss. 1994. *Punishment: An introduction to principles* (Fourth Edition). Pretoria: Lex Patria.
- Roessner, Dieter & Britta Bannenberg. 2002. *Deutschland*. In Albrecht, Hans Jörg & Michael Kilchling (Eds). *Jugendstrafrecht in Europa. Kriminologische Forschungsberichte aus dem Max-Planck Institut fuer auslaendisches und internationales Strafrecht, Band 100*. Freiburg i.Br.: edition iuscrim.

- Sampson, Robert J & John H Laub. 1990. "Crime and deviance over the life course: The salience of adult social bonds". *American Sociological Review*, 55:609–627.
- Sampson, Robert J & John H Laub. 1992. "Crime and deviance in the life course". *Annual Review of Sociology*, 18:63–84.
- Schmallegger, Frank. 2007. *Criminal justice today* (Ninth Edition). Upper Saddle River, NJ: Pearson.
- Scott-Peck, M. 1978. *The road less traveled: A new psychology of love, traditional values and spiritual growth*. Simon & Schuster.
- South African Law Commission. 1997. *Discussion Paper 79. Project 106: Juvenile Justice*. Pretoria: SALC.
- Schulz, Stefan. 2002a. "Legal interpretation and the Namibian Constitution (A paradigm shift: Through reason towards justice)". In Hinz, MO, SK Amoo & D van Wyk (Eds). *10 years of Namibian nationhood – The Constitution at work*. Pretoria Africa: University of South Africa, pp 192–215.
- Schulz, Stefan. 2002b. "Juvenile justice in Namibia – A system in transition". In Winterdyk, John A (Ed.). *Juvenile justice systems: International perspectives* (Second Edition). Toronto: Canadian Scholar's Press, pp 353–384.
- Schulz, Stefan. 2004. *Juvenile [child] justice in Namibia – A system in transition*. Windhoek: Polytechnic of Namibia.
- Schulz, Stefan. 2006. Beyond self-control: Analysis and critique of Gottfredson & Hirschi's General Theory of Crime (1990). Berlin: Duncker & Humblot.
- Schulz, Stefan. 2007. "Juvenile justice in limbo: *Quo Vadis Namibia?*". *The Namibian*, 2 March 2007, p 6.
- Skelton, Ann & Hennie Potgieter. 2002. "Juvenile justice in South Africa". In Winterdyk, John A (Ed.). *Juvenile justice systems: International perspectives* (Second Edition). Toronto: Canadian Scholar's Press, pp 477–501.
- Snyman, Cally, R. 1995. *Criminal law* (Third Edition). Durban: Butterworths.
- Snyman, Cally, R. 2002. *Criminal law* (Fourth Edition). Durban: Butterworths.
- Super, Gail. 1999. *Discussion document: Juvenile justice in Namibia*. Windhoek: Inter-ministerial Committee on Juvenile Justice.
- Super, Gail. 2002. *Pre-workshop Report on the Implementation of the Juvenile Project D and the Juvenile Justice Program Description*. Windhoek: Inter-ministerial Committee on Juvenile Justice.
- Terblanche, SS. 2007. *Guide to sentencing in South Africa* (Second Edition). Durban: LexisNexis.
- Tonry, Michael. 1996. *Sentencing matters*. New York: Oxford University Press.
- Van der Merwe, Dana P. 1998 [1991]. *Sentencing*. Cape Town: Juta.
- Wolfgang, Marvin, Robert Figlio & Torsten Sellin. 1972. *Delinquency in birth cohort*. Chicago: University of Chicago Press.
- Winterdyk, John A. 2002. "Introduction". In Winterdyk, John A (Ed.). *Juvenile justice systems: International perspectives* (Second Edition). Toronto: Canadian Scholar's Press, pp XI–XL.
- Wood, Peter B, Betty Pfefferbaum & Bruce J Arneklev. 1993. "Risk-taking and self-control: Social psychological correlates of delinquency". *Journal of Crime and Justice*, 16(1):111–130.

High Court of Namibia Vulnerable Witnesses' Project

Annel M Silungwe

Introduction

On 10 October 2007, construction of a special facility to cater for vulnerable witnesses at the seat of the High Court in Windhoek was belatedly initiated by members of the Auas Rotary Club,¹ in conjunction with the High Court of Namibia. The High Court Vulnerable Witnesses' Project was intended to mark the centenary of Rotary International, which is the first voluntary, not-for-profit, service organisation in the world. The Project was inaugurated on 21 July 2008 at a ceremony attended by Judges of the High Court, senior officials of the High Court, the Ministry of Justice, and the Ministry of Gender Equality and Child Welfare, as well as media practitioners.²

This paper attempts to highlight the necessity for establishing this facility, designed to meet the special needs of vulnerable witnesses.

The need for specific measures in respect of vulnerable witnesses as a restorative response to crime

As a general rule, the accusatorial system that applies in Namibia – and, indeed, the Namibian Constitution – require a fair and public hearing of, for instance, criminal charges against, and in the presence of, an accused, by an independent, impartial and competent court.

Very often, a vulnerable witness, particularly a very young child, is either reluctant or refuses to testify in the physical presence of the accused, which at once rekindles his/her memories of trauma experienced at the time of the commission of a sexual crime and/or

1 The Auas Rotary Club raised funds amounting to more than N\$250,000 in cash and in goods for this Project – “generosity at its best”, as remarked by His Lordship Judge President Petrus T Damaseb in his opening address.

2 The inauguration ceremony was opened by His Lordship Mr Justice Petrus T Damaseb, Judge President of the High Court of Namibia. Addresses were given by the Judge President, the then President of Auas Rotary Club Albertus Aochamub, the Rotary District Governor of Rotary International District 9350 Elwin Thompson, and the Prosecutor-General Ms Olivia M Imalwa. The author of this article, who is a member of the Auas Rotary Club and a Past District Governor of a Rotary International District, acted as Director of Ceremonies.

acts of domestic violence. Moreover, courtroom attire by the judge, legal representatives of parties and court officials may be found intimidating by such vulnerable witness.

It is generally accepted that sexual crimes and criminal acts of domestic violence inflict psychological trauma on the victims. Such trauma is the more devastating where the victim is a child or the alleged perpetrator is a close relative of, or is known to, the victim. Perpetrators of such crimes deserve to be punished appropriately once their guilt is established beyond a reasonable doubt, and after a fair trial. However, as previously shown, it is not easy for children and other vulnerable witnesses to testify in the physical presence of the alleged perpetrator, since the stress of a direct confrontation with the accused may result in such witness confusing events or details, recalling things incorrectly, or forgetting essential information and consequently losing credibility.³ The author has personal experience of a case in which a young child witness refused to testify or to answer relevant questions whilst physically sitting in the same room with the accused until the court relocated to the Child and Women Abuse Centre at the State Hospital in Katutura.⁴

Happily, legislative intervention, namely the Criminal Procedure Amendment Act,⁵ which introduced a new section 158A of the Criminal Procedure Act,⁶ addresses the needs of vulnerable witnesses, without derogating from the right of the accused to a fair trial.

The amended section 158A(3), which defines *vulnerable witness*, reads as follows:⁷

- (3) For the purposes of this section, a vulnerable witness is a person –
 - (a) who is under the age of eighteen;
 - (b) against whom an offence of a sexual or indecent nature has been committed;
 - (c) against whom any offence involving violence has been committed by a close family member or a spouse or a partner in any permanent relationship;
 - (d) who is as a result of some mental or physical disability, the possibility of intimidation by the accused or any other person, or for any other reason will suffer undue stress while giving evidence, or who as a result of such disability, background, possibility or other reason will be unable to give full and proper evidence.

Furthermore, the new section 158A sets out certain steps regarding “special arrangements” for the convenience and protection of vulnerable witnesses.

3 UNESCO (2001:17).

4 See Hubbard (2004).

5 No. 24 of 2003.

6 No. 51 of 1977.

7 Section 158(A)(1), (2)(a)-(d) and (6) of the Criminal Procedure Act, as amended by the Criminal Procedure Amendment Act.

Primarily, a court before whom a vulnerable witness is to give evidence in criminal proceedings may, on application by any party to such proceedings or the witness concerned, or on its own motion, make an order that special arrangements be made for the giving of the evidence of the witness. Such special arrangements include – the relocation of the trial to another place for the purpose of hearing the evidence of the vulnerable witness

- the rearrangement of the furniture in a courtroom, or the removal or addition of certain furniture or objects in the courtroom, or a direction that certain persons sit or stand at certain locations in the courtroom
- the granting of permission to a 'support person' to accompany the vulnerable witness while such witness is giving evidence, and
- the granting of permission to the vulnerable witness to give evidence behind a screen or in another room which is connected to the courtroom by means of closed circuit television or a one-way mirror, or by any other device or method that allows the accused, his or her legal representative (if any), the prosecutor in the case and the presiding officer to be able to hear the witness and also to observe the said witness while s/he is giving evidence

Of all the foregoing special arrangements, the rearmost involves a high level of technological know-how and equipment.

Prior to the inauguration of the Vulnerable Witnesses' Project at the seat of the High Court, there were no comparable congenial facilities available within the building complex of the seat of the High Court to provide an atmosphere that was conducive to allowing vulnerable witnesses to feel safe to testify. Hence, criminal proceedings, for instance, had to be transferred to other places such as the Katutura Magistrate's Court⁸ or the Women and Child Abuse Centre, which is annexed to the Katutura Central Hospital, in order to facilitate the giving of evidence by a vulnerable witness. With this background in mind, Judge President Petrus T Damaseb pertinently described the situation in his address on the occasion of the inauguration of the High Court Project, as follows:

Since the passing of the Amendment Act, the High Court has been assiduous in establishing the facilities that would enable the Court to implement the relevant provisions of the Act. At present, where a vulnerable witness (particularly a very young child) is reluctant or refuses to testify in the physical presence of an accused, the Court has at times used the facilities provided by the Women and Child Abuse Centre attached to the State Hospital in Katutura. Besides, some Judges have been very imaginative: they have reverted to all manner of arrangements that would create a less intimidating environment in the court room. For example, some Judges have cast away their robes and have literally descended from the Bench in order to get closer to such witnesses, particularly very young children who are alleged victims of sexual assaults.

8 In the Katutura Magistrate's Court, vulnerable witnesses can testify behind a one-way mirror or by means of closed-circuit television from a child-friendly room equipped with inviting toys and furnishings.

The project we are to inaugurate will obviate such problems that have made certain Judges very creative in their effort to see justice done.

The facility and service

With the inauguration of the Vulnerable Witnesses' Project, a specially designed and well-equipped courtroom opened its doors for the hearing of cases involving vulnerable witnesses. The facility includes the provision of closed-circuit cameras that enable the court to conduct proceedings in an atmosphere that is not intimidating, but friendly and comfortable for vulnerable witnesses, especially young children. A specially designed separate room is annexed to the courtroom. From the comfort of the separate room, a vulnerable witness is able to testify without physically coming face-to-face with the accused.

The separate room, which is suitably and comfortably furnished, contains suitable toys, children's books, colouring materials, etc. The vulnerable witness is able to see the judge who controls what images may appear on the big screen in the courtroom and the small screen next to the judge on the Bench. There is a camera in the separate room and there are cameras in the courtroom. One courtroom camera is capable of zooming in on the accused for the purpose of identification by the vulnerable witness, in the event that the accused's identification becomes an issue. Microphones have been installed, one in the vulnerable witness's separate room to be used by the vulnerable witness and an interpreter (if any), and one in the courtroom to be used by the judge, witnesses (other than the vulnerable witness), the accused, interpreters (if any), defence counsel and prosecutors.

Conclusion

The Vulnerable Witnesses' Project has begun to play a vital role in the administration of justice and is thus a most welcome development in the history of the seat of the High Court.

References

- Hubbard, D. 2004. *The "Vulnerable Witnesses" Act. Children in court: Protecting vulnerable witnesses*. Windhoek: Legal Assistance Centre.
- UNESCO/United Nations Educational, Scientific and Cultural Organisation. 2001. *Towards victim-friendly sexual offences courts in Namibia*. Windhoek: Pollination Publishers.

Child suggestibility in the Namibian justice system

Joab T Mudzanapabwe

The issue of credibility of child testimony has vexed courts all over the world for many years and continues to do so. In general there are two different schools of thought. On the one hand, there are those who believe that children are innocent, honest and always truthful in what they report. On the other, there are those who argue that children are so untrustworthy that their testimonies must not be allowed to stand up in courts of law.

Although there is some substance to both positions, each misses the point. Whether children's testimonies are accurate or not largely depends on intervening variables, for instance, what happens between experiencing and witnessing an incident and reporting it. Some intervening variables enhance accurate recall of the incident whilst others promote inaccurate recall.

Suggestibility has been identified as one such intervening variable. While it is not easy to reach a generally agreed definition of suggestibility, it does have some easily identifiable characteristics. These include the extent to which certain cognitive, social and developmental factors influence the individual's ability to encode, store, retrieve and report an event;¹ changes or distortions in one's memory that are a product of the suggested information/misinformation about an event;² and that it is an external idea presented to someone in a form that causes suggestion and is then internalised or accepted as the individual's own idea.

While suggestion/suggestibility can occur with anybody, there are certain groups that are more vulnerable. Researchers have identified children under the age of 10 years as being particularly vulnerable to suggestibility. Younger children have also been found to be more prone to suggestibility when compared to older children. Cohen and Hernick, concurring with Coxon and Valentine, noted that children aged between 3-4 years are more suggestible than older children, who are in turn more suggestible than adults.³

Researchers in the discipline of psychology have conducted many studies to illuminate the dynamics of suggestibility in children. Below is a short synopsis of the relevant literature on child suggestibility.

1 See Ceci & Bruck (1994).

2 Reed (1996).

3 Cohen & Hernick (1980); Coxon & Valentine (1997).

It is recognised in neuropsychology that the prefrontal cortex of brain, which is heavily involved in problem-solving and goal-directed thinking, matures at a slower pace compared to other parts of the brain. The pre-frontal cortex only reaches maximum development in young adulthood. The immaturity of the pre-frontal cortex might negatively affect the amount and quality of information that the child encodes at the scene of the crime.⁴ Children, especially younger ones, do show deficits in attentional linguistic and labelling skills which in turn affect the reports they give about events.

Attention difficulties affect the ability to encode event information accurately and the ability to understand questions that may be put to children during interrogation and cross examination.

Social learning theorists, including Albert Bandura, argue that children learn by imitation. They also tend to imitate adults that they respect and idolise, i.e. role models. In general children view adults as credible and competent, hence they presume that adults' affirmations are more reliable than their own or those of their peers.⁵

In the criminal justice system, interviewers and interrogators are always powerful adults, such as social workers, policeman, lawyers and judges. Children are often wary of contradicting such powerful figures.

There is controversy on whether suggestibility is a mere expression of memory gaps, as was suggested by Alfred Binet in 1900. Lipmann⁶ observed that children do not have less memory in comparison to adults but they remember things differently because they pay more attention to certain details in a situation and overlook others.⁷

The role of age in mediating suggestibility is well documented. Other mediating variables are as follows:

- **Negative life events:** Individuals who have experienced negative life events are more vulnerable compared to those who have not.⁸ This is probably because such individuals are more prone to feelings of uncertainty and since they are uncertain about themselves they are more likely to allow the interviewer to lead and direct them.
- **Event centrality:** Research shows that children offer more resistance to suggestion when they are asked questions that are central rather than peripheral to the event. Frequently investigators ask peripheral questions to children in an effort to contextualise an incident. While this practice has good intentions it may inadvertently increase the likelihood of suggestibility.

4 Muller & Chiroro (2005).

5 Ceci & Bruck (1994).

6 Lipmann (1911).

7 Gulota & Resoling (2004).

8 Goodman (2007).

- **Level of witness participation:** Children who participate actively in an event are more likely to accurately recall the information in comparison to those who passively observed the event.⁹
- **Warning:** According to Saywitz and Moan-Hardie, when children receive some warning of an event that they witnessed or experienced and are asked to recall it they are likely to be resistant to suggestion. In cases of sexual abuse there is usually no opportunity for such warning because the abuse is usually perpetrated cunningly.¹⁰
- **Prestige source:** Suggestions from those in prestigious positions have more damaging effects on the accuracy of reports when compared to suggestions from a person equal or lower in status to the child. In the legal system interviewers are invariably of a higher status than the child.¹¹
- **Power:** Interviewers like judges or lawyers, carry trappings of power, unlike children, and they usually wear uniforms – like those of the police, which can alienate children.
- **Retention interval length:** Witness accuracy tends to decline when there is a delay between the event and the time of recall later where there may have been exposure to misleading information. In the case of child sexual abuse the disclosure may often happen several weeks or months after the traumatic event. Also because the wheels of justice often turn slowly it is not unusual for the child to appear in court a year or two after the event has happened.
- **Nature of questions:** Questions are powerful tools. On the one hand, they can serve to convey new information and, on the other hand, they can influence answers. Suggestive questions may contain inferences. Children rarely answer “I don’t know” or “I don’t remember”. They believe that because the question is asked it is their obligation to answer. Children think in a manner which is qualitatively different to that of adults.

Anecdotes

Below we present two cases that occurred in real life, one in a courtroom (with grave consequences for the people involved) and the second in a laboratory experiment. Both show how children can be easily suggestible. The case of Kelly Michael and the Sam Stone study are good examples of how suggestibility may manifest itself in real life and in laboratory settings.

The Kelly Michael case

In September 1984 Margaret Kelly Michael was employed by the We Care Day Care Nursery in the United States of America as a pre-school teacher. On 26 April 1985, a mother of a four-year-old child from Kelly’s class noticed while waking her child from a nap that he was covered with spots. She took the child to the paediatrician and

9 Rudy & Goodman (1991).

10 Saywitz & Moan-Hardie (1994).

11 Nicholaas & Moan (1991).

while the nurse was taking his temperature rectally, the child said, "This is what my teacher does to me at nap time at school." He said Kelly was the one who took the temperature and that she did it daily. The mother asked the boy more questions when they returned home and he said, while rubbing his genitals, "Kelly uses white jean stuff". The mother reported a case of the alleged abuse of her son to the authorities and other children in the same class and their parents were also interviewed. Because of the 'suggestive' questioning style, most children reported that Kelly was abusing them. Kelly was convicted on 115 counts of abuse. She was sentenced to

47 years in prison. An appeal based on the quality of the interviews by concerned scientists showed that the interviews were filled with suggestions. Kelly was released from prison after serving seven years. The interviewers of the children had been following one hypothesis in their questioning, namely that Kelly had abused the children.

This case highlights the importance for interviewers to follow different lines of questioning and alternative hypotheses rather than a single one. The pursuit of a single hypothesis causes a lot of bias on the part of the interviewer. These biases are revealed when interviewers persistently maintain one line of inquiry (through the use of repeated leading questions, bribes and threats) even when children consistently replied that the questioned events never occurred. Biases are also revealed in their failure to follow-up on some of the children's inconsistent or bizarre statements, for doing so might not confirm the primary hypothesis of the interviewers. The following dialogue illustrates how an interviewer (Q) engaged one child (A) during one of the initial investigations of the Kelly Michael case:¹²

Q: Do you think that Kelly was not good when she was hurting you all?

A: Wasn't hurting me. I like her

Q: I can't hear you; you got to look at me when you talk to me. Now when Kelly was bothering kids in the music room

A: I got socks off

Q: Did she make anybody else take their clothes off in the music room?

A: No

Q: Yes

A: No

Q: Did you ever see Kelly have blood in her vagina?

A: This is blood

Q: Kelly had blood in her vagina

A: Yeah

Q: She did? Did you ever get any of that blood on your penis?

A: No. Green blood

Q: Did you ever see any of your friends get blood on their penis from her vagina?

A: Not green blood but red blood

12 Committee of Concerned Social Scientists [n.d.].

Q: Tell me something, tell me about the piss box. The piss box that's in the music room?

A: No, up there. All the way up there

Q: Is the piss box the bench at the piano? When you open up the bench: is that the piss box?

A: Yeah

Q: It is?

A: Yeah

Q: And what happened, she would open it up?

A: And, popped it up

A: She popped it up and then what would you do?

A: Jump in it?

Q: Jump in it?

A: Yeah

Q: And would you have to pee in it?

AL? Yeah (about 10 questions later, the topic comes up again)

Q: So the pee-pee box is the bench at the piano and you flip it open?

A: No

Q: What is the pee-pee box?

A: This is the pee-pee box

Q: That's not a pee-pee box. That's a crayon box

Q: Did Kelly ever make you kiss her on the butt?

A: No

Q: Did Kelly ever say--I'll tell you want. When did Kelly say these words? Piss, shit, sugar?

A: Piss, shit sugar?

Q: Yeah, when did she say that, what did you have to do in order for her to say that?

A: I didn't say that.

Q: I know, she said it, but what did you have to do?

(In this section, the child is asked to use anatomically detailed dolls and different utensils)

Q: Okay, I really need your help on this. Did you have to do anything to her with this stuff?

A: Okay. Where's the big knife at. Show me where's the big knife at.

Q: Pretend this is the big knife because we don't have a big knife

A: This is a big one

Q: Okay, what did you have to do with that? What did you have to...

A: No..take the peanut-put the peanut butter

Q: You put what's that, what did you put there?

A: I put jelly right here

Q: Jelly

A: And I put jelly on her mouth and on the eyes

Q: You put jelly on her eyes and her vagina and her mouth

A: On her back, on her socks

Q: And did you have to put anything else down there?

A: Right there, right here and right here and here

Q: You put peanut butter all over? And where else did you put the peanut butter?

A: And jelly

Q: And jelly?

A: And we squeezed orange on her.

Q: And you had to squeeze an orange on her?

A: Put orange juice on her

Q: And did anybody--how did everybody take it off? How did she make you take it off?

A: No. Lick her all up, eat her all up and lick her all up

Q: You had to lick her all up?

A: And eat her all up

Q: Yeah? What did it taste like?

A: Yucky

Q: So she made you eat the peanut butter and jelly and the orange juice off of the vagina too?

Q: Was that scary or funny?

A: Funny, funny and scary.

This interview is one of many that show how interviewers did not seriously consider any evidence that was contrary to their primary beliefs. Thus when children's responses contained discrepancies, inconsistencies, incomprehensible responses or no information, the investigators only considered these responses to be consistent with the fact that abuse had taken place or else they chose to ignore these statements. The children were never asked common sense questions such as: "Did this happen to you or are you just pretending that it happened to you?" or "Did you see this happen or did someone tell you that it happened?" Children were never challenged about their statements, "Are you sure that this happened or are you telling me a joke?" Competent investigative interviewers would have used such techniques in order to understand how the alleged acts could actually be carried out in a short period of time in a very public place.

The Sam Stone study

In this study, researchers made a series of untruthful statements to 3-6 year old children and, eventually, got many of the children to adopt these statements as being true. First, researchers told the children that a fictitious character by the name of Sam Stone really existed and that he was "very clumsy" and "always broke things that did not belong to him". The children were further deceived when "Sam Stone" visited their school for two minutes while the children were engaged in a story telling session. During the visit, "Sam Stone" did not break anything or otherwise behave clumsily. However, the following day, the children were shown a "ripped book and a soiled teddy bear". At this time, few of the children blamed Stone for the damage but 25% surmised he may have been responsible. Over the course of the next ten weeks, the children were interviewed once every two weeks for two minutes. During each session, the children were asked two questions which researchers Ceci and Bruck describe as "leading questions". These questions included "I wonder whether Sam Stone was wearing long pants or short pants when he ripped the book?" or "I wonder if Sam Stone got the teddy bear dirty on purpose or by accident?" It should be noted, however, that these are not leading questions that merely suggest the desired answer. These questions give the answer and do not allow the children the opportunity to reject the suggestion. In each of these 'questions', the child is told that Sam Stone is responsible for the damage and is simply asked to speculate on why he did it or what he may have been wearing when he damaged the property. At the end of the ten-week period, the children were interviewed by someone who

claimed not to be present the day “Sam Stone” visited the school. When asked, 72% of the 3- and 4-year-olds said Sam Stone had ruined at least one of the items and 45% of the 3- and 4-year-olds actually claimed to have witnessed the events. Despite weeks of explicit deception, however, only 11% of the 5- and 6-year-olds claimed to have actually observed Sam Stone damage the items. According to Ceci and Bruck, —¹³

... these results indicate that not only do young children form stereotypes but that stereotype formation interacts with suggestive questioning to a greater extent for younger than older children.

The use of anatomically correct dolls

Most child sexual abuse centres make use of anatomically correct dolls during investigations of alleged sexual abuse. In Namibia anatomically correct dolls are also used at Women and Child Protection Units during forensic interviews. Although dolls allow interviewers to extract information from children, there are pros and cons of using such dolls in forensic interviews. One might wonder why the use of anatomically correct dolls may be a human rights issue when it may help to prosecute the perpetrator. The fact of the matter is that these dolls are very good tools provided they are used properly but can be very destructive if used unprofessionally.

It is, therefore, important at this point to look at when one can use these dolls and the pros and cons of using them without infringing the rights of the child. There are two important pre-requisites in the use of anatomically correct dolls. Firstly, both the interviewer and the child must be capable of using these dolls correctly.¹⁴ For the interviewer it means that he/she should have the necessary training to use the dolls including reading relevant research, hands on practice and adherence to professional guidelines. For the child, it means being able to make a representational shift, i.e. having the cognitive ability to understand that the doll is going to represent him/her or another actual person and is not an instrument for play.

Secondly dolls should not be exclusively used without verbal statements to make findings that the child was sexually abused. This will be considered a diagnostic test and is an inappropriate use of dolls. The child’s demonstration with dolls should be a part of the forensic interview just as the forensic interview is part of the investigation. The child’s affect, words, and corroborating evidence should all determine the outcome of an investigation.

According to Everton and Boat,¹⁵ the memory stimulus, diagnostic screen and anatomical models using dolls assumes that the dolls are ‘suggestive’ in that they encourage, stimulate, disinhibit and provide an easy vehicle for children to reveal their sexual

13 Ceci & Bruck (1993:416–417).

14 Holmes (2000).

15 Everton & Boat (1993).

knowledge during the evaluation process. The interviewer should not, however, infer from the sexual behaviour of the child as he/she plays with the doll that sexual abuse occurred. The behaviour of the child with a doll should encourage the interviewer to follow up with some verbal statements to establish the source of the child's knowledge. Dolls should be introduced only after partial or full disclosure. If they are introduced before disclosure one runs the risk of 'suggesting' to the child through manipulation of the doll that indeed abuse has happened.

There is literature, however, which shows that anatomically correct dolls are less suggestive when compared to regular dolls or no dolls at all during forensic interviews. Goodman and Aman¹⁶ found that three groups (aged 3–5 years) of non-abused children who were interviewed with anatomically correct dolls, regular dolls and no dolls made the same number of errors (which were statistically significant) during suggestive questioning. Realmuto et al.¹⁷ as well as Tredoux et al.¹⁸ found out contrary to the findings of Goodman that dolls may cause suggestibility or inaccurate reports in children.¹⁹ They found out that children aged seven or younger where the interviewer used anatomically correct dolls only correctly identified cases of non-abuse 67% of the time. Even more alarmingly only 33% categorised abuse correctly, meaning they predicted abuse in the majority of the cases where there was none. Tredoux et al. concluded that the use of dolls is a poor source of information on its own as it results in an overestimation of abuse.²⁰

Anatomically correct dolls have been assumed to cause sexualised play in children which in turn encourages inferences from the interviewer that abuse happened. Researchers observed that only 2% of children who are not suspected of having been sexually abused enacted apparent sexual intercourse between a doll and themselves.²¹ This provides substantial evidence that dolls do not induce young, non-abused, sexually naive children to engage in explicit sexual play. So when then can these dolls be used?

Dolls can be used for clarification purposes. This happens when a child will be making statements which are not clear regarding the sexual act. The child may be able to demonstrate this very well by showing on the dolls how the sexual abuse happened.

Dolls are used to demonstrate consistency in the child's statements. One challenge of forensic interviews is the demonstration of consistency in children's statements. It is easy to make false allegations by simply saying, for example, "Daddy touched my pee." This can, however, be verified by asking the child to demonstrate on the doll what happened. One has to be careful not to ask, for example, "Show me how daddy touched your pee." This will suggest that the daddy in fact touched the child and what is left is to be shown how he touched.

16 Goodman & Aman (1990).

17 Realmuto et al. (1990)

18 Tredoux et al. (2005).

19 Goodman (2001).

20 Tredoux et al. (2005).

21 Everton & Boat (1993).

Dolls are used to allow the child to have distance from his or her own body. If you ask a child to show you where the man put his penis, the child will undress to show you her vagina, or anus which is not in the best interests of the dignity of the child. One would rather tell the child that there are dolls which have got sexual organs like the child and he/she may use them to demonstrate what happened.

The other reason for the use of the dolls is to allow the child to communicate what he/she cannot say. Children may clam up when the forensic interview becomes too intense. The interviewer may then introduce anatomical dolls as a different form of communication to allow the child to open up.

The following are aspects which users of anatomical dolls should be take note of in order to get the best out of them:

- Do not use the dolls if the child cannot make a representational shift (understand that the doll represents them or another person).
- Do not use the dolls if you do not need to. They should always be used in conjunction with other forms of assessment.
- Dolls should be introduced after the child has made the verbal disclosure, whether partial or full.
- The child should be told specifically that the dolls are not toys and that they are meant to assist the child to articulate what happened.
- The doll should be presented to the child clothed so that the child can demonstrate what happened from the start.
- The interviewer must check whether it is appropriate to use only one doll or more. Using more than one doll may be particularly difficult for pre-school children. The interviewer may use two dolls to check for representational shift.
- Choose anatomical dolls that are reputable. Professionally developed dolls are designed to withstand frequent use and are available in different skin tones, various developmental levels (infant, toddler, child, adolescent, adult and grandparents).
- Use anatomical dolls that have the appropriate skin colour. It may be confusing to check for representational shift in a 'black' Namibian child using a 'white' doll.

In conclusion, dolls are very good tools to use when assessing children who are allegedly sexually abused. Caution should, however, be taken so that the dolls will not end up suggesting an abuse which did not happen. Dolls should be used by trained professionals in an environment that is conducive to getting the best use out of them.

Suggestibility, self-esteem and negative life events

There is a close connection between maltreatment and memory recall.²² Although it is controversial, many researchers believe that clinically relevant factors such as a history

22 Goodman et al. (2001).

of abuse or trauma are important influences on memory. One reason for this kind of thinking is that abuse is associated with adverse emotional reactions and delays in cognitive and language abilities. Abused children generally perform more poorly than non-abused children on standardised tests of short term memory for events and verbal skills. Poor memory for events and poor performance on intelligence tests are linked to increased suggestibility in adults and children.²³ Compared to non-abused children, maltreated children may not have accurate memories of actual events, and they may be more suggestible about fictitious events. Some forms of abuse such as witnessing a sexual assault on the mother, violent kidnapping or having suffered abuse themselves may cause disorders like post traumatic stress disorder, severe anxiety or dissociation. Such psychological sequelae may be associated with impairment of the ability to properly encode and retrieve subsequent information.²⁴ Abused children probably find the suggestions of an abuse contained in questions more plausible than would non-abused children. They are also more likely to acquiesce to misleading abuse-related suggestions. Measures of general psychopathology and intelligence are significantly related to the children's accuracy of recall.

Drake et al.²⁵ found out in their study that people who reported a greater number of negative life events produced significantly higher scores on the Gudjonson suggestibility scale. These findings have important implications in that children who have experienced high number of negative life events are more likely to accept any misleading information put forward to them. They are more prone to shifting their initial answers in response to interviewing pressure. Negative life events such as sexual abuse lower the self-confidence and self-esteem of the victims. This again exposes them to suggestibility.

The above observations and conclusions are cause for concern in this country where rates of sexual abuse are significantly high. The scourge of HIV and AIDS has caused a lot of children to be orphaned. Orphans are more exposed to abuse because of the lack of parental protection. The loss of parents is a severe negative life event and is potentially traumatic. Given that there are many children in Namibia who have experienced negative life events, it is vital to have mechanisms in the legal justice system to detect such children and protect them from suggestibility. If children are not properly assessed for their vulnerability to suggestibility, the administration of justice may be compromised. In most cases courts require assessment for the establishment of diagnostic psychopathologies not the non diagnostic psychological problems such as negative life events and low self-esteem. If the rights of children are to be protected, they have to be protected wholly. We must realise that vulnerable children who have experienced negative life events may be suggestible to allegations that they were sexually abused when they were not, or to agree to the suggestion that they were not abused and yet indeed the abuse could have happened. There is need for interdisciplinary collaboration between social scientists and

23 See above.

24 (ibid.).

25 Drake et al. (2008).

legal practitioners in order to address this silent scourge of child suggestibility in the legal justice system.

Assessment of witness suggestibility

Children are a special population. They are special in the sense that they are not yet psychologically and physiologically mature to be able to deal with life demands as adults would. Cognitively, children below the age of 10 years do not have the capacity to think abstractly i.e. form hypotheses about life issues. Similarly children below the age of 10 years are more suggestible than older ones and adults. While the age group below 10 years is more prone to suggestibility, there are some within this age group who are more suggestible than others; hence the need for assessment for suggestibility.

The assessment of individual suggestibility can either be done by means of standardised psychological tests or in the course of the assessment interview by asking suggestive questions. The latter method uses “suggestive probes” which are directed at peripheral aspects of an event. By trying to get unrealistic descriptions a witness’s vulnerability, to suggestibility is then established. This method should, however, be used with caution because everybody can be tricked if their memory is uncertain and the technique is subtle enough. On the other hand, very suggestible witnesses may be able to resist some misleading questions because they detect some impossibility in the suggested questions.²⁶

For the purposes of standardised assessment of suggestibility, several psychometric tests have been developed. Examples of such tests are The Bonn Test of Statement Suggestibility, and the Gudjonson Suggestibility Scale. The key issue here is that these tests were developed outside Namibia and hence they are not standardised for this country and they do not have local norms. Although these tests are used for detecting suggestibility in children, they should always be used with support of other assessment methods, e.g. clinical interview. The ideal situation for the effective use of such tests would be to standardise or develop

norms for Namibia so that suggestible children can be detected and be protected during legal proceedings in Namibia.

Witness credibility

In the courtrooms, whether or not someone is telling the truth is usually assessed on the basis of the general credibility of the witness. This is premised on the idea that honest people tend to be honest in different situations and at different times. Endres²⁷ rejected this premise noting that knowing a person’s previous behaviour in different circumstances is not sufficient to accept their current (or future) testimonies as truthful.

26 Endres (1997).

27 (ibid.).

Endres further noted that when people's most vital interests are at stake many people tend to give untruthful accounts.²⁸

In view of the foregoing discussions it can be concluded that general credibility on its own is not sufficient to ensure that witnesses give truthful and accurate testimonies in courtrooms. More needs to be done including giving serious attention to the concept of suggestibility. Over many years courts have tended to rely heavily on medical/physiological examinations to determine whether or not sexual abuse has taken place. This practice seems

to be prudent but it also has certain limitations. First, some forms of child sexual abuse do not leave behind physical markers e.g. kissing and fondling or making the child play with genitalia of an adult. Second, there are incidents in which sexual abuse has actually taken place but no abnormalities are picked up on physical examination. Kreston²⁹ cited a case in which a 12-year-old girl was found to be normal on genital examinations but showed positive on a pregnancy test. Kreston noted that in 28–49% cases physical examination shows no abnormalities when in fact sexual abuse would have actually taken place.

The interview, therefore, plays a very important role in gathering information regarding whether child (sexual) abuse has taken place or not. Children undergoing forensic interviews are vulnerable to suggestibility, hence the importance of sensitising stakeholders in the justice system to this concept and its implications. Muller expresses the view that judicial officers will benefit by learning more about child psychology.³⁰ To quote her, "If we are to see justice being done, the courtroom will have to become more a place of learning for judicial officers".³¹

Retractions of earlier disclosures by victims of sexual abuse are a common problem. There are many reasons for this phenomenon including lack of support and societal pressure. Collings noted that a substantial percentage of retractions occur during therapy or forensic interviewing.³² This is probably because therapy sessions and forensic interviews are laced with suggestibility.

In the case of child sexual abuse, disclosures are often made first to mothers or caregivers. One would wonder to what extent mothers and caregivers may introduce suggestion in their interviews. It is commonplace that children are beaten or threatened in order that they name the person responsible for the abuse. It is conceivable that such pressure may force a child to give untruthful accounts.

28 (ibid.).

29 Kreston (1997).

30 Muller (2003).

31 (ibid.).

32 Collings (2006).

The Namibian scenario

In the report entitled *Towards victim-friendly sexual offences courts in Namibia*,³³ the United Nations Educational, Scientific and Cultural Organisation (UNESCO) estimated that at least one act of rape takes place every hour of the day in Namibia. The report emanated from the Victim-friendly Sexual Offences Court Project, which ran from 1999 to 2000. One of the key conclusions of this project was that forensic interviewers had to show sensitivity towards and have an understanding of the psychology and cognitive development of the children that they interviewed.

Because more and more children are falling victims to child (sexual) abuse, increasing numbers of children are expected to end up giving testimonies in criminal proceedings. These children needed to be protected from interviewing styles that might introduce suggestion.

It is of great concern to note that Namibia was ranked 1st on the incidence of child sexual abuse cases in a study of nine Sub-Sahara African countries.³⁴

In response to the shocking rape statistics in this country, the government enacted the Combating of Rape Act.³⁵ The Act prescribes stiff sentences to convicted sexual offenders. It also makes special provisions to reduce traumatising by legal processes of vulnerable witnesses such as children. Following the promulgation of the Rape Act witnesses under the age of 10 are no longer required to give an oath of affirmation before giving evidence; while witnesses under the age of 14 may be cross-examined only through the presiding officer or an intermediary. Information given by children under the age of 14 prior to the trial such as statements to the social workers or police officers can be considered at trial, subject to certain safeguards.

The Draft Child Care and Protection Act of 2009 also provides for the establishment of children's courts with the aim of reducing traumatising of children during legal processes. While these developments are welcome there is still an issue on whether judicial officers and social workers, policemen etc. are adequately trained to identify, detect and manage suggestibility.

Suggestibility is a highly sensitive, elusive and technical concept. Many people tend to overestimate their ability to detect it and control it. Child witnesses often present a double bind for those conducting forensic interviews. On the one hand, children produce higher percentage of accurate and relevant information in free recall situations where they are merely asked to tell in their own words everything they remember without prompts, cues or suggestions. On the other hand, younger children (pre-school and below) produce little or no information at all when simply asked to "tell us what you remember". The

33 UNESCO (2001).

34 *International Herald Tribune* (2006).

35 No. 8 of 2000.

interviewer is forced to be more directive which in the same vein increases the chances of introducing suggestibility into the interview processing.

The mantra that justice must not just be done but must be seen to be done is very true. Suggestibility has the potential of negatively influencing the equitable, fair and just administration of justice. The effect of suggestibility may potentially lead to false convictions of innocent people (false positive) and it may also result in the acquittal of guilty offenders (false negative) where children's testimonies are discredited. The interviewing styles of judicial officers and other stakeholders are responsible to a large extent for inaccuracies that creep into the reports of children. As a result of the introduction of suggestibility, interviewers either deliberately or inadvertently turn children into liars or non-credible witnesses.

In conclusion children are not miniature adults. The lack of cognitive sophistication is a true reflection of the immaturity of their brains. It is incumbent upon judicial officers to recognise the vulnerability of children and take ameliorative action. The fact that, for example, children tend to fill in gaps or to acquiesce to adult figures must not be taken to mean that they are not credible witnesses. The onus is upon adult interviewers to tap into information that children can provide in a manner that preserves the accuracy and integrity of that information. To evaluate the testimonies of children using adult standards is harmful and dangerous.

References

- Bruck, M & SJ Ceci. 1997. "The suggestibility of young children". *American Psychological Society*, 6(3):75–78.
- Bruck, M & SJ Ceci. 1999. "The suggestibility of children's memory". *Annual Review of Psychology*, 50:419–439.
- Bruck, M, SJ Ceci & DW Shuman. 2005. "Disclosure of child sexual abuse: What does research tell us about the ways that children tell?". *Psychology, Public Policy and Law*, 11(1):194–226.
- Ceci, SJ & M Bruck. 1003. "The suggestibility of the child witness: A historical review and synthesis". *Psychological Bulletin*, 113(3):403–439.
- Ceci, SJ & M Bruck. 1994. "How reliable are children's statements?" *Family Relations*, 43(3):255–257.
- Committee of Concerned Social Scientists. [n.d.]. *The suggestibility of children: Evaluation of social scientists. From the Amicus Brief of the Case of State of New Jersey v Michaels*. Available at <http://www.law.umkc.edu/faculty/projects/ftrials/mcmartin/suggestibility.html>; last accessed 3 November 2009.
- Drake, KE, R Bull & JCW Boon. 2008. "Interrogative suggestibility, self-esteem and the influence of negative life events". *Legal and Criminological Psychology, British Psychological Society*, 11:299–307.
- Endres, J. 1997. "The suggestibility of child witnesses: The role of individual differences and their assessment". *Journal of Credibility Assessment and Witness Psychology*, 1(2):44–67.

- Gauld, A. 1992. *A history of hypnotism*. Cambridge: Cambridge University Press.
- Goodman, GS. 2006. "Children's eyewitness memory: A modern history and contemporary commentary". *Journal of Social Issues*, 62(4):811–832.
- Goodman, GS, BL Bottoms, L Rudy, SL Davis & B Schwartz-Kennedy. 2001. "Effects of past abuse experiences on children's eyewitness memory". *Law and Human Behaviour*, 25(3):269–298.
- Gulotta, G & D Resoling. 2004. *Child suggestibility: An empirical study*. Turin: Department of Psychology. Available at http://www.forensicpsychology.it/numero%20009/art_Ercolin_eng.PDF; last accessed 3 November 2009.
- Holmes, LS. 2000. *Using anatomical dolls in child sexual abuse forensic interviews*. Alexandria, VA: American Prosecutors Research Institute, pp 1–5. Available at http://www.ndaa.org/publications/newsletters/update_volume_13_number_8_2000.html; last accessed 3 November 2009.
- Kreston, SS. 2007. "An inconvenient truth: On the absence of definitive corroborative medical evidence in child sexual abuse cases". *Child Abuse Research in South Africa*, 8(2):81–96.
- LaFraniere, S. 2006. "Scourge of child sexual abuse takes toll on girls in sub-Saharan Africa". *International Herald Tribune*.
- Legal Assistance Centre. 2006. *Rape in Namibia: An assessment of the operation of the Combating of Rape Act*. Windhoek: Gender and Advocacy Research Project.
- Muller, K. 2003. "The enigma of the child witness: A need for expert evidence". *Child Abuse Research in South Africa*, 4(2), 2–9.
- Reed, DL. 1996. "Findings from research on children's suggestibility and implications for conducting child interviews". *Child Maltreatment*, 1(2).
- Sarason, IG & BR Sarason. 1996. *The problem of maladaptive behaviour: Abnormal psychology*. New Jersey: Prentice Hall.
- Tredoux, C, D Foster, A Allan, A Cohen & D Wassenaar (Eds). 2005. *Psychology and law*. South Africa: Juta Academic.
- UNESCO/United Nations Educational, Scientific and Cultural Organisation. 2001. *Towards victim-friendly courts in Namibia*. Windhoek: Pollination Publishers.
- Zillmer, EA, MV Spiers & WC Culbertson. 2001. *Principles of neuropsychology*. Florence, KY: Wadsworth.

Understanding the perpetrators of violent crimes against children

Veronica C de Klerk

Introduction

Shortly after the Namibian Government took office in 1990, it started forwarding inputs for formalising the Convention on the Rights of the Child (CRC), when world leaders decided that children's rights should be incorporated into a special convention dedicated to such rights.

The CRC became the first legally binding international instrument which detailed all human rights, namely civil, cultural, economic, political and social rights. Children's rights would, therefore, also be recognised as human rights and would encapsulate –

- the right to survival
- the right to develop to the fullest
- the right to protection from harmful influences, abuse and exploitation, and
- the right to participate fully in family, cultural and social life.

The CRC further spelled out four core principles:

- Non-discrimination
- Devotion to the best interest of the child
- The right to life, survival and development, and
- Respect for the views of the child.

Since Namibia has ratified the CRC, the Namibian Government has pledged to honour and adhere to this universally agreed set of non-negotiable standards and obligations. In particular, this pledge challenges the Namibian Government to respect the dignity and worth of each individual – irrespective of race, colour, gender, language, religion, political or other opinion, origin, wealth, birth status, or ability. It is important to note that these standards are interdependent and indivisible, which implies that certain rights are not recognised at the expense of others.

As far back as the early 1960s, there was a global trend for researchers in the field of family violence to focus on physical violence against children. Referring to this type of child abuse, Kempe used the term “battered child syndrome” for the first time in 1962.¹ Gradually, the study of child abuse broadened beyond the early limited conceptualisation

1 Kempe & Helfer (1972).

of physical abuse, to include studying the extent of violent behaviour towards children, contributing factors, and other forms of maltreatment of children, including neglect.

During an assessment of the Women and Child Protection Units in Namibia, commissioned by the United Nations Children's Fund and The Ministry of Safety and Security in 2006, a social worker at one such Unit observed as follows:²³

Back in better days, one could trust the family, but today they will beat the children and abuse them physically, emotionally, or even sexually, because too many children are already being dumped on the extended family.

In people's minds there still is the hope that traditional rules and practices would bind families to take care of the children after the parent's death, but in reality, the traditional way of life does not exist any more.

In a study commissioned by Women's Action for Development (WAD) and the University of Namibia in 2006 to understand the perceptions of male perpetrators and the reasons for committing violent crimes against women and girls in Namibia, the following was noted:³

The escalating violent crimes committed against women and girls in Namibia pose a serious threat to the basic fabric of the Namibian society, as this is just the tip of the iceberg, reflecting the country's social health in terms of: *the cultural aspects of our patriarchal society; and our violent colonial past that is perpetuated in post-independent Namibia*. The newly acquired freedom of basic human rights seems not to be applicable to all Namibian Citizens, especially women and girls, as male counterparts seemingly struggle to perceive that human rights issues are inclusive of women's rights as well.

Within this situation, inequality between males and females is embedded in our society and it has created an environment where violence against women and children does not only flourish and grow, but is often condoned and accepted by society.

Towards an understanding of crimes against children

Generally speaking, there are four recognised areas of child abuse, as follows:

- **Physical abuse:** A person in a position of power and authority abuses this position through deliberate and malicious acts of physical violence, such as –
 - beating
 - biting
 - arm twisting
 - hair pulling
 - shaking, and
 - burning.

2 UNICEF et al. (2006:203).

3 WAD et al. (2006:xiii).

- **Neglect:** The failure to provide for a child's basic physical and social needs and rights, such as –
 - food and water
 - hygiene and adequate supervision
 - education and social contact, and
 - a safe, stable home environment.
- **Emotional abuse:** Repeatedly depriving a child of love and affection may involve –
 - ridiculing, teasing, shouting at, or belittling a child, and
 - making unrealistic demands on him or her.
- **Sexual abuse:** This is any sexual contact between a child under the legal age of consent and an adult, or between a child and any other older child, when threats or bribes are used. Such abuse takes many forms, including –
 - rape, sodomy and incest
 - pornography and exposure
 - sexual fondling, and
 - inappropriately intimate touching.

The Combating of Rape Act⁴ states that the age of consent for the crime of rape is 14 for both boys and girls, and even if there was no coercion or force, a rape has been committed if a complainant is under 14 years old, and the perpetrator is more than three years older.

The World Health Organisation expands on the definition of child sexual abuse by stating that an adult is guilty of this type of offence when he or she uses the child for sexual purposes, whether consent is alleged to have been given or not.⁵

A study done on child sexual abuse in South Africa and Namibia mapped the nature of this offence. Figure 1 on the following page shows the main forms of this type of abuse mentioned by respondents during personal interviews.

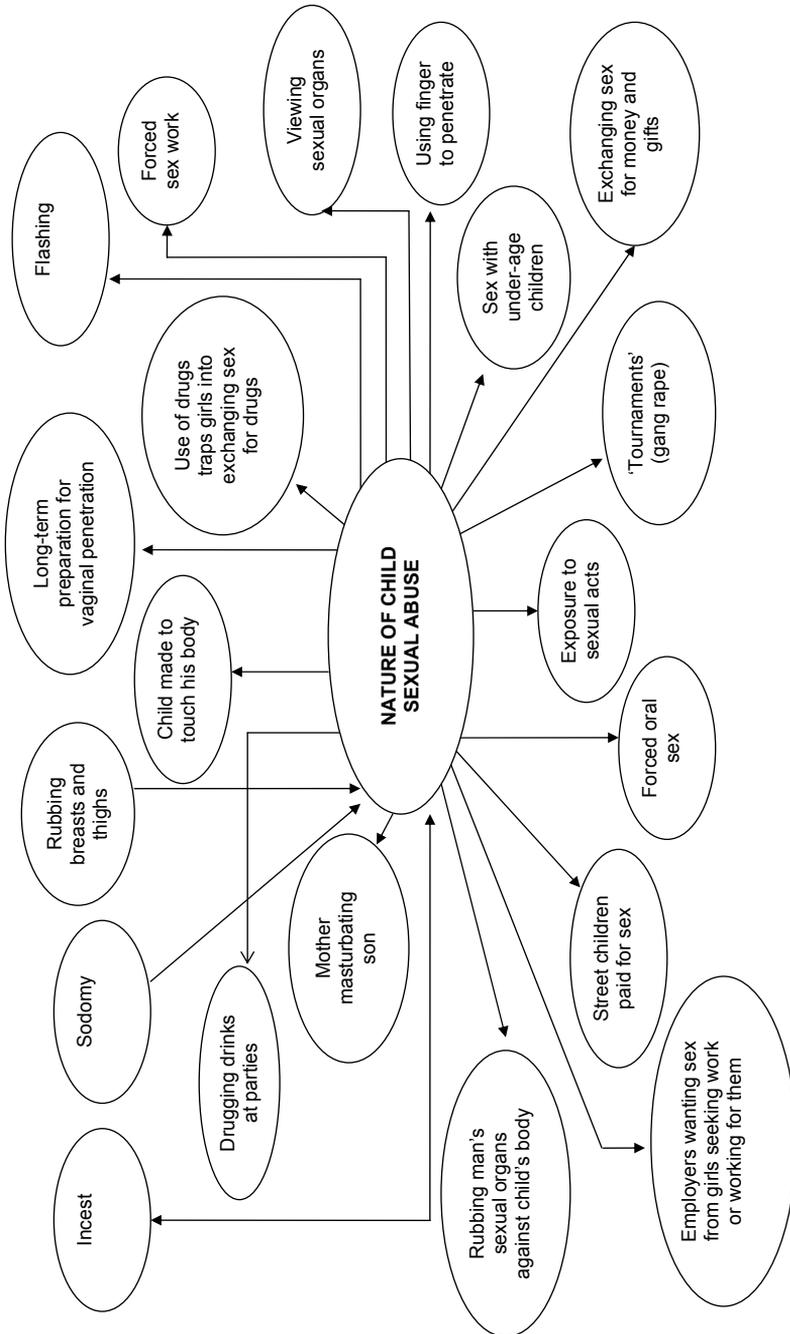
Identification of the perpetrators

In 2006, UNICEF commissioned an investigation into the functioning of Women and Child Protection Units in Namibia. Figure 2 on the following page presents a visual mapping of perpetrators of violence as identified during that investigation. These include perpetrators in general, but also specifically those who offended against children.

4 No. 8 of 2000.

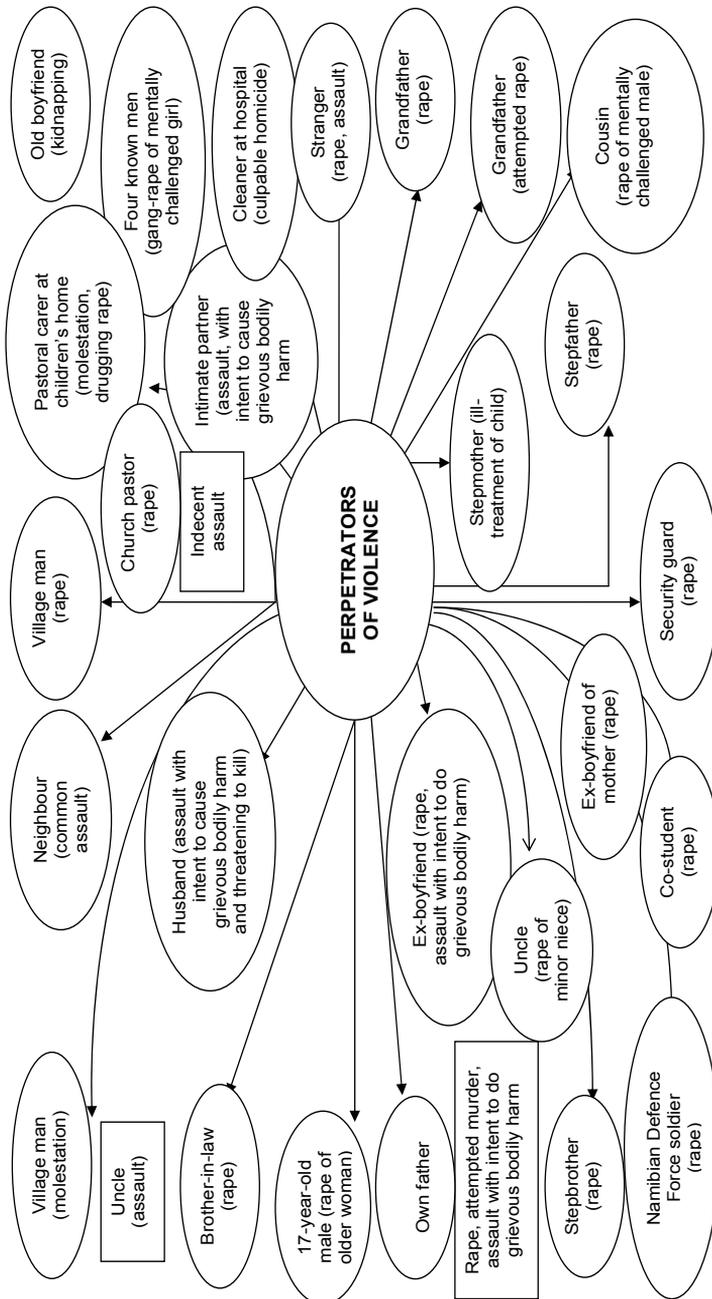
5 WHO (1999).

Figure 1: A visual mapping of the nature of child sexual abuse⁶



6 Jewkes et al. (2003:58).

Figure 2: Perpetrators of violence, as reported at police stations and Women and Child Protection Units⁷



7 UNICEF et al. (2003:133).

Important observations from Figures 1 and 2 are that, although males are commonly singled out as the violent family member, females also perpetrate violence within the family; and that the majority of abusers are either closely related to or known by the victim of violence.

The Namibian situation

Any evaluation of the degree to which the Namibian Government, on the one hand, and the citizenry, on the other, have succeeded in fully honouring and applying all the rights of a child some 20 years after endorsing the CRC needs to be done against the backdrop of conditions which prevailed prior to Independence, and certain cultural traditions, some of which are in stark contrast to the rights of the child as embodied in the CRC.

Although some critics may argue that two decades are long enough for the government and other stakeholders to have corrected the old order during which the rights of a child were not pertinently recognised, it is impossible to have wiped out this malaise of the past century in 20 years. The generation which had a very different view about children and their rights is still alive and well, and since any law has to be internalised and practised by conviction by parents to be effective, it can safely be assumed that the rights of a child will only be fully recognised and honoured by parents of a new generation. This is true of parents, school teachers and the community at large, especially with regard to the indigenous peoples of Namibia. For example, according to a teacher, many of the older teachers in schools who are no longer allowed to apply corporal punishment for even minor misdemeanours ascribe the breakdown of discipline in numerous secondary schools to 'an overemphasis of the rights of a child'. Such teachers feel that the right of teachers to perform their teaching duties effectively are seriously infringed by senior learners who exploit the perceived 'powerless' situation of teachers. The unfortunate spin-off of this situation in many senior schools is that teachers claim to merely tolerate the state of affairs for the sake of their salary, while they are constantly on the look-out for other employment.

It is clear from the attitude of these teachers that the emphasis on the rights of the child more or less neutralised their authority to demand specific levels of performance from learners. The teachers further maintained that learners also refused to execute alternative punitive measures in the form of extra homework, detention classes and the like. Moreover, if performed, such measures impacted on the teacher as well, since s/he had to mark or monitor the students thus punished. From discussions with teachers, one is led to believe that matters in some senior schools leave much to be desired. Needless to say, the entire scenario gives cause for concern with regard to the future.⁸

The older generation parents still maintain their stance that, for as long as their children are in the parental home and are cared for by their parents, their children are required to

8 MGECW (2009b).

submit to their parents' will and the rules of the house, unconditionally. No scope is left for a child's opinion or viewpoint on a matter at hand.⁹

As is the case with the contents of several Namibian laws, the existence as well as the contents of the CRC may be totally unknown to parents. Although ignorance is no excuse for contravening a law, it precludes the introduction of any change in traditional parent-child relationships.

Long-standing cultural traditions among the indigenous Namibian population do not provide for special rights for children. Parents are perceived as having the responsibility to provide for a child's need of food, clothing, protection, education, etc., rather than it being a child's right to have those needs fulfilled. The consequence of this widely held and long-standing assumption is that parents all too often renege on their responsibility and take decisions in the best interest of themselves rather than the child. A case in point is the non-enrolment of girls in schools, or their early withdrawal from school to assist parents with domestic chores. The right of a child to education, therefore, is superseded by what is in the best interest of the parent. It should be mentioned at this point that Namibia has made good progress on this particular front: 20 years after Independence, Primary school enrolment stands at 95% of all school-ready learners.

Although Primary education is compulsory in Namibia, the law is not strictly enforced for a variety of practical considerations. The welcome stance of the Namibian Government on the non-obligatory payment of school fees by learners as well as the wearing of school uniforms have contributed to the high Primary school attendance. Nonetheless, schools do exert pressure on learners to pay their fees and wear uniforms; however, the extent to which such pressure denies learners their right to education is not known.

Education authorities recognise the value of parents' contributions in the way of school fees, but they expressly forbid a child being denied the right to attend school, or a child being discriminated against because his/her parents are too poor to pay school fees or buy a school uniform.

With its ongoing school-building programme, the Namibian Government is clearly striving to honour its commitment to the 1990 United Nations' declaration to provide education for all by the year 2015, by which date all children should enjoy free and compulsory education of good quality.¹⁰

The impact of poverty

Poverty has a severe impact on the life and human rights of a child in Namibia.

9 (ibid.).

10 Office of the President (2004).

Children living on streets, or 'street kids', as they are often referred to, is a phenomenon which has grown in prevalence in recent times and manifests a cyclic nature.¹¹

Although other factors add to the occurrence of children living on streets in Namibia, poverty plays a major role in driving young children of both sexes onto the streets to make a living. This inevitably leads to prostitution to earn money for food, shelter and other needs, such as school fees for some who still try to get education.

With the high prevalence rate of HIV/AIDS in Namibia,¹² street children run a very high risk of being infected with HIV. The problem of malnutrition in Namibia is equally serious, as can be judged by the latest statistics: 8% of Namibian children below the age of 5 (i.e. 19,298) as being malnourished.¹³ Moreover, up to 69,956 children in Namibia suffer from dwarfing or retarded growth due to continued malnutrition.¹⁴

The above picture is rather bleak, although the Namibian Government does as much as it can with the means at its disposal, as is also clear from the recently published Ministry of Gender Equality and Child Welfare handbook.¹⁵ This handbook will ensure that the rights of children with regard to safety, proper care, nutrition, etc. are honoured, although much still needs to be done regarding the hordes of young children in various Namibian towns who have taken to life on the street. Since these children have neither a place to call home nor an adult to take responsibility for them, none of their rights in terms of the CRC is honoured.

This problem is exacerbated in Namibia by the high incidence of HIV/AIDS. The country has the fifth highest infection rate in the world¹⁶ and, as can be expected, a substantial number of AIDS orphans. Although statistics of the latter are not kept by the Ministry of Health and Social Services, a gestimate points at over 200,000 orphaned and other vulnerable children of whom only about 180,260 benefit from allowances paid by the state.

Other phenomena infringing on the rights of a child in Namibia

Very many children in Namibia are exposed to a host of other factors which impact on their lives and rights to a greater or lesser degree. These include –

- a lack of financial maintenance by fathers
- deprivation of inheritance

11 Jewkes et al. (1993).

12 MHSS (2007).

13 MHSS (2008).

14 (ibid.).

15 MGECW (2009a).

16 MHSS (2007).

- domestic violence, and
- child labour.

These factors will be addressed individually below.

Lack of financial maintenance by fathers

It is an unfortunate reality in Namibia that many men father children with one or several women without paying maintenance for the general care of their offspring. It often happens that such fathers disappear without a trace and, therefore, cannot be compelled to pay maintenance. Often, however, they have no form of income due to unemployment, and are thus also unable to contribute towards maintenance – even when compelled to do so by a court order.

In an apparently desperate bid to find a father and someone to help care for all her children, women often have children from different men, mostly only to experience the last man to abscond after the arrival of his addition to the family.

Such children grow up without a father's love or a male parental role model. Children from such homes usually grow up with a need for love and acceptance, which gang life offers in the form of admiration for the execution of ruthless crimes. The following example taken from the evidence given by a converted criminal bears brutal testimony to what the consequences of an unfulfilled search for love can be:¹⁷

If I could only receive a pat on the shoulder from a father after performing well, like the adoration when I brutally raped a girl in front of my gang mates, I would not have landed up among them.

However, there is also evidence of Namibian men who scandalously desert their partners and children, without paying maintenance, only in order to team up with another girlfriend – who is similarly entertained and dumped after the arrival of a baby. The irony is that, although many such men are prosperous in business and can afford to pay maintenance, they simply refuse to.

Deprivation of inheritance

Cultural marriages are recognised as valid under the Namibian Constitution. However, many couples in such marriages often do not have the documentation to prove their state. This becomes a decisive factor when the husband dies and the wife finds herself without written proof of the union. It happens regularly that wives in traditional marriages are chased off their land or out of their homes with their children by in-laws after their husband's death. This not only robs families of their inheritance, it also deprives children of a home and possibly even the continuation of their education.

¹⁷ Personal testimony of former convicted perpetrator at WAD conference.

Namibian law forbids the disinheritance of widows and children. However, unless widows take recourse to the police, which might be discouraged by threats of witchcraft, the culprits get away with it.

Domestic violence

The scientific study of domestic violence really only began at the beginning of the 1960s, but there is no shortage of attempts to understand and explain the tragic problems of wife abuse, child abuse, elder abuse, and intra-family violence in general.

The emotions that are stirred by descriptions and photographs of victims of family violence cry out for answers to the question “Why?,” or “Who could have done something so horrible?” Many have tried to answer these questions, but there remains precious little theory in the way of answering them.

A survey commissioned by WAD and executed by the University of Namibia on the root causes of violence against women and children among convicted perpetrators in Namibian prisons indicated the extent of the problem.¹⁸ Apart from the profound psychological consequences which domestic violence can have on a child, it can sow the seeds of replication of similar forms of violence to settle differences in a child's future life.¹⁹

Towards a definition of *family violence*

The World Health Organisation (WHO) defines *family violence* as being physical violence between family members by way of –²⁰

... the intentional use of physical force, with the potential to cause death, injury or harm. Physical violence includes, but is not limited to, scratching; pushing; shoving; grabbing; biting; choking; shaking; hair-pulling; slapping; punching; hitting; burning; the use of restraints, or one's body size or strength against another person; and the use (or threat of use) of a weapon, whether a gun, knife or other object.

Psychological/emotional violence

The Legal Assistance Centre, in its *Guide to the Domestic Violence Act 4 of 2003*, explains *psychological* or *emotional* abuse as follows:²¹

This requires a pattern of seriously “degrading” or “humiliating” behaviour towards the complainant, a family member, or a dependent of the complainant, such as:

18 WAD et al. (2006).

19 (ibid.).

20 MHSS (2004:2).

21 LAC (2004:12).

- repeated insults or causing emotional pain. An example is a husband requiring his wife to accept his girlfriend sleeping in the married couple's bed.
- repeated and serious exhibition of obsessively jealous or possessive behaviour towards the complainant, the complainant's dependents or family. An example is a man who insists that a teenage sister-in-law, who lives with him and his wife, may not visit any friends, or be visited by them.

Child labour in Namibia counts as one of the many causes of children dropping out of school at an early age. Other important causes include poverty, illiterate parents who do not value education, and poor scholastic performance. This makes children vulnerable to falling victim to exploitative employers as cheap labour.

Although a recent case of foreigners who employed children in the building trade in northern Namibia provided government with the opportunity to act and endorse the law on child labour, child labour is difficult to police in general, in especially far-flung rural areas. Young children are usually withdrawn from school to herd the family's livestock and, in that way, their talents are wasted and their future ruined.

Identified characteristics of perpetrators of child abuse

In a recent in Namibia looking into the nature of perpetrators of violent crimes against women and girls, some of the main findings indicated that –²²

... cultural factors, alcohol consumption, low levels of education, and poor socialization, were all contributing factors that underlie the violent crimes against women and girls.

The family violence perpetrator is described by researchers as a man who exhibits a public image of a peaceful human being, but he may be a dangerous and violent husband and father in the domestic sphere.²³

According to Justice and Justice, who did a study on personality profiles of abusive parents, authoritarian personalities, alcohol dependency and emotional immaturity, were common characteristics of abusers in the family situation. These characteristics of family violence abusers were confirmed in two more recent studies in Namibia.²⁴

One of the most consistent findings from research on physical violence against children is the so-called intergenerational transmission of violence. This proposition simply states that children who have been physically abused, or witnessed such abuse in their families, tend to grow up to be abusive adults. This theory has been viewed by researchers as an overstated hypothesis, and Hampton and others concluded that –²⁵

22 WAD et al. (2006:xiii).

23 Fineman & Mykitiuk (1994).

24 Rose-Junius et al. (1998); Jewkes et al. (2003).

25 Hampton et al. (1993:15).

[T]he intergenerational transmission theory is often simplistically presented and viewed as a single-cause explanation for abuse. A more sophisticated, multi-dimensional model of abuse is needed to explain child abuse.

Briggs and others presented a model of a sexual assault cycle, which offers valuable information about the sexual offender of children.²⁶ The cycle starts with the abuser's anticipation and rehearsal. Most abusers are said to think about their behaviour before they approach the victim. The perpetrator may fantasise about the abusive behaviour in his/her mind, and that makes the action seem more acceptable when it is eventually performed. The next step is to target the victim. It is common practice for a child sexual abuser to target vulnerable victims. Some develop a fetish for boys; others prefer girls, while some do not care about the gender – as long as it is a child. Vulnerable families may be targeted to gain access to children, or the offender will seek employment in an institution where children are cared for, for the same reason.

Other studies have found that the abuser targets victims whom s/he perceives as vulnerable, such as a lonely, attention-seeking child, or one who seems less likely to tell.²⁷ It has also been noted that men may start abusing their children sexually when they are unemployed, or have suffered some other setback in their lives, which leaves them feeling vulnerable and powerless.²⁸

Grooming is a term used to refer to the abuser's tactics to gradually test the victim's level of resistance, and it is a means of securing the victim's trust, privacy, and secrecy for the abusive actions. Grooming strategies may include watching pornography with the victim, intimate touching between the abuser and the child, as well as stroking and kissing.

Men who groom in institutions like schools or children's homes are often well regarded, and make themselves indispensable in their positions.²⁹

Some theories to explain domestic violence

Gelles and Straus mention two theories in an attempt to explain violence within the family.³⁰ The first is the exchange theory, which suggests that human interaction is guided by the pursuit of rewards and the avoidance of punishment and costs. Thus, if one or more family members are committed to providing reward services (care, support, education, etc.) to another, the second member is expected to respond with some benefits like gratitude, achievements, etc. If such reciprocal exchange of rewards occurs, the interaction will continue. If not, the interaction may be broken. It is not always possible

26 Briggs et al. (1998).

27 Dunkerly et al. (1994).

28 Jewkes et al. (2003).

29 (ibid.).

30 Gelles & Straus (1998).

to break relations with family members, even if there is no reciprocity. When the principle of retributive justice is violated, there can be increased anger and resentment, and conflict and violence can erupt.

Gelles and Straus (1998) proceed to explain that exchange theorists see the infliction of hurt on someone who has injured you, as rewarding.³¹ The idea of ‘revenge being sweet’ can be useful to explain why wives respond with extreme violence to a husband who has abused her for many years, even to the extent of killing him. It can also be used to explain why a parent would severely beat a child who has been crying non-stop, or does the same to an older child who has been extremely demanding, especially if the parent is overstressed for other reasons as well.

Parents or carers who abuse teenage children (and risk being hit back), verbally abuse them, or emotionally alienate them as a method of punishment, may do so because they feel that their investment in rearing the child/children has yielded disappointing results.

Parents or carers who overestimate their child’s ability and capabilities may abuse them because they have expected more from the child than they receive, and experience it as a form of rejection by the child.

The second theory offered in an attempt to explain violence within the family is the social control model. According to this model, family violence is more common when non-nuclear family members such as relatives or friends are unavailable, unable, or unwilling to become involved and are, therefore, not around to serve as agents of social control. According to the social control model, people hit and abuse other family members because they can.³²

Concluding notes

In their 2002 *World Report on Violence and Health*, WHO states that, throughout the world, children are abused and neglected by their parents and other caregivers. WHO also note that violence against children includes physical, sexual, and emotional abuse, as well as neglect.

With regard to physical violence, the report states that homicides are more prevalent under children between the ages of 0 to 4. The most common causes of death are head and abdominal injuries, or intentional suffocation. Further disturbing information in the report is the following:³³

In most places boys are the victims of beatings and physical punishment more often than girls, while girls are at higher risk of infanticide, sexual abuse, neglect and being sold into prostitution.

31 (ibid.).

32 (ibid.).

33 WHO (2002:16).

Although violence against children, like wife and elder abuse in families, is generally regarded as the strong acting against the weak, some people with clinical experience often find this an ironic description. They report that many perpetrators of abuse actually exhibit a pathetic and ineffective psycho-social profile – not always people who would be described as socially powerful.³⁴

Reflecting a similar theme, it has been observed that the physical abuse of children tends to start with a feeling of parental incompetence. Even mothers may resort to violence when they sense that they have lost control of their children and of their own lives.

These are examples of the use of violence to compensate for a perceived loss of power and control. This may be an important feature of the power dynamics in family violence that should receive greater theoretical attention.

Irrespective of government policy, the rights of a child are infringed upon in many ways in Namibia. These acts border on criminality because of the hopes that are pinned on our country's children to take Namibia into the future.

To stop the abuse of children's rights, a concerted information campaign by all stakeholders should be launched to educate the public and schools about the contents of the CRC. With the cooperation of law enforcement and the judiciary, the rights of a child in Namibia can be realised in the not too distant future.

References

- Briggs, D, P Doyle, T Gooch & R Kennington. 1998. *Assessing men who sexually abuse*. London: Jessica Kingsley Publishers Ltd.
- Dunkerley, A, P Doyle, T Gooch & R Kennington. 1994. "Learning from perpetrators of child sexual abuse". *Probation Journal*, (41):147–151.
- Fineman, NA & R Mykitiuk. 1994. *The public nature of private violence*. London: Routledge.
- Finkelhor, D, G Gelles, G Hotaling & M Straus (Eds). 1983. *The dark side of families*. New Delhi: Sage Publications.
- Gelles and Straus, M. 1998. *Violence behind closed doors in American families*. New York: Garden City Publishers.
- Hampton, RL, TP Gullotta, GR Adams, EH Potter III & RP Weissberg (Eds). 1993. *Family violence: Prevention and treatment*. New Delhi: Sage Publications.
- Hubbard, D. 2001. *A summary of the Combating of Rape Act, (Act No. 8 of 2000)*. Windhoek: Legal Assistance Centre.
- Jewkes, R, L Penn-Kekana, H Rose-Junius & J Malala. 2003. "Child sexual abuse and HIV: Study on links in South Africa and Namibia". An unpublished research report for Save the Children (UK) and (Sweden).

34 Rose-Junius et al. (1998).

- Kempe, CH & RE Helfer (Eds). 1972. *Helping the battered child and his family*. Philadelphia: Lippincott & Co.
- Legal Assistance Centre. 2004. *Guide to the Combating of Domestic Violence Act 4 of 2003*. Windhoek: LAC.
- MGECW/Ministry of Gender Equality and Child Welfare. 2009a. *Draft Child Care and Protection Bill*. Windhoek: MGECW.
- MGECW/Ministry of Gender Equality and Child Welfare. 2009b. *Minimum standards for residential child care facilities in Namibia*. Windhoek: MGECW.
- MHSS/Ministry of Health and Social Services. 2004. "A sub-study of the WHO Multi-country Study on Intimate Partner Violence in Windhoek". An unpublished research report.
- MHSS/Ministry of Health and Social Services. 2007. *2007–2008 Progress Report on the Third Medium-term Plan on HIV/AIDS*. Windhoek: MHSS.
- MHSS/Ministry of Health and Social Services. 2008. *2006–07 Namibia Demographic and Health Survey – Key findings*. Windhoek: MHSS.
- Office of the President. 2004. *Namibia Vision 2030*. Windhoek: Office of the President.
- Rose-Junius, SMH, VN Tjapepua & J de Witt. 1998. "An investigation to assess the nature and incidence of spouse abuse in three sub-urban areas in the Karas Region, Namibia". An unpublished research report.
- UNICEF/United Nations Children's Fund, Ministry of Safety and Security & PEACE Centre. 2006. *An investigation into the functioning of Women and Child Protection Units and Police Stations with regard to the protection of abused women and children in Namibia*. Available at <http://www.peace.org.na/Web%20Pages/research.htm>; last accessed 8 November 2009.
- WAD/Women's Action for Development, University of Namibia & Namibian Prison Service. 2006. "Understanding the perpetrators of violent crimes against women and girls in Namibia: Implications for prevention and treatment". An unpublished research report.
- WHO/World Health Organisation. 1999. *Report of the consultation on child abuse prevention*. Geneva, 29–31 March 1999. Geneva: WHO.
- WHO/World Health Organisation. 2002. *World Report on Violence and Health*. Geneva: WHO.

Access to information by orphans and other vulnerable children in the Ohangwena Region¹

Chiku Mchombu

School principals and teachers must understand OVC problems and assist with information.
[15-year-old boy, Ohangwena Region]

Introduction

This paper is based on a larger study conducted in January 2009 in the Ohangwena Region to identify the information needs and information-seeking behaviour of orphans and (other) vulnerable children (OVC). The study found that financial assistance, exemption from school development funds and child care support were among the most pressing information needs for most OVC. The findings also show that radio was the most popular channel for obtaining information among respondents at all levels of education. Other channels were church leaders, regional councillors and traditional leaders. The more educated respondents also mentioned newspapers as a preferred channel for obtaining information. Respondents with low levels of education, i.e. Grade 7 and below, preferred to consult friends, relatives and teachers as sources of information, whereas respondents with Grade 8 and above preferred radio, newspapers and teachers as their main source of information. In general, the study reveals there is an acute shortage of appropriate information for OVC to successfully understand and manage their survival.

1 My heartfelt thanks are due to the University of Zululand for financial support and the University of Namibia for logistical support; the Regional Governor of Ohangwena, U Nghaamwa; the Regional Councillor of Eenhana, N Haufiku; of Ondobe, M Pohamba; of Engela, NU Ndilula; and of Ohangwena, U Nghaamwa. To my research team, Ms Kunelago Kashakumwa, Ms Pinehopiko Kanashukulu, Ms Povelu Nghaamwa, Mr Paulas Panduleni, Ms Ndawepeka Hauwanga, and Ms Esther Shweleni, I would like to express my sincere gratitude, as well as to the Uukwanyama Traditional Authority, especially Ms Theresia Ndapandulula, the children, teachers and caregivers who took part in the research; and last, but not least, my driver and special assistant Mr Tumaini Mchombu. In addition, I would like to thank Ms Wendy Hilonga, Mr Philip Shilongo, Mr Edwin Kafita, Mr Emmanuel Mukusa, Ms Christa Schier, and Prof. Kingo Mchombu for their valuable assistance. And finally, I would like to acknowledge the logistics support of the Windhoek and Eenhana offices of the Ministry of Gender Equality and Child Welfare.

Background

Namibia, like most countries in sub-Saharan Africa, faces a major challenge in managing OVC to ensure they are taken care of and lead productive lives. Although a number of studies have been done on several aspects of the OVC situation in Namibia, none has been undertaken on OVC's access to information in the Ohangwena Region in northern Namibia. Ohangwena was selected for this study because, among Namibia's 13 Regions, it has recorded one of the highest percentages (33%) of OVC residents. Others with high numbers of OVC residents are, in descending order, Caprivi (42%) Omusati (34%), Oshikoto (32%) and Kavango (31%).²

According to the National Planning Commission's Regional Poverty Profile as determined through surveys in 2001, Ohangwena has 228,384 inhabitants, or 12.5% of Namibia's total population.³ Between 1999 and 2001, the Region's mortality rate increased by 122%. On average, therefore, a quarter of all households in the Region experienced a death in the family during this period. Comparative figures for the rest of the country were only 15% on average. Clearly, the high mortality rate in the Region created many orphans, most of whom were under the age of 15. This shows that Ohangwena has the largest proportion of households in the nation taking care of OVC.⁴ It was this large number that prompted the focus of this study.

Data from the 2006 Demographic Health Survey Report by the Ministry of Gender Equality and Child Welfare reveals that there are 250,000 OVC in Namibia overall, of whom 155,000 are orphans.⁵

Attempts made to meet the basic needs of the OVC by various stakeholders have included providing shelter, food, school uniforms and financial grants. One gap which has not been closed, however, is the provision of adequate information to both OVC and caregivers in the country, to empower and enable these children to manage their lives better. Access to information, as Praverand has pointed out, is a human right and the most basic of all human needs.⁶

An *orphan* is defined as a child between 0 and 18 years who has lost one or both parents and/or whose primary caregiver has died; a *vulnerable child* is a child between 0 and 18 who is in need of care and protection.⁷

On the other hand, Skinner and others define *vulnerable children* as those who have no or limited access to their basic needs, or those for whom only some basic rights are fulfilled.

2 MHSS (2008:258).

3 NPC (2004).

4 (ibid.).

5 MGECW (2009).

6 Praverand (1980:55–58).

7 MGECW (2009:4).

The authors identify *basic rights* as including –⁸

- name and nationality
- a safe home and community environment
- education
- family care
- adequate food
- protection from abuse
- security from the government and community
- health care
- shelter
- love
- clothing, and
- the right to make decisions about their life.

The Ministry of Health and Social Services defines *vulnerable children* as those who live in a household with a chronically ill adult or adults, and experience hardship in coping with life.⁹

Additional needs have been identified by Kurewa, who points out that children also have social and psychological needs.¹⁰ While *social* needs include food, clothing, and shelter, *psychological* needs include the need for constant counselling because of the emotional problems these children face, the need to be loved, respected and accepted, and the need to feel a sense of belonging. Kurewa’s study concluded that most AIDS orphans were ignorant about their rights.¹¹ However, although the author identified different needs for children, there was no mention of the need for information.

Unfortunately, the reviewed literature is silent on the need for information by OVC. Nonetheless, these children require information on coping skills, how to protect themselves from sexual exploitation, and the risk of HIV infections. In some cases, orphaned children are heads of households and caregivers, and require exactly the same information as adults playing similar roles.

This paper draws from a study which aimed to establish the extent to which OVC have access to the information they require to meet their both their basic needs and other needs they have as a disadvantaged group in society.

Research objectives

The study aimed at examining OVC’s access to essential information in the Ohangwena Region that allows them to cope with their daily lives. The specific objectives of the study included the following:

8 Skinner et al. (2004).

9 MHSS (2008:256).

10 Kurewa (1999).

11 (ibid.).

- To identify channels and sources of information used by OVC, and
- To establish the perceived usefulness of the identified information sources and channels.

Literature review

The number of children orphaned due to the AIDS pandemic is increasing worldwide. OVC face many problems that force them to seek information that will enhance their chances of success in solving the many problems and challenges they face in their daily lives. As Chitiyo and others as well as Barna point out, these children suffer from emotional trauma from losing their parents or caregivers, who in some cases die after a long illness.¹²

Under these circumstances, older children assume parental roles and responsibilities by taking care of sick parents/caregivers and siblings. Abebe and Aase term these *care-giving and care-receiving practices*.¹³ However, such additional responsibilities affect the child who, in some cases, ends up dropping out of school. As Chitiyo and others postulate, these additional responsibilities overstrain orphans physically and emotionally.¹⁴

Another problem is the increasing number of OVC who do not attend school or drop out permanently due to economic hardship because their parents or caregivers cannot afford school fees and uniforms. As Ainsworth and Filmer argue, the increasing number of OVC in developing countries has come about as a result of personal tragedies resulting from social and economic problems.¹⁵ The danger is that they will acquire inadequate education, thereby limiting their own and their country's future.

After the death of the parent/caregiver, children may experience stigmatisation, abuse, and other human rights violations, including name-calling, denial of access to education and shelter, or being forced to engage in unprotected sex – in turn making them more vulnerable to infections like HIV and other sexually transmitted infections. Problems such as these will impact negatively on the children's mental well-being.¹⁶ Thurman and others point out that children and young people suffering from emotional distress are more likely to show signs of behavioural regression and withdrawal from the community.¹⁷ Psychosocial intervention is absolutely crucial for these children to manage their emotions positively.

12 Chitiyo et al. (2008:384–392); Barna (2005:475–484).

13 Abebe & Aase (2007:2058–2069).

14 Chitiyo et al. (2008:385).

15 Ainsworth & Filmer (2006:1099–1128).

16 Wood et al. (2006:1923–1933); Chitiyo (2008:386).

17 Thurman et al. (2008:1557–1567).

Methodology

In January 2009, research was conducted in Ohangwena to determine the information needs and seeking behaviour of OVC. The respondents lived in the Region under study, and hailed from the Eenhana, Engela, Ohangwena and Ondobe Constituencies. A total of 368 residents, aged between 8 and 18, participated in the study.

The Ohangwena Region lies in northern Namibia. It shares its eastern border with the Kavango Region, its southern border with Oshana and Oshikoto, and its western boundary with Omusati. There are 11 Constituencies in the Region, namely Eenhana, Endola, Engela, Epembe, Ohangwena, Okongo, Omulonga, Omundaungilo, Ondobe, Ongenga, and Oshikango. Only four constituencies were sampled for this study, as indicated earlier.

In respect of research procedure, the first step was to seek permission from the Ministry of Gender Equality and Child Welfare to conduct an investigation on OVC in Ohangwena. The second was to communicate with traditional leaders and regional councillors to inform them of the intention to carry out the study and obtain their cooperation and support. The third was to recruit and train five suitably experienced research assistants who were fluent in English and *Oshikwanyama*. The research assistants were informed of the purpose of the study, what the interviewing techniques entailed the interview schedules, and the criteria to be applied in selecting participants in the field.

Data collection instrument and selection of participants

The OVC interview schedule was made up of two parts. Section 1, which was used for gathering demographic information, had five questions. These obtained data on a subject's age, gender, education level, accommodation, and source of school development fund fees. The aim was to get personal information about the OVC and to confirm whether or not they qualified as subjects for the study. Section 2 dealt with OVC information needs and seeking behaviour, and had 13 questions. The aim of this section was to determine when, how and why information was needed, and to address problems and situations OVC faced that would prompt the seeking of information. This included the search strategies employed to obtain information; the channels and sources used to obtain it; what problems OVC faced in seeking and obtaining information; and to find out what organisations or institutions they used most often for these services.

Children participating in the study were identified by way of recommendations by key informants such as social workers, traditional leaders and teachers, using the 'snowball' sampling technique.¹⁸

18 This is a technique whereby informants with special expertise – in this case, traditional leaders, teachers and social workers – identify children who match the research criteria.

Presentation of findings

A total of 368 OVC participated in the interviews in the Ohangwena Region. The majority (208, or 57%) were aged between 13 and 17 years, followed by those between 8 and 12 years (93, or 25%), while the rest were 18 years old (67, or 18%).

There were 186 (51%) male and 182 (49%) female OVC interviewed, with the majority (141, or 38%) being between Grade 8–12, followed closely by Grade 4–7 (134, or 37%) and Grade 1–3 (37, or 10.1). While 23 (6.2%) had never been to school and 31 (8.4%) were school dropouts, with a few (2, or 0.6%) at college or university. The demographic data is presented in Table 1.

Table 1: Demographic information (N=368)

Demographic characteristics		Ohangwena Region, rural	
		N=368	%
Age	8–12	93	25.3
	13–17	208	56.5
	18–22	67	18.2
Total		368	100.0
Gender	Male	186	50.5
	Female	182	49.5
Total		368	100.0
Educational level	Never went to school	23	6.2
	School dropout	31	8.4
	Grade 1–3	37	10.1
	Grade 4–7	134	36.4
	Grade 8–12	141	38.3
	College/vocational training	1	0.3
	University	1	0.3
Total		368	100.0

The participants were also asked why they needed information. Their responses are presented in Table 2 according to gender. Both male and female respondents identified the following information needs: financial assistance and grants; school development fund exemption, child care support, feeding schemes, health care services, and counselling. These six topics of investigation were identified by the majority of OVC in Ohangwena.

Table 2: Reasons for needing information, by gender (more than one response)

Reasons for information need	Male		Female		Total	
	N=186	%	N=182	%	N=368	%
Financial assistance and grants	149	80.0	139	76.0	288	78.0
School development fund exemption	119	64.0	121	66.5	240	65.2
Child care support	48	25.8	44	24.2	92	25.0
Feeding schemes	35	19.0	30	17.0	65	18.0
Health care services	27	15.0	34	19.0	61	17.0
Counselling	23	12.0	24	13.0	47	13.0

Another question posed was on the channels by means of which respondents obtained information. The responses, cross-tabulated by level of education, are presented in Table 3.

Table 3: Channels employed to obtained information, by level of education

Channels used to obtain information		Never went to school	School drop-out	Grade 1-3	Grade 4-7	Grade 8-12	College/ Vocational training	University	Total
		N=23	N=31	N=37	N=134	N=141	N=1	N=1	N=368
Radio	#	17	24	29	116	121	0	1	308
	%	74	80	78	87	86	0.0	100	84
Newspapers	#	0	7	0	28	58	1	0	94
	%	0.0	20	.0	21	41	100	0.0	25
Church leaders	#	5	9	6	33	24	0	0	77
	%	22	27	16	25	17	0.0	0.0	21
Regional Councillors	#	2	7	11	26	27	0	0	73
	%	9	20	30	19	19	0.0	0.0	13
Traditional leaders	#	8	3	10	13	13	0	0	47
	%	35	7	27	10	9	0.0	0.0	13

Table 3 shows the channels that most respondents in Ohangwena used, by educational level. The participants who had never been to school preferred the radio as a source of information (17, or 74%), followed by traditional leaders (8, or 35%) and church leaders (5, or 22%). While school dropouts also preferred radio (24, or 80%), their second choice was church leaders (9, or 27%) and their third was newspapers and regional councillors (7, or 20%).

For respondents with a Grade 1–3 education, radio was a popular choice (29, or 78%), followed by regional councillors (11, or 30%) and traditional leaders (10, or 27%). Respondents with Grade 4–7 also preferred radio (116, or 87%), followed by church leaders (33, or 25%) and newspapers (28, or 21%). Respondents with Grade 8–12 favoured radio (121, or 86%) as a first choice, followed by newspapers (58, or 41%) and then regional councillors (27, or 19%). Respondents attending college, vocational training or university (2, or 100%) preferred radio and newspapers as a channel for accessing information.

The findings show that radio was popular among respondents of all levels of education, with Grade 7 learners and below preferring radio, church leaders, regional councillors and traditional leaders as sources of information, while respondents with Grade 8 and above preferred radio and newspapers.

A question on sources of information was also posed to the participants (see Table 4).

Table 4: Ohangwena Region, Rural

Sources of information		Never went to school	School drop-out	Grade 1–3	Grade 4–7	Grade 8–12	College /Vocational training	University	Total
		N=23	N=31	N=37	N=134	N=141	N=1	N=1	N=368
Radio	#	17	23	25	111	120	1	1	298
	%	74	77	68	83	85	100	100	81
Friends/ Relatives/ Grandparents	#	8	9	16	39	25	0	0	97
	%	35	27	43	29	18	.0	.0	26
Teachers	#	0	0	8	39	35	0	0	83
	%	0.0	0.0	22	29	25	0.0	0.0	22
Newspapers	#	0	5	2	19	36	1	1	64
	%	0.0	13	5	14	26	100	100	17
Church leaders	#	4	8	1	20	27	0	0	60
	%	17	23	3	15	19	0.0	0.0	16
Regional Councillors	#	3	7	6	15	24	0	0	55
	%	13	20	16	11	17	0.0	0.0	15

Respondents who indicated they had never been to school (17, or 74%) and school dropouts (23, or 77%) both preferred radio as their primary source of information. The two groups also chose friends and relatives (8, or 35% and 9, or 27%, respectively) as their third choice. Other sources mentioned were church leaders (4, or 17% and 8, 23%, respectively). Respondents with an education level of Grade 1–3 selected radio as their main source (25, or 68%), followed by friends and relatives (39, 29%), and then teachers (8, 22%). Respondents with a Grade 4–7 education also favoured radio (111, or 83%), followed by friends, relatives and teachers (39, or 29%). Respondents with a level of education equivalent to Grade 8–12 chose radio (120, or 85%), followed by newspapers (36, or 26%) and teachers (35, or 25%). Respondents at college, undergoing vocational training or at university both favoured radio and newspapers (2, or 100%).

From these findings, it is clear that, irrespective of their level of education, respondents favoured radio as a primary source of information. Those with lower levels of education sought friends, relatives and teachers as sources of information, while respondents with Grade 8 and above used newspapers and teachers as their secondary and third sources, respectively.

Respondents were asked to give comments on how information flow could be improved to enable OVC to access useful information. The participants’ views are presented in Table 5.

Table 5: Suggestions on how to improve the flow of information (multiple responses)

Suggestion (N=360)	Frequency	Percentage
Government should provide information to OVC on where to get their basic needs (clothes, shoes, stationery, school bags, uniforms, food/feeding schemes)	124	38
Government should provide information to OVC on how to apply for exemption from the school development fund (“So we can study and have a better future”)	63	19
Government should build schools and houses for OVC (“Our relatives misuse our food, mistreat us, and sell our blankets”)	33	10
Councillors/traditional leaders should talk to the youth about how they can be assisted, and should advise caregivers on how to handle OVC	21	6.3
OVC such as school dropouts and Grade 10 failures need to be assisted in applying for farms, projects or job opportunities	18	5.5
OVC should be assisted with information on how to obtain birth certificates and financial assistance	17	5
Councillors should use the radio and newspapers to disseminate information such as where to get food	13	3.9

Suggestion (N=360)	Frequency	Percentage
School principals and teachers need to understand OVC’s problems and assist them with the necessary information	12	3.6
Government should provide OVC with transport to school or bicycles during the rainy session (“The school is 7 km away”)	12	3.6
Government should assist OVC with their Namibia College of Open Learning (NAMCOL) studies up to university level	9	2.7
OVC should be provided with information on how to get free medical treatment	8	2.4
Total	330	100

Table 5 provides some of the suggestions offered by OVC in the Ohangwena Region on how to improve the flow of information. The majority (124, or 38%) of OVC felt that the government needed to provide more information on basic needs areas. The next suggestion made by the biggest number of respondents was to provide more information on how to apply for exemption from the school development fund. It seems many OVC (63, or 19%) are not aware that the government has exempted OVC from paying such fees, so these children need information in this regard. It was also suggested that government should build more houses for OVC (33, or 10%) because they felt they were being mistreated by their relatives. In addition, they suggested, Councillors and traditional leaders should talk to the youth on how they can be assisted, while 21 (6.3%) felt that they should also advise caregivers on how to handle OVC. As regards OVC who had dropped out of school or had failed Grade 10, it was suggested by respondents that they be provided with farms, projects or job opportunities, since most of them became cattle herders. Other suggestions included the following:

- OVC should be given information on how to obtain birth certificates and financial assistance
- Councillors should use the radio and newspapers to disseminate information such as where to get food
- School principals and teachers had to try to understand OVC problems and assist them with information
- Government should provide bicycles to OVC to use to and from school during the rainy session, because the school was 7 km away
- Government should assist OVC with access to the Namibia College of Open Learning up to university level, and
- Government should provide free information on how to get medical treatment.

Discussion

The study shows that most OVC were between 13 and 17 years old, with 51% of the sample being male and 49% female.

The study found that most OVC in rural areas were likely to drop out of school, compared with non-OVC in the rural areas. Nyamukapa and Gregson¹⁹ found that OVC who had lost a female parent had lower primary school completion rates in rural Zimbabwe. The findings of the Namibia studies were similar to these from Zimbabwe, which found that 54 (15%) of OVC had either never gone to school or had dropped out.²⁰ In the latter study, the emphasis was on OVC who had lost their mother, while the Namibia study did not specify which parent had died.

Both male and female participants identified the following areas as important information needs areas: financial/grants (288, or 78%), school development fund/grants (240, or 65%), child care support (92, or 25%) and feeding schemes (65, or 18%).

In respect of information channels used, radio was the most popular among all participants, with 308 (84%) responding that this was their primary source of information. This choice was followed by newspapers (94, or 25%) and church leaders (77, or 21%). It was also suggested that government should provide information on where OVC should go to have their basic needs met (clothes, shoes, stationery, school bags, uniforms, food/feeding schemes). Other OVC pointed that government should inform all OVC of the required procedures when they apply for exemption on school development funds (“So we can study and have a better future”), while a few OVC suggested that government build schools and houses for OVC (“Our relatives misuse our food, mistreat us, and sell our blankets”).

References

- Abebe, Tatek & Asbjorn Aase. 2007. “Children, AIDS and the politics of orphan care in Ethiopia: The extended family revisited”. *Social Science & Medicine*, 64:2058–2069.
- Ainsworth, Martha & Deon Filmer. 2006. “Inequalities in children’s schooling: AIDS, orphanhood, poverty and gender”. *World Development*, 34(6):1099–1128.
- Barna, Redd. 2005. “Orphans of Eritrea: What are the choices?”. *American Journal of Orthopsychiatry*, 75(4):475–484.
- Chitiyo, Morgan, Darlington Changara & George Chitiyo. 2008. “Providing psychosocial support to special needs children: A case of orphans and vulnerable children in Zimbabwe”. *International Journal of Educational Development*, 28:384–392.
- Kurewa, Pricilla. 1999. The needs of AIDS orphans in Namibia: A study of the plight of AIDS orphans in [the] Windhoek area. Unpublished research report, University of Namibia, Windhoek.
- MHSS/Ministry of Health and Social Services and Macro International Inc. 2008. *Namibia Demographic and Health Survey 2006–7*. Windhoek/Maryland: MHSS & Macro International Inc.

19 Nyamukapa & Gregson (2005).

20 (Ibid.).

- MGECW/Ministry of Gender Equality and Child Welfare. 2009. *National Plan of Action 2006–2010 for Orphans and Vulnerable Children in Namibia: Annual progress and monitoring report for 1 April 2007 to 31 March 2008*. Windhoek: MGECW.
- NPC/National Planning Commission. 2004. *Ohangwena Regional Poverty Profile*. Windhoek: NPC.
- Nyamukapa, Constance & Simon Gregson. 2005. "Extended families and women's roles in safeguarding orphans' education in AIDS-affected rural Zimbabwe". *Social Science & Medicine*, 60:2155–2167.
- Praverand, Pierre. 1980. "Knowledge is power". *International Development Review*, 22(1):55–58.
- Skinner, D, N Tshoko, S Mtero-Munyati, M Segwabe, P Chibatamoto, S Mfecane, B Chandiwana, N Nkomo, S Tlou & G Chitiyo. 2004. *Defining orphaned and vulnerable children*. Cape Town: Human Sciences Research Council.
- Thurman, L, A Snider, NW Boris, E Kalisa, E Nyirazinyonye & L Brown. 2008. "Barriers to the community support of orphans and vulnerable youth in Rwanda". *Social Science & Medicine*, 66:1557–1567.
- Wood, Kate, Elaine Chae & Peter Aggleton. 2006. "Telling the truth is the best thing: Teenage orphans' experiences of parental AIDS-related illness and bereavement in Zimbabwe". *Social Science & Medicine*, 63:1923–1933.

Child trafficking, child prostitution and the potential dangers of the 2010 FIFA World Cup in South Africa

Michael Conteh

In their little worlds in which children have their existence, there is nothing so finely perceived and so finely felt, as injustice ...

Charles Dickens, *Great Expectations*

This article aims to examine child trafficking and child prostitution in relation to the potential dangers of the 2010 FIFA World Cup¹ (FWC) in South Africa. The overview covers key concepts that are relevant for the purpose of this article. The article also discusses child trafficking vis-à-vis the strategies to combat it, and critically analyses strategies in the context of the 2010 FWC. Finally, based on the analysis, the paper takes a position with regard to the potential dangers of the 2010 FWC and offers suggestions for Namibia's response to them.

Introduction

Trafficking in human beings and, more especially, trafficking in children have been high on the international agenda for more than a decade. Only recently, however, has the international community more fully appreciated that, in addition to being a serious violation of children's rights and a criminal act, the trafficking of children is unquestionably a serious labour issue. It has now become a non-stop global fight to eliminate the practice. While the *trafficking of adults* is defined in international law by the coercion, abuse of power, force or threats that initiate the movement into exploitation, *child trafficking* is defined by the exploitation itself. Regardless of how the child comes to move, the very fact that this transfer through a third person results in exploitation is considered to be child trafficking.

The first FIFA World Cup in Africa will be held from 11 June to 11 July 2010 in nine South African cities, namely Cape Town, Durban, Johannesburg, Mangaung/Bloemfontein, Nelspruit, Nelson Mandela Bay/Port Elizabeth, Polokwane, Rustenburg and Tshwane/Pretoria. It is expected that thousands of people will visit South Africa during this period – “where the matches will have an estimated culminative worldwide audience of between

1 This name is trademarked by the Fédération Internationale de Football Association (FIFA).

26 and 30 million people”, as the South African real estate *Investor* magazine reveals in its November–December 2007 edition.² The big question remains, however: Are there any potential dangers for child trafficking and prostitution? It is feared that the huge influx of people into South Africa and the sheer magnitude of the 2010 FWC event will increase the abuse, exploitation and trafficking of children.

Defining *human trafficking*

The following definitions of *trafficking in persons* and *exploitation* are derived from Article 3(a) of the Optional Protocol to the United Nations Convention on Transnational Organized Crime, also known as the *Palermo Protocol*:³

“Trafficking in Persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation[.]

“Exploitation” shall include at a minimum the exploitation or the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article.

The subsequent paragraph of Article 3 of the Palermo Protocol provides as follows:

- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

Thus, consent is irrelevant if it is obtained by means of coercion or deceit,⁴ including any abuse of power without physical force. This applies to cases when individuals initially consent, e.g. to migrate or work, but are then subjected to exploitation. If there is no realistic possibility of free and fully informed consent being given or refused, the recruitment or movement of persons in the manner described in the cited text amounts to trafficking.⁵

2 SANTAC (2008).

3 Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime of 2000.

4 *Deception* can relate to the nature of the services to be performed as well as the conditions under which the person will be or is forced to perform such services.

5 This also applies to those persons who entered prostitution voluntarily and were later subjected to work under coercive or slavery-like conditions in the sex market by any means set forth in

The question of consent is irrelevant under any circumstances in the case of a child, as outlined in Article 3(c) of the Palermo Protocol:

- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article.

In accordance with the Convention on the Rights of the Child (CRC), Article 3(d) of the Palermo Protocol defines *child* as any person under 18 years of age.

In addition, the exploitative outcome stated in the above citations need not be fulfilled for it to constitute a case of trafficking, if the intent to do so is discovered. According to the Palermo Protocol, *exploitation* may include the following:

- Sexual exploitation (including the exploitation or prostitution of others or other forms of sexual exploitation – such as pornography and forced marriages)
- Forced labour or services⁶
- Slavery⁷ or practices similar to slavery, servitude, or
- The removal of organs.⁸

In Article 3, the crossing of borders is specifically excluded as a constituting element of the definition of *trafficking in human beings*, as trafficking may occur within a country’s borders for the purposes of exploitation.

To summarise, therefore, *human trafficking* involves the following components:

- ***Child trafficking:*** the recruitment or movement of persons under the age of 18, internally or across borders by an individual (a family member, relative or a trafficker in an organised syndicate) who has an intention to exploit. The child’s consent is irrelevant when determining whether or not such recruitment or movement is a case of trafficking, and coercion or deception need not be present.

Article 3 of the Palermo Protocol.

6 Defined as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily” (Article 2(1), International Labour Organisation [ILO] Convention No. 29 Concerning Forced Labour).

7 Defined as “the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised” (Slavery Convention, 1927).

8 The Palermo Protocol does not specifically mention the recruitment of children for hazardous work or illegal adoption. However, in accordance with other binding international legal instruments, States Parties should take action to stop any person under 18 from being employed in hazardous work or the two should not be contingent on each other) from being adopted in violation of the applicable international law on adoption (i.e. respectively, the ILO Convention No. 182 On the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour and the Hague Convention on the Protection of Children and Co-operation in Respect of Inter-country Adoption). However, Namibia is not party to the Hague Convention.

- **Adult trafficking:** This involves recruitment or movement by a third party with an intention to exploit using coercion, deception or an abuse of authority.

Child trafficking in Namibia

The Office to Monitor and Combat Trafficking in Persons (or *TIP Office*) at the United States' Department of State annually evaluates the commitment and effectiveness of countries worldwide in terms of their response to the anti-trafficking standards set forth in the Trafficking Victims Protection Act of 2000, as amended. The TIP Office publishes an annual Trafficking in Persons Report (the *TIP Report*), in which it classifies countries according to a three-tiered scale, where Tier 1 is best and Tier 3 worst. Namibia is classified as a Special Case in the most recent TIP Report (June 2008), since the existence of a significant human trafficking problem in Namibia is suspected, but remains unsubstantiated by sufficient reliable reporting.⁹ However, Namibian government representatives have begun issuing statements concerning the incidence and prevalence of trafficking in persons in the country over the past number of years.

Following an International Organisation for Migration report on human trafficking in southern Africa, the Deputy Chairperson of the National Council in Namibia told the media that Namibia's not being mentioned in the report is not an indicator of the incidence of trafficking, but of the limited information available.¹⁰

Child trafficking is also happening here[;] all we need is to carry out a survey to determine how and where exactly.

In contrast, a Namibian police spokesperson stated that there was no evidence of human trafficking, but conceded that this might be related to the clandestine nature of the crime:¹¹

If it is being practised, it is very secret.

In the Ministry of Gender Equality and Child Welfare's country report on the African Union Solemn Declaration on Gender Equality in Africa in 2006, the statement was more definitive:¹²

Trafficking of women and girls in Namibia does not exist. However, at least one case has been reported which involved the transportation of a young Namibian woman to South Africa for forced prostitution.

Notwithstanding such statements and the official position from government institutions, in November 2007, the Southern African Development Community (SADC) Parliamentary

9 USDS (2008).

10 *New Era*, 19 April 2005; MGECW (2009).

11 (*ibid.*).

12 MGECW (2006).

Forum in Windhoek also issued an interim statement on the binational Namibian–Angolan oversight mission on strengthening the implementation of cross-border HIV and AIDS interventions by Members of Parliament from the two countries concerned.¹³ A delegation of three MPs from Angola and three from Namibia visited the regions around the countries’ common border. In Namibia, the delegation visited the Ohangwena and Omusati Regions, meeting their Governor, regional representatives of the Ministry of Health and Social Services, and health practitioners in the area. The trafficking of women and children was a central issue on the delegation’s agenda.

The delegation was informed of cases of women and children being trafficked across the two countries’ borders as well as within those countries and others in SADC:¹⁴

Children and women were reportedly trafficked and ended up serving as domestic workers and laborers in farms both around border areas and distant localities. As a result[,] they often lacked access to basic necessities such as education, health care and citizenship (due to birth registration).

Children from Angola, Botswana, South Africa, Zambia and Zimbabwe reportedly entered Namibia illegally to work on communal farms, where they are forced into domestic servitude and sexual exploitation.¹⁵ Accordingly, the United States Department of State reported that Namibia might be a country of origin and destination, especially for child trafficking.¹⁶

Child trafficking has also surfaced directly and indirectly in reports and conferences on the worst forms of child labour in Namibia. In a report on the latter topic, Debie LeBeau (2004) makes no direct reference to human trafficking; however, her report opens up questions as to whether trafficking exists in Namibia.¹⁷ She describes children as young as 8 who engage in both transactional sex for food, accommodation, and material benefits, and those who receive payments in cash. Similarly, in its study on the worst form of child labour in Namibia, the US Department of Labor reported that children in Namibia work in commercial and communal agriculture and in domestic service:¹⁸

[C]hildren from poor rural households frequently assisted extended family members in urban centres with house cleaning, cooking, and child care in exchange for food, shelter, and sometimes clothes and money.

In 2009, an article entitled “Human trafficking mirrors society’s underbelly” in the *New Era* reported on a presentation by a Namibian girl involved in a suspected case of human trafficking. She talked about her experiences at a human trafficking-based gender violence

13 SADC–PF (2007).

14 (ibid.:5).

15 IOM (2006).

16 USDS (2008).

17 LeBeau et al. (2004).

18 USDL (2008).

and HIV conference in Mexico in 2008.¹⁹ The case, as reported in the media, involved two 16-year-old girls who, in their attempt to hitchhike to Windhoek from Walvis Bay, were offered a lift by two truck drivers to Johannesburg, South Africa, where they were told they could expect clothes and other material goods, before being brought back to Namibia. They accepted this offer and, as they had no travel documents, were concealed in the truck when crossing the border post. They were then raped by the truck drivers in Potchefstroom, South Africa, and were abandoned soon thereafter. After begging on the streets, they found accommodation with a man who then demanded sex in return for their food and board. They were raped again. One of the girls contacted a police station who then discharged and deported them to Namibia. They were both HIV-positive and the one child was pregnant. Although this case involves movement and an element of deception, the fact that the girls were not exploited but rather raped and abandoned leads to definitional questions of whether this constitutes a case of trafficking.²⁰

According to a baseline assessment of human trafficking in Namibia compiled by the Ministry of Gender Equality and Child Welfare in 2009, a small number of cases of human trafficking have been identified.²¹ However, there is a possibility that more cases exist. The difficulty in ascertaining the exact status of possible cases stemmed from two general factors, according to the study:

- Limited time for follow-up investigation where the available facts were inadequate, and
- Conflation of terminology and concepts in terms of understanding trafficking, smuggling, and illegal migration.

One of the major difficulties in assessing potential trafficking cases is the lack of definitional clarity about trafficking on the part of both lay and professional personnel²² (among the interviewees and stakeholders).

There were some attempted trafficking scenarios, but their intent and outcome were unclear. For example, an interception at the border precluded full knowledge of the intended outcome of the movement of a person. Finally, in some cases, contradictory information about the existence of human trafficking would be given by individuals within the same bodies or departments, or it was unknown whether or not suspected cases had been resolved.²³

Causes of child trafficking

Human trafficking is often referred to as modern-day slavery. The causes of trafficking spring from an array of sources: violence against women and children; concealment

19 Sasman (2009).

20 (ibid.). Reference to a case in Merab Kiremire's (2006) research.

21 MGECW (2009).

22 (ibid.).

23 (ibid.).

of incest and rape; discrimination and devaluation of women and children; and greed, political instability, armed conflict, even natural disasters.²⁴ Furthermore, poverty, the lack of economic opportunities, orphanhood, a lack of control in the tourism industry, porosity of borders (especially at Oshikango and Noordoewer), and insufficient awareness of the rights of children are some of the most evident contributing factors of human trafficking in Namibia.²⁵

In order to address the root causes of child trafficking, the Southern Africa Network against Trafficking and Abuse of Children (SANTAC), in its Kopanong Declaration, urged all governments to strengthen and extend poverty eradication programmes, extend free and compulsory primary education of good quality – especially for girls, and establish birth registration as a priority. Action to prevent trafficking should include programmes to reduce the demand for services or products delivered by children who have been trafficked.²⁶

To help prevent child trafficking in Namibia, the proposed Child Care and Protection Bill makes it a crime to remove a child from the care of anyone such as a parent or caregiver who lawfully looks after such child. The Bill also defines as a crime the detention of a child in order to keep it away from a parent or other lawful caregiver. Another preventative measure is that it will be illegal to take a child out of Namibia without the consent of both the child's parents or caregivers, or without permission from a Magistrate's Court²⁷ (if the parents or caregivers are not available or are unreasonably withholding consent).

Legal framework in Namibia

Trafficking in persons is a significant human rights and development issue worldwide that affects men, women and children, and Namibia is no exception. To this effect, in 2003, Namibia ratified the United Nations Convention against Transnational Organized Crime and the additional Optional Protocol to Prevent, Suppress and Punish Trafficking in Humans, Especially Women and Children.

Until recently, Namibia had no legislation on trafficking in human beings. In fact, very few people knew anything about the concept of *human trafficking*.²⁸ Where persons came into or extended their stay in the country illegally, they were simply charged under the relevant immigration laws and deported to their countries of origin. The circumstances of their coming into the country were not of concern, or at least were never investigated.

24 Songololo (2000:27); Innocenti Research Centre (2003:5–6); Snyman (2005:282); Throng & Angeles (2005:2).

25 Kiremere (2006).

26 SANTAC (2007).

27 MGECW (2009).

28 (ibid.).

Trafficking in humans and smuggling of persons has now been criminalised in Namibia's Prevention of Organized Crime Act (POCA),²⁹ which became law on 5 May 2009. POCA does not address human trafficking and the smuggling of persons comprehensively in line with the international Conventions and Protocol, however. A large part of the Act is devoted to offences relating to racketeering, money laundering and criminal gangs. Human trafficking and the smuggling of persons are covered under the category "Other Offences".³⁰ The penalty under POCA for trafficking in humans is a fine not exceeding N\$1,000,000 or imprisonment for a period not exceeding 50 years, or both; the penalty for smuggling in persons is a fine not exceeding N\$500,000 or imprisonment for a period not exceeding 25 years, or both.

Sexual exploitation and the trafficking of women and children cannot be addressed outside the legal scope within which the phenomenon is addressed in the Namibian context. It is important to note that prostitution was never an offence in terms of common law in Namibia,³¹ and the act of engaging in sexual intercourse for reward has not been declared an offence in terms of any Namibian statute. However, various other aspects of sex work are currently criminalised by the Combating of Immoral Practices Act,³² The Children's Act,³³ and Municipal Regulations. The Combating of Rape Act³⁴ is also relevant to child prostitution.

Perhaps the most comprehensive piece of legislation that will cover child trafficking and other forms of exploitation of children in Namibia is the proposed Child Care and Protection Act. This piece of legislation is in line with the United Nations Convention on the Rights of the Child and a number of other international agreements, which stipulate that child trafficking has to be prevented. In line with these agreements, the Child Care and Protection Bill makes the trafficking of children a crime.

The draft Child Care and Protection Act defines *trafficking*, in relation to a child, as –³⁵

- ... the recruitment, sale, supply, transportation, transfer, harbouring or receipt of children, within or across the borders of Namibia –
 - by any means, including the use of threat, force or other forms of coercion, abduction, fraud, deception, abuse of power or the giving or receiving of payments or benefits to achieve the consent of a person having control of a child, or
 - due to a position of vulnerability,
- for the purpose of exploitation.

29 No. 29 of 2004.

30 Section 15, Prevention of Organized Crime Act.

31 Jordan et al., cited in LAC (2002).

32 No. 21 of 1980.

33 No.33 of 1960.

34 No. 8 of 2000.

35 MGECW (2009).

The definition also covers “the adoption of a child facilitated or secured through illegal means”. This provision will include trafficking for purposes such as –³⁶

- prostitution or other forms of sexual exploitation
- forced labour or services, prohibited child labour or other economic exploitation
- slavery or practices similar to slavery, including debt bondage or forced marriage
- servitude, or
- the removal of any body parts.

The Bill further makes it a crime for individuals or companies to assist child trafficking in any way, such as by providing accommodation for children who are being trafficked or supplying information to potential traffickers. The Bill also provides for assistance to children who are victims of trafficking, including steps to return children who have been moved across borders to their home countries, safely, and with the least possible trauma.³⁷

The following is a summary of the current laws in Namibia on prostitution and human trafficking.

Combating of Immoral Practices Amendment Act³⁸

Article 5 of the Combating of Immoral Practices Act³⁹ prohibits procuring a woman for the purpose of unlawful carnal intercourse, enticing a woman to a brothel for the purpose of prostitution, procuring a woman to make her become a prostitute or an inmate of a brothel, or causing any drug or intoxicating liquor to be taken by a woman with the intent to stupefy or overpower her so as to enable any person to have unlawful carnal intercourse with her. Article 9 of the Act makes it illegal to keep or maintain a place for the purpose of prostitution, while Article 10 declares it illegal to live wholly or in part on the earnings of prostitution.

Article 13 of the Act penalises taking any female to a brothel or detaining her against her will for the purpose of unlawful carnal intercourse with another person. Section 2 of that Article declares that a female under 16 years of age who is found in a brothel will be deemed to be held there against her will. Punishment for the offence stated in section 2 is imprisonment for up to seven years.

Article 14 makes it an offence for any male to have, to attempt to have, or to solicit a girl younger than 16 years of age for the purpose of having carnal intercourse or committing

36 (ibid.).

37 (ibid.).

38 No. 7 of 2000.

39 No. 21 of 1980.

an immoral or indecent act. Punishment is imprisonment for a period not exceeding six years, a fine, or both.

Article 9(1) and (2) of the Constitution of the Republic of Namibia state the following:

- (1) No persons shall be held in slavery or servitude.
- (2) No persons shall be required to perform forced labour.

Article 15 protects children against economic exploitation, while Article 95 obliges the state to ensure the protection and welfare of all people, even in the face of abuse and exploitation.

Forced labour is also prohibited under the Labour Code of Namibia. The latter prohibits employing any child younger than 14 years of age. In addition, section 42(d) of the Code provides that no child under the age of 15 is permitted to be employed in an industrial undertaking or mine; no child under the age of 16 is allowed to work underground; and no child under the age of 18 is permitted to work at night. Article 15(2) of the Constitution protects children under the age of 16 from hazardous work that would conflict with their education.

The stated intention of these laws is to provide for the combating of brothels and other immoral practices. The statute does not criminalise the actual act of engaging in sex for reward, but criminalises a number of the activities associated with it. Thus, under the Act it is illegal to –

- keep a brothel, which is defined as any house or place kept or used for purposes of prostitution or for persons to visit for the purposes of having unlawful carnal intercourse or for any other lewd or immoral purposes
- procure any female to have unlawful carnal intercourse with another person, to become a prostitute or to become an inmate of a brothel
- entice a female to a brothel for the purposes of prostitution, or to conceal a female who has been enticed to a brothel, and
- detain a female against her will in a brothel, or to otherwise detain her for the purposes of unlawful carnal intercourse with another person.

It is an offence to knowingly live wholly or in part on the earnings of prostitution.

Combating of Rape Act

Most of the Combating of Rape Act deals with overt forms of force or coercion. However, in terms of section 2, rape is committed in any case where a sexual act is committed with a person under the age of 14 by a perpetrator who is more than three years older than the victim. Even if the sexual act was consensual, or took place as paid sex, the crime has still been committed.

The Combating of Rape Act and the Combating of Immoral Practices Act offer similar protection to persons under the age of 16. Although these two pieces of legislation could possibly be used as tools to combat the demand for child prostitution, the defined offences are unlikely to be very effective. Who will be the complainant if a sexual act takes place between a willing child prostitute and a willing client? No charge is likely to be laid. A third party might lay the charge if the sexual encounter takes place in public.

Municipal Regulations

Sections 12 and 16 of the Street and Traffic Regulations state the following:⁴⁰

No person shall in or in view of any street or public place solicit a person in any way for the purposes of prostitution.

Nongovernmental and international organisation responses

In 2002, Terre des Hommes launched a campaign against child abuse in southern Africa. Terre des Hommes and its partners in Mozambique, Namibia, South Africa, Zambia, and Zimbabwe work against child trafficking and exploitation.⁴¹ The Legal Assistance Centre in Windhoek has also been active in this respect; in 2002 it called for the decriminalisation of prostitution in Namibia, a new law to deal with the problems of child prostitution and trafficking, and new measures to deal with sex tourism.⁴²

Also in Namibia is the Church Alliance for Orphans, which provides technical assistance and facilitates financial assistance and capacity-building of church and faith-based organisations that care for orphans and other vulnerable children in Namibia.⁴³

In addition, the African Regional Labour Administration Centre conducted a workshop in October 2003 on child labour in the agricultural sector. The workshop aimed at building on the commitment of participating countries to tackle child labour and to develop action plans toward that end. Participants attended from Egypt, Ethiopia, Kenya, Malawi, Namibia, Nigeria, South Africa, Tanzania, Uganda, and Zimbabwe.⁴⁴

Multilateral initiatives

At a March 2004 meeting in Maputo, Mozambique, police chiefs from SADC Member States decided to take strong action against both trafficking in children and trafficking in organs in the region. The decision came at the end of a five-day meeting of the Southern African Regional Police Chiefs' Cooperation Organisation, under the theme "Violence

40 Government Notice 9 of 1930, as amended by General Notice 27 of 1994.

41 Spielmans (2002).

42 Hamata (2002).

43 *American Jewish World Service*, 15 July 2004.

44 *Xinhua General News Service*, 17 October 2003.

against women and children".⁴⁵ SADC includes Angola, Botswana, the Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.⁴⁶

2010 FIFA World Cup dilemma

To ensure a lasting social legacy, child protection within South Africa and the southern African region needs to be given primary consideration by the event organisers and the government during the build-up to the 2010 FWC. Non-governmental organisations (NGOs) and networks like SANTAC have a key responsibility to advocate and lobby for child protection measures to be put in place as part of the 2010 FWC operational and security plans. Molo Songololo calls on the South African NGO community to establish a national campaign in partnership with government to realise and implement measures to secure child protection during 2010 and beyond. Let 2010 be a kick-off for effective child protection!

An assessment of the impact of the 2010 FWC, conducted by Molo Songololo and supported by the Habitat International Foundation and SANTAC, indicates that the 2010 FWC will create conditions that will increase –⁴⁷

- demand for sexual services, including sexual services from children
- demand for cheap and exploitable labour, which will lead to children being forced to work in various legal and illegal sectors
- the number of children left unattended and unsupervised, as schools will be closed for six weeks during the event
- alcohol and drug consumption, which will fuel social crimes and crimes against children, particularly sexual offences, and
- opportunities for criminal elements to ply their trade, including trafficking and the exploitation of children.

A further concern is the relaxation of visa controls before, during and after the FWC, which could provide opportunities for traffickers and exploiters to move children across South Africa's borders for purposes of labour or sexual exploitation. In recent months, NGOs have reported an increase in child labour practices, such as children forced to beg and sell goods on the streets, as well as the prostitution of children.⁴⁸

As a direct result of Molo Songololo's advocacy and lobbying, the National Department of Social Development drafted a Child Protection Strategy for the 2010 FWC in partnership with NGOs. The strategy highlights the need to minimise risk factors for the abuse, exploitation and trafficking of children during the event. A major limitation of the strategy is that it does not address the allocation of financial and other resources for the

45 *Africa News*, 20 March 2004.

46 *Agence France Presse*, 4 September 2003.

47 (ibid.).

48 (ibid.).

development and implementation of 2010 FWC Child Protection Plans.⁴⁹ It is feared that the high vulnerability experienced by South African children place them at risk – which will increase during the global soccer event in 2010.

Conclusion

It is incomprehensible that trafficking in human beings should take place in the 21st century –incomprehensible but true. Trafficking leaves no land untouched, including our own.
Colin Powell, former Secretary of State, United States of America

Human trafficking is as much a reality in the SADC region as in the world. Due to the FWC being hosted in South Africa – a SADC country – in 2010, it is urgent for all Member States to work together in order to minimise the risk of human trafficking and child abuse in connection with the event.⁵⁰ Many trafficking cases may be obvious. A scenario in which children are recruited, transported to another country, never allowed to leave a commercial farm, and work around the clock clearly fall within the definition of *trafficking in persons* and such conduct has to be criminalised as such. Similarly, cases involving children recruited or harboured and forced to provide sexual services unmistakably meet the definition of *trafficking in persons*. Some cases, however, may be more complicated. When in doubt as to whether a particular circumstance meets the definition or not, attention should be paid to both the definition contained in the Palermo Protocol and the constituent elements of trafficking in persons as defined in POCA, the Child Care and Protection Bill, and other domestic legislation. Where possible, police officers and other law enforcement authorities should consult with prosecutors to assess whether a particular set of facts meets the definition of *trafficking in persons*, as reflected in domestic legislation.

The phenomenon of trafficking has spread its tentacles to all corners of the world, reaching into all sectors – political, economic, crime, health, migration and, most importantly, human rights – and the ripple effects are colossal. There is no contradicting the truly global nature of the crime of human trafficking with virtually no country left untouched by the movement and bondage of human beings. Without real commitment to eliminate this heinous activity, it will not only continue – it will worsen and grow. To this end, it is highly recommended that the Namibian government consider the following strategies advocated by Songololo⁵¹ for child protection during the 2010 FWC in particular, and beyond:

- Educate and train service providers, border patrol units, airport staff, hotel and guest house operators, tour and transport services, police, and social development workers to identify, refer and assist children in need and difficulty
- Monitor the internal and cross-border migration of children, and establish referral and direct assistance protocols with local and regional stakeholders

49 (ibid.).

50 SANTAC (2008b).

51 SANTAC (2009).

- Monitor and assist children forced to live and work on the streets, i.e. street children, children begging and selling goods on the street, and those working in backyard industries as taxi fee collectors, etc.
- Place all child care and protection services on full alert
- Develop a referral protocol for the immediate and direct assistance to children in need including those who are lost and those who go missing, and
- Establish a rapid response team to address serious crimes against children.

Although these measures are not a panacea for addressing the problem of human trafficking, especially the trafficking of children for sexually exploitative purposes during the 2010 FWC, it is imperative that the government works closely with all other SADC Member States, particularly its immediate neighbours, for the implementation of these measures to prevent the crime of trafficking.

References

- Africa News*, 20 March 2004; "Mozambique: Police chiefs against trafficking in human beings".
- Agence France Presse*, 4 September 2003; "Globalization Fuelling crime in southern Africa".
- American Jewish World Service*, 15 July 2004; "Capacity building for Joint Ecumenical Committees and members of CAFO"; available at http://www.ajws.org/index.cfm?section_id=3&page_id=96; last accessed 22 September 2009.
- Dickens, Charles. 1861. *Great expectations*. London: Chapman & Hall.
- Hamata, Max. 2002. "Tax sex workers, says new report". *The Namibian*, 8 October 2002.
- Innocenti Research Centre. 2003. *Trafficking in human beings, especially women and children, in Africa*. Florence: United Nations Children's Fund.
- IOM/International Organisation for Migration. 2006. "Angola: New counter-trafficking initiatives under way". *Eye on Human Trafficking*, 7; available at www.iom.org; last accessed 13 June 2009.
- Kiremere, M. 2006. *Trafficking for sexual exploitation: Adolescents in Namibia*. Summary of findings available at www.queensu.ca; last accessed 12 April 2009.
- Legal Assistance Centre. 2002. *Whose body is it? Commercial sex work and the law in Namibia*. Windhoek: LAC.
- LeBeau, Debie, Dawia Bosch, Debbie Budlender & Annalize Fourie. 2004. "Towards the elimination of the worst forms of child labour". Pretoria: Pollination Publishers.
- MGECW/Ministry of Gender Equality and Child Welfare. 2006. *Namibia's Country Report on the African Union Solemn Declaration on Gender Equality in Africa*. Windhoek: Directorate of Gender Equality and International Affairs.
- MGECW/Ministry of Gender Equality and Child Welfare. 2009. *The Draft Child Care and Protection Act: Issues for public debate. Booklet 1*. Windhoek: MGECW/ Legal Assistance Centre/United Nations Children's Fund.

- MGECW/Ministry of Gender Equality and Child Welfare. 2009. *Baseline assessment of human trafficking in Namibia*. Windhoek: MGECW.
- Molo Songololo. 2000. *The trafficking of children for purposes of sexual exploitation – South Africa*. Cape Town: Molo Songololo.
- SADC–PF/Southern African Development Community Parliamentary Forum. 2007. *Interim statement on the bi-national oversight mission on strengthening the implementation of cross-border HIV/AIDS interventions by members of parliament from Angola and Namibia*, 18–25 November 2007. Windhoek: SADC–PF.
- Sasman, Catherine. 2009. *Namibia: Human trafficking mirrors society's underbelly*, 6 February. Available at <http://allafrica.com/stories/200902060690.html>; last accessed 11 February 2009.
- SANTAC/Southern Africa Network against Trafficking and Abuse of Children. 2007. *SANTAC Conference Declaration*. Stop Child Trafficking: A Southern African Regional Conference Exploring Strategies for Prevention and Intervention. Kopanong Hotel and Conference Centre, Johannesburg, South Africa, 27–28 March 2007. Johannesburg: SANTAC.
- SANTAC/Southern Africa Network Against Trafficking and Abuse of Children. 2008a. *SANTAC Gazette*, 3(January–June):6.
- SANTAC/Southern Africa Network against Trafficking and Abuse of Children. 2008b. *SANTAC Gazette*, 4(July–December):2–3, 6.
- SANTAC/Southern Africa Network against Trafficking and Abuse of Children. 2009. *SANTAC Gazette*, 5(January–June):3.
- Snyman, R. 2005. “Victims of human trafficking”. In Davis, L & R Snyman (Eds). *Victimology in South Africa*. Pretoria: Van Schaik, p 282.
- Spielmanns, Heike. 2002. *Launch of the Regional Southern Africa Campaign against Child Abuse, Maputo, Mozambique, 16 June 2002*. Available at <http://www.againstchildabuse.org/article/articlestatic/6/1/7/>; last accessed 10 July 2009.
- Throng, Thanh-Dam & Maria Belen Angeles. 2005. *Searching for best practices to counter human trafficking in Africa: A focus on women and children*. Paris: United Nations Educational, Scientific and Cultural Organisation.
- USDL/United States Department of Labor. 2008. *Findings on the worst forms of child labor – Namibia*. Available at www.unhcr.org; last accessed 12 July 2009.
- USDS/United States Department of State. 2008. *Trafficking in Persons Report 2008: Special cases – Namibia*. Available at www.unhcr.org; last accessed 12 July 2009.
- Xinhua General News Service*, 17 October 2003; “Regional Workshop on Combating Worst Forms of Child Labor Concludes”.

The Ombudsman for Children in Poland¹: A model for Namibia?

Agata Rogalska-Piechota

Introduction

Even though the Ombudsmen system is difficult to evaluate,² the role of ombudsman or other possible independent national human rights institutions in the promotion and protection of the rights of the child is indisputable. States all over the world, encouraged by relevant provisions of the Convention on the Rights of the Child,³ ensure that the children's issues are not excluded from the scope of interest of the domestic Ombudsman or their collective equivalent. At the same time, it is vital to remember that several states have decided to abandon the model of establishing one universal independent national human rights protection body, which serves all possible groups of individuals, and have instead constituted at least one complementary institution of narrow and specialised character. A good example of a state that decided to introduce an institution focused exclusively on children is the Republic of Poland, a country that in 1978 initiated in the United Nations Commission on Human Rights work on the Convention on the Rights of the Child. There, besides the 'general' Ombudsman, is also the Ombudsman for Children.⁴ The institution, which is present in the Polish domestic legal system since 1997 and was primarily modelled on its Norwegian equivalent,⁵ has gone long way to the point where it is now – being perceived as one of the most effective Ombudsmen for

1 The notion *Ombudsman for Children* is an indirect translation of the Polish expression *Rzecznik Praw Dziecka*, used by the body in itself in the international relations. See, inter alia, the European Network of Ombudspersons for Children's website <http://crin.org/enoc/>; last accessed 17 September 2009.

2 Peters (2002:319).

3 Article 4 of the Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by United Nations General Assembly Resolution 44/25 of 20 November 1989, entry into force 2 September 1990.

4 Of course it is possible to enumerate other 'specialised ombudsmen', such as German and Swedish ones, dealing with military affairs, or Canadian ombudsmen such as a Prison Ombudsman, a Transportation Ombudsman, a Commissioner of Official Languages, a Human Rights Commissioner, and a Privacy Commissioner. See Peters (2002:319).

5 The Norwegian Ombudsman for Children (Nor. *Barnembudet*) is the oldest institution of this kind in the world. It was established by the Statute No. 5 of the Ombudsman for Children of 6 March 1981, with subsequent amendments. The instructions for the Ombudsman for Children were laid down by the Royal Decree of 11 September 1981. See the Norwegian Ombudsman for Children's website <http://www.barneombudet.no/english/>; last accessed 17 September 2009.

Children in the world, with high scope of powers, which can possibly even be extended by the domestic Parliament.

In this respect it might be advisable to make short analysis of the above-mentioned institution in order to clarify to what extent this typically North-European concept of safeguarding rights of the child within the national legal system, combined with a unique Polish approach to the scope of the Ombudsman's powers, may serve as model for Namibia.

History of the Ombudsman for Children in Poland

In order to understand present position of the Polish Ombudsman for Children, its relations with the 'general' Ombudsman and its significance for the legal system one should take a trip back in time and make a few historical comments.

First of all, it should be emphasised that after political transformation in 1989 in Central and Eastern Europe the institution of the Ombudsman became one of the pillars of Polish democracy. It gained its constitutional framework in 1989, after relevant amendments were made to the 1952 Constitution.⁶ It also explored all the powers within its broad mandate, deriving from the 1987 Ombudsman Act.⁷

To make this picture complete it should be added that at the time of debate concerning the position of the Ombudsman for Children the institution of 'general' Ombudsman had a strong hold and a well established de facto and de jure position.⁸ To illustrate the role of this institution in the Polish society both in 1990s and 2000s one may refer to the statement of J Kochanowski, the Fifth-Term Ombudsman, which reads as follows:⁹

The Polish experience may not be typical of the majority of countries in which the institution of the Ombudsman operates. This is because the range of competencies of the Polish

6 Namely, on 8 April 1989 the Constitution Amending Act (Pol. *ustawa o zmianie Konstytucji PRL*) of 7 April 1989 entered into force (*Dziennik Ustaw* of 1989, No. 75, item 444), which contained Article 36a, devoted exclusively to the legal position of the Ombudsman.

7 The institution of the Ombudsman, modelled on Norwegian model, was established by the Polish Parliament in 1987. The above-mentioned body was designed as an independent and autonomous one-man institution, responsible exclusively to the Parliament. See the Ombudsman Act (Pol. *ustawa o Rzeczniku Praw Obywatelskich*) of 15 July 1987 (*Dziennik Ustaw* of 2001, No. 14, item 147, with subsequent amendments).

8 Actually, the mandate and scope of powers of the Ombudsman have not changed much since establishment of this institution in 1987. To simplify, it should be added that all the wordings of the Act connected with socialistic regime was replaced by concepts associated with democratic state. However, the basic powers of the Ombudsman, such as its possibilities to interact with the courts of justice, are attached to this body since its very beginning.

9 Statement made by Dr J Kochanowski, the Ombudsman of the Republic of Poland on 11 July 2006 in Vienna during the European Ombudsman Meeting IOI – European Region. See <http://www.ioi-europe.org/news/proceedings.pdf>, pp 51–52; last accessed 17 September 2009.

Ombudsman is very broad. It does not exclude any public bodies from being monitored. The Ombudsman has the right to appeal against acts of a general nature and also in individual cases to independent bodies, i.e. the Constitutional Tribunal, administrative courts or other courts. Similarly, he can question the legality of court judgments. Obviously this is done exclusively within the binding frameworks of judicial procedures on the principles similar to those affecting parties in the proceedings ... This does not mean, however, that the Polish Ombudsman operates only in judicial trial forms or in administrative proceedings. Like Ombudsmen in other countries he uses the form of appeals (the so-called recommendations) in order to change a state inconsistent with the law or undertake a necessary action (in the case of inactivity) ... The success of the institution of the Ombudsman consists in the following:

- the guarantee of general and free access to his office;
- there is no binding formalised procedure;
- there are no time-limits;
- it can act against the inactivity and tardiness of the monitored bodies;
- it can inspire the undertaking of pro-civic legislation through the appropriate state bodies by appealing for the passing, amending or repealing of defined acts of law;
- its authority and the right to research cases *in situ*, including without prior warning, allow for thoroughness in establishing and revealing shortcomings;
- the right to undertake cases *ex officio*, which allows for the undertaking of various important social issues and also for helping those incapable of coping by themselves and requiring aid;
- the possibility of eliminating flawed administrative acts, court judgements and normative acts, including laws, and of shaping the appropriate practice in the activity of public bodies. ...
- finally, it informs Parliament and public opinion about the state of the observance of freedom and human and civil rights in the country and presents suggestions about undertaking remedial measures if irregularities have been declared.

On the other hand, it must be remembered that there are also limits on the possibilities of the Ombudsman's actions, which must not be underestimated, such as:

- in contrast to tribunals and courts, he does not have in any country, including Poland, the competence to impose his standpoint on the subjects being monitored, to settle disputes or to close a case completely as regards its essence;
- his effectiveness depends on the force of his argument and the reactions of the addressees to the conclusions directed to them by the Ombudsman. It also depends on his authority.

In early 1990s it became obvious that Poland needed a new constitutional order. On 23 April 1992 the Constitutional Act regulating the procedures of preparation and enacting of a new Constitution was adopted.¹⁰ On 30 October 1992, after free elections, the Constitutional Commission of the National Assembly started its work.¹¹ Then the discussion concerning the creation of the Ombudsman for Children arose. At the same

10 The Constitutional Act on Preparation and Enacting Procedure of the Constitution of Republic of Poland (Pol. *ustawa konstytucyjna o trybie przygotowania i uchwalenia Konstytucji Rzeczypospolitej Polskiej*) of 23 April 1992 (*Dziennik Ustaw* of 1992, No. 67, item 336, with subsequent amendment).

11 The first Commission of the National Assembly, that is a commission of the combined houses of *Parliament*, started its works after the elections to the First Term Sejm and the Second Term Senate. See Chruściak & Osiałyński (2001).

time it was obvious that the institution of the 'general' Ombudsman would remain the constitutional body. Moreover, its broad mandate and scope of powers was not to be subject to any limitations.

The drafts of the new Constitution reflected only to some extent the disputes over guaranteeing constitutional protection of the rights of the child that were found in national discussion as well as in parliamentary debates in the early 1990s. To summarise this issue it should be stated that almost every draft of the Constitution included provisions regulating the matter. The approach varied from a civil and political rights orientation to a social and economic rights one and depended on the political views of the drafters. The majority of concepts associated the child with its family and was focused on rights of the child protection through safeguarding the rights of the family. Only one draft signed by the parliamentarians representing the major left wing party in Poland contained provisions establishing an institutional protection of the rights of the child, namely the Ombudsman for Children. Despite that fact, the issue of whether to provide Poland with the Ombudsman for Children appeared in the work of the Constitutional Commission of the National Assembly and had been discussed since 1994 until 1997.¹² The parliamentarians, satisfied with the work of the Ombudsman's Office, were not unanimous about whether it was necessary to establish such an additional human rights protection mechanism. One of the recurring ideas was to create a Vice-Ombudsman, that would serve exclusively for children. Another concept was to create a kind of child-oriented administrative institution at the ministerial level, such as the Government's Plenipotentiary for Children. One other idea was to focus on strengthening the child-care administration by creating relevant institutions, similar to the German *Jugendamt*,¹³ at the local level.

The discussion crossed the parliamentarian walls and featured into the daily newspapers. However, even though the then Ombudsman, T. Zieliński, was against the idea of establishing an institution of the Ombudsman for Children, claiming that children's issues were covered by his Office's daily work,¹⁴ the press coverage revealed a deep desire by the public for a new child-oriented body that would be based on constitutional provisions.¹⁵ At the same time, there was no consensus at all on the possible relations between the 'general' Ombudsman and the Ombudsman for Children. Consequently, on 21 March 1997 the National Assembly adopted a provision, which composes today's Article 72

12 Jaros (2006).

13 Jaros (2006:52–57).

14 See statement of T Zieliński, the Second-Term Ombudsman, published on 9 September 1994 in *Gazeta Wyborcza* newspaper, quoted in Jaros (2006:51).

15 The headlines of the articles speak for themselves: “*Dzieci czekają na swego rzecznika*” (“Children are waiting for their Ombudsman”) or “*Spór o rzecznika praw dziecka*” (“Dispute about the Ombudsman for Children”). See, among others, Łopatkowa (1995, quoted in Jaros 2006:51).

(4) of the Constitution,¹⁶ that established the Ombudsman for Children. However, the competence and procedure for appointment of the Ombudsman for Children were left to be specified by statute.¹⁷

The parliamentary debate over the Ombudsman for Children Act lasted from July 1998 to January 2000. Finally, on 6 January 2000 the Parliament adopted the Ombudsman for Children Act.¹⁸ The text was a compromise between politicians of opposing views. It did not contain any requirements for the candidates. As far as the position of the new Ombudsman was concerned, the Act was meeting half-way a concept of an ombudsman exclusively for children and an ombudsman for children and family.¹⁹ Moreover, the dispute about the relations between the newly established institution and the ‘general’ Ombudsman influenced the scope of its powers. Basically, the Ombudsman for Children was equipped mainly with powers which would follow the approach of alternative dispute resolution, such as the right to make recommendations and requests. However, this institution was not entitled to use the legal powers, such as the ability to initiate proceedings before competent authorities or possibility to make cassation appeals against final court’s judgments and administrative decisions. Those powers remained within the domain of the ‘general’ Ombudsman. It became possible for the Ombudsman for Children, however, to transfer its cases to the ‘general’ Ombudsman, if the Ombudsman for Children was of the opinion that the usage of legal powers was necessary.²⁰ On such occasions it was compulsory for the Ombudsman to deal with the case.²¹

Since adoption of the above-mentioned statute, three Ombudsmen and one Ombudswoman for Children have been appointed.²²

The powers of the Ombudsman for Children were obviously weaker than the ones associated with the ‘general’ Ombudsman. Consequently, the dispute about the role and position of this body did not come to an end at the moment of adoption of the Ombudsman for Children Act. After several years, that is in 2008, the Ombudsman for Children Act was amended, in order to meet society’s expectations concerning

16 The Constitution of the Republic of Poland (Pol. *Konstytucja Rzeczypospolitej Polskiej*) of 2 April 1997 (*Dziennik Ustaw* of 1997, No. 78, item 483, with subsequent amendments).

17 See stenographic record of the Third Meeting of the National Assembly of 21 March 1997, p. 29, quoted in Jaros (2006:54).

18 *Dziennik Ustaw* of 2000, No. 6, item 69, with subsequent amendment.

19 Biuletyn No. 1669/III. Meeting of the Commission of Education, Science and Youth, Commission of Social Policy and Family and Commission of Justice and Human Rights of 22 June 1999, p 2.

20 One may say that the legal position of the Ombudsman for Children originally resembled a little bit the situation of the ones to whom it was designed to serve, as children, generally speaking, execute their rights while being represented by adults.

21 Jaros (2006:60–67).

22 Namely, the previous Ombudsmen for Children were M Piechowiak, P Jaros, and E Sowińska. The Office is currently headed by M Michalak.

the scope of the body's powers.²³ However, it should be stated that even though the Parliament finally decided to equip the Ombudsman for Children inter alia with several new legal powers, elevating its position with the powers of the 'general' Ombudsman, the concept of combining the Office of the 'general' Ombudsman and the Ombudsman for Children was also put forward during the parliamentary debate. The idea of removal of the Ombudsman for Children as an institution separate from the Ombudsman was represented mainly by the Ombudsman's Office. J Kochanowski, the Ombudsman, and M Wróblewski, the Director of the Constitutional and International Law Unit of the Ombudsman's Office, tried to persuade the parliamentarians that children's issues are covered already by the Ombudsman, and that the suggested division into human and civil rights and rights of the child was artificial. Their statements were supported also by presenting financial arguments coming from the assumption that having two bodies of overlapping competencies was expensive for the state's budget.²⁴

Therefore, the 2008 Amendment to the Ombudsman for Children Act was adopted, strengthening the position of the Ombudsman for Children. However, it is being still postulated by the Ombudsman for Children as well as by his supporters that the Polish 1997 Constitution should be amended in order to bring into alignment all its powers with the powers of the 'general' Ombudsman.²⁵ As for now the 'general' Ombudsman remains the only independent human rights protection body that is entitled to make application to the Constitutional Tribunal requesting examination of matters such as the conformity of statutes and international agreements to the Constitution, the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute, the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes and the conformity to the Constitution of the purposes or activities of political parties.²⁶ Currently, having regard to the 2008 Amendment to the Ombudsman for Children Act, it may be stated, with some slight hesitation, that in future strengthening the child-oriented institution would be more likely scenario than quashing it or attaching it to the 'general' Ombudsman.²⁷

23 The Amendment to the Ombudsman for Children Act (Pol. *ustawa o zmianie ustawy o Rzeczniku Praw Dziecka oraz ustawy o wynagrodzeniu osób zajmujących kierownicze stanowiska państwowe*) of 24 November 2008; (Dziennik Ustaw of 2008, No. 214, item 1345).

24 Biuletyn No. 677/IV. Meeting of the Commission of Education, Science and Youth, Commission of Social Policy and Family, 27 May 2008, p 10.

25 Biuletyn No. 677/IV (op. cit.), p 9.

26 Article 191(1) 1 of the 1997 Constitution.

27 On 25 September 2009 in the Sejm took place the first hearing of the Senate's project of another amendment to the Ombudsman for Children Act (Pol. *senacki projekt ustawy o zmianie ustawy o Rzeczniku Praw Dziecka oraz niektórych innych ustaw*). According to the Senate's proposal the powers of the Ombudsman for Children would be brought into alignment with the powers of the 'general' Ombudsman in respect to the right to stand before the Supreme Court and the Constitutional Court. For the Senate's project of the Amendment of the Ombudsman for Children Act (item no. 2266), see the Sejm website <http://orka.sejm.gov.pl/projustall6.htm>; last accessed 30 October 2009.

Legal position of the Ombudsman for Children

As it was stated above the Polish Ombudsman for Children is a constitutional body. The legal basis for its establishment is Article 72 (4) of the 1997 Constitution, which is found in the Subchapter “Economic, Social and Cultural Freedoms and Rights” of Chapter II, titled “The Freedoms, Rights and Obligations of Persons and Citizens”.²⁸ Article 72 of the 1997 Constitution, which deals with the rights of the child, reads as follows:

Article 72

1. The Republic of Poland shall ensure protection of the rights of the child. Everyone shall have the right to demand of organs of public authority that they defend children against violence, cruelty, exploitation and actions which undermine their moral sense.
2. A child deprived of parental care shall have the right to care and assistance provided by public authorities.
3. Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child.
4. The competence and procedure for appointment of the Ombudsman for Children shall be specified by statute.

As was articulated above, the relevant statutory provisions that regulate the position of the Ombudsman for Children are included in the Ombudsman for Children Act. According to Article 1(2) of the Act the institution stands for the protection of rights of the child set forth the 1997 Constitution, the Convention of the Rights of the Child and other legally binding provisions, with respect, however, for the rights and obligations of parents. According to Article 3 (2) the Ombudsman acts to protect the rights of the child, such as the right to life and the right to health care, the right to grow up within a family, the right to adequate social conditions and the right to education. The above-mentioned list is illustrative, not exhaustive. It should be also emphasised that according to Article 1 (3) of the Ombudsman for Children Act the body, while executing its powers, should take into account the best interests of child and the fact that its family constitutes the natural environment for the child’s growth. The Act also establishes that the concept *child* is reserved for every human being from its conception until the age of majority.²⁹ Such a legal construction makes the Ombudsman for Children competent also in matters concerning bio-medical issues related to the beginning of life as well as to the rights of the foetus or the embryo.³⁰

The Ombudsman for Children is entitled to take actions, in a manner compatible with the relevant provisions of the Ombudsman for Children Act, that would aim to ensure full and harmonic growth of the child, with respect for its dignity and subjectivity.³¹

28 Associating the rights of the child with economic, social and cultural freedoms and rights is an effect of the compromise described above. See also Jaros (2006:40–57).

29 Article 2(1), Ombudsman for Children Act.

30 Rzewuski (2007); Żelichowski (2000); Żelichowski (2003).

31 Article 3(1), Ombudsman for Children Act.

The powers of the Ombudsman are similar to those exercised by the other European Ombudsmen for children.³²

According to Article 9 the office of the Ombudsman for Children may take actions on its own motion, taking into account, particularly, any information coming from citizens or their organisations which indicate the alleged violations of the rights or the welfare of the child. Since the adoption of the Amendment to the Ombudsman for Children Act in 2008 the Ombudsman for Children is obliged to inform individuals and organisations, which served as a source of information, about his standpoint concerning the case, and about the outcome of this performance whenever the Ombudsman decides to perform an action.

According to the relevant provisions of the Ombudsman for Children Act in the amended version, the body has several powers at its disposal. First of all, it is possible for the Ombudsman to investigate, including without prior notice, every case *in situ*.³³ It is entitled to demand from authorities, organisations or institutions both explanation and information as well as providing it with relevant documentation, including documents covering personal data.³⁴ The Ombudsman is also authorised to institute civil proceedings and to participate in pending proceedings, executing the same powers as the public prosecutor.³⁵ The Ombudsman for Children may also demand from relevant prosecutors the institution of preparatory proceedings, that is enquiry or investigation, in cases concerning offences.³⁶ The body is also entitled to initiate administrative proceedings, make complaints to the administrative court and to participate in pending proceedings, executing the same powers as the public prosecutor³⁷ as well as to make punitive motions

32 Jaros (2006:108).

33 Article 10(1)1, Ombudsman for Children Act.

34 Article 10(1)2, Ombudsman for Children Act.

35 Article 10(1)3, Ombudsman for Children Act. It should be specified that according to Article 2 of the Public Prosecutor's Office Act (Pol. *ustawa o Prokuraturze*) of 20 June 1985 (Dziennik Ustaw 1985, No. 31, item 138 with subsequent amendments), so-called non-prosecutorial powers of the public prosecutor are present in civil and administrative proceedings, as well as in their mutations (ex. tax proceedings) that derive from the position of this institution as an organ of legality, designed to "preserve the rules of law and to watch over prosecuting offences". As an example one may quote Article 7 of the Code of Civil Proceedings (Pol. *Kodeks Postępowania Cywilnego*) of 17 November 1964 (Dziennik Ustaw of 1964 No. 43, item 296 with subsequent amendments), according to which the prosecutor may demand the institution of proceedings in any case, as well as to participate in any proceedings already pending, if in his assessment, this is required to protect the rule of law, citizens' rights or the interest of society generally. In the non-property cases in the field of family law, the prosecutor may institute litigation only in the cases stipulated in law. Even though it does not transpire from the above-mentioned article, it should be stated that, further regulations empower the prosecutor on a very broad scale. Basically, as far as civil proceedings are concerned, only issuing a divorce or a separation lawsuit remains outside its competences.

36 Article 10(1)4, Ombudsman for Children Act.

37 Article 10 (1) 5 Ombudsman for Children Act.

in cases prosecuted as petty offences.³⁸ Apart from that, the Ombudsman for Children is empowered to command carrying out of research, preparation of expertise or the making of an opinion for his own purposes.³⁹ The demand for confidentiality of alleged victims and informers is protected, as the Ombudsman is allowed not to disclose the information that could lead to revealing the identity of the complainant, if it would be necessary to protect freedoms, rights and interests of individuals.⁴⁰ The Ombudsman for Children is also empowered to make a request to competent authorities, organisations or institutions for undertaking necessary actions for the benefit of the child that would be within the scope of the authority.⁴¹ It is compulsory for the above-mentioned entities not only to undertake such actions⁴² but also to immediately inform the Ombudsman for Children, within no later than 30 days, about their actions or positions taken.⁴³ In instances when the entities mentioned above failed to take the action requested by the Ombudsman for Children or the Ombudsman for Children does not share their position, it may refer the matter to the competent superior body asking for it to take the necessary action.⁴⁴ Moreover, whenever the Ombudsman for Children is of the opinion that the rights or welfare of the child were infringed by the above-mentioned entities he is entitled to demand disciplinary proceedings or imposition of regulatory sanctions.⁴⁵ The authorities, organisations and institutions are obliged to cooperate with the Ombudsman for Children by, *inter alia*, providing his office with access to their case-files, and facilitating it with relevant information and explanations, including the ones concerning the factual and legal basis for their decisions.⁴⁶ The indicated powers, present in above-mentioned form in the Polish legal system since 2008, make the institution of the Polish Ombudsman for Children unique in comparison to other independent children's rights protection bodies.⁴⁷

The Ombudsman for Children also has at his disposal sufficient non-judicial measures. He is tasked to cooperate with societies, civil society movements, other associations and foundations acting for the rights of the child.⁴⁸ He presents to the competent authorities, organisations and bodies his evaluation and conclusions which aim at securing the

38 Article 10(1)6 Ombudsman for Children Act.

39 Article 10(1)7 Ombudsman for Children Act.

40 Article 10(2) Ombudsman for Children Act.

41 Article 10a(1) Ombudsman for Children Act.

42 Article 10a(2) of the Ombudsman for Children Act.

43 Article 10a(3) of the Ombudsman for Children Act.

44 Article 10a(4) of the Ombudsman for Children Act.

45 Article 10a(5) of the Ombudsman for Children Act.

46 Article 10b of the Ombudsman for Children Act.

47 Before the 2008 Amendment the Ombudsman for Children, according to former Article 10 of the Ombudsman for Children Act, was entitled to ask authorities, organisations or institutions for explanations and information as well as to provide it with relevant documentation, including documents covering personal data. It could also ask the competent authorities, including the 'general' Ombudsman, organisations or bodies for undertaking necessary actions for the benefit of the child that would be within their scope of the authority.

48 Article 11a, Ombudsman for Children Act.

effective protection of the rights and welfare of the child and to improve the procedures adopted by the above-mentioned authorities, organisations and bodies.⁴⁹ He is also entitled to make a referral to the competent authorities demanding execution of their legislative initiative powers as well as to encourage them to pass new laws or to amend existing laws.⁵⁰ The above-mentioned authorities are supposed to state their attitude towards the Ombudsman's request within a 30 day period.⁵¹ Moreover, the Sejm and the Senate are annually, no later than 31 March each year, to be provided by the Ombudsman for Children's with information concerning his activities as well as with his remarks regarding observance of the rights of the child.⁵² The Ombudsman's report is distributed to the public.⁵³

Independence of the Ombudsman for Children

The Polish Ombudsman for Children is designed to be independent, which can be inferred from Article 7(1) of the Ombudsman for Children Act. According to this provision the body shall be independent from other state authorities and responsible exclusively to the Sejm on terms prescribed by law. The rule indicated above also arises from other provisions constituting the position of this body within the legal framework, method of the Ombudsman's appointment and removal from office, funding, remuneration and personnel issues as well as accountability.

First of all, with regard to the institution's independence, even though the majority of the provisions concerning the Ombudsman for Children are of statutory character, its anchorage in the 1997 Constitution is of great effect as it underlines the permanence of the institution: the constitutional amendment process is specifically designed so as to prevent frequent amendment.⁵⁴ One may observe the impact of the institution's establishment based on the constitutional provision while examining the outcome of the 2008 debate concerning possible amendments to the Ombudsman for Children Act.⁵⁵ As stated above, even though the view was expressed that the body could possibly be combined with the 'general' Ombudsman, making the Ombudsman for Children the first Vice-Ombudsman that would serve exclusively for the purposes of preserving the rights of the child, the concept of quashing this institution was not subject to parliamentary debate. Furthermore, this argument was in fact ignored, as parliamentarians were aiming to strengthen the powers of the Ombudsman for Children and voted for the Amendment.

Another aspect which is relevant to the independence of the Ombudsman for Children is the method of his/her appointment and removal from office. In Poland, the Ombudsman

49 Article 11(1), Ombudsman for Children Act.

50 Article 11(2), Ombudsman for Children Act.

51 Article 11(3), Ombudsman for Children Act.

52 Article 12(1), Ombudsman for Children Act.

53 Article 12(2), Ombudsman for Children Act.

54 For an identical opinion concerning the institution of Namibia's Ombudsman, see Ruppel-Schlichting (2008).

55 Biuletyn No. 677/IV (op. cit.), p. 3-13.

for Children is appointed by the Sejm with the approval of the Senate on the proposal of the Sejm Martial, the Senate Martial, a group of no fewer than 35 Members of Sejm or a group of no fewer than 15 Senators.⁵⁶ The Sejm votes over the the procedure of proposing candidates,⁵⁷ and subsequently over proposed candidates. After appointment of the Ombudsman for Children the Sejm Martial sends promptly, that is without undue delay, the Sejm's resolution to the Senate Martial.⁵⁸ From that moment the Senate has one month to give its consent by resolution to the appointment of the Ombudsman for Children elected by the Sejm. Lack of adoption of such a resolution by the Senate means its silent consent.⁵⁹ In instances where the Senate opposes the choice made by the Sejm, the Sejm is supposed to repeat the whole procedure and appoint another person.⁶⁰

Another safeguard for the Ombudsman for Children independence is the construction of its term of office. It lasts 5 years,⁶¹ which does not overlap with the 4 year term of the Parliament.⁶² The same person may serve a maximum two subsequent terms.⁶³ The term of office of the Ombudsman is terminated in case of his/her death or removal from office.⁶⁴

The Ombudsman for Children's independence is also supported by the conditions of the removal process. Before the expiry of the Ombudsman for Children's term of office, the Sejm, acting with the approval of the Senate, is empowered to remove him/her from the office for specified causes set out by law, such as the Ombudsman's formal resignation, his/her incapacity on health grounds confirmed by the relevant medical certificate, gross misconduct or conviction for an intentional offence.⁶⁵ The voting procedure concerning the Ombudsman's removal from the office resembles the process of his/her appointment.⁶⁶

As was stated above, it is possible for the Sejm to remove the Ombudsman for Children from office in cases of his/her conviction for an intentional offence. In this respect it should be added that the Ombudsman enjoys immunity, as he/she cannot be subject to

56 Article 4(1), Ombudsman for Children Act.

57 Article 4(2), Ombudsman for Children Act.

58 Article 4(3), Ombudsman for Children Act.

59 Article 4(4), Ombudsman for Children Act.

60 Article 4(5), Ombudsman for Children Act.

61 Article 6(1), Ombudsman for Children Act.

62 Prof. K Działocha, persuaded the parliamentarians to adopt the above-mentioned provision in order to separate the term of office of the Ombudsman for Children and the Parliament, by saying:

If we equip the Ombudsman for Children with attribute of independence and autonomy, it is an argument against 4 year term, that would overlap with the term of the Parliament. This is an argument for 5 year term of office, as in case of the Ombudsman.

See Biuletyn No. 1776/III, (op. cit.), p. 7.

63 Article 6(3), Ombudsman for Children Act.

64 Article 6(2), Ombudsman for Children Act.

65 Article 8(1), Ombudsman for Children Act.

66 Article 8(2)–(4), Ombudsman for Children Act.

criminal proceedings or deprivation of liberty without the formal consent of the Sejm. It is forbidden to detain or arrest the Ombudsman for Children, except if he/she is caught red-handed and under the additional condition that his/her detention would be necessary to secure the proper conduct of the proceedings. The Sejm Martial, who should be informed about such an arrest immediately, is entitled to release the detainee.⁶⁷

To ensure that professional considerations do not influence the Ombudsman for Children's impartiality the body is also subject to *incompatibilitas* regulations. According to Article 7(3) of the Ombudsman for Children Act a person holding this position is not allowed to occupy any other position or post, except for holding a position of university professor. It is also forbidden for the Ombudsman to be a member of any political party or to undertake public work that would be contrary to his/her duties and responsibilities.

Other relevant safeguards of the Ombudsman for Children's impartiality and his/her pro-child approach are the provisions concerning the selection criteria. According to Article 1 (4) of the Ombudsman for Children Act a person appointed should be the Polish citizen, exercising full capacity to undertake legal transactions and enjoying all public rights, without a prior criminal record concerning intentional offences. Moreover, the Ombudsman for Children is expected to have a masters degree, with at least 5 years' experience in working with or for the benefit of children. A candidate should be also of blameless character. He/she is expected to be exemplary in moral character and social concerns.⁶⁸

The above-mentioned requirements were specified in the 2008 Amendment to the Ombudsman for Children Act. Prior to the Amendment the Polish law lacked criteria for the selection of candidates. However, even before the entering into force of the 2008 Amendment the Parliament tended to use similar criteria for the purpose of selecting the best candidate. It may be observed, however, that according to both prior and current regulations, the Ombudsman for Children does not have to possess any legal qualification.⁶⁹ The emphasis is more on moral values and a pro-child approach than on the professional background of the candidate. In terms of management, the Ombudsman for Children is supposed to play the role of leader rather than manager within his/her Office. That is fully understandable as management is a function that must be exercised in any business, whereas leadership is a relationship between leader and the led that

67 Article 7(2), Ombudsman for Children Act.

68 In comparison, the 'general' Ombudsman is expected to be a citizen who distinguishes himself/herself with his/her legal knowledge, professional experience and his/her prestige deriving from his/her moral values and social sensitivity. See Article 2 of the Ombudsman Act.

69 Prof. M Piechowiak, the First Ombudsman for Children is a philosopher, senior lecturer of the Zielona Góra University and the Poznan Adam Mickiewicz University, with excellent human rights background. P Jaros, the Second Ombudsman for Children, is a lawyer and former judge, lecturer of the Cardinal Stefan Wyszyński University in Warsaw. E Sowinska, the Third Ombudswoman for Children is a medical doctor. M Michalak, the current Ombudsman for Children, is a pedagogue and rights-of-the-child activist.

can energise an organisation.⁷⁰ In case of dealing with children's issues child-oriented leadership is vital for gaining acceptance and trust of the body in the eyes of children. Otherwise it could easily remain paternalistic institution governed by adults for adults.

The Ombudsman for Children's Office operates on the foundation of the Statutes set out by the Sejm Martial.⁷¹ The Ombudsman's expenditure and other expenses regarding its Office is financed by the State Budget, which has its basis in the Budgetary Statute.⁷²

It should also be stated that according to the 2008 Amendment the Ombudsman for Children is finely entitled to have a deputy.⁷³ which could be helpful in case of business trips and work overload. The Vice-Ombudsman for Children may be appointed by the Sejm Martial at the request of the Ombudsman for Children. However, it is up to the Ombudsman for Children to decide on the scope of responsibilities of his/her deputy.⁷⁴

Bearing in mind the above considerations one may say that the Polish Ombudsman for Children meets all the necessary requirements for an independent national human rights institution promoting and protecting the rights of the child, as enumerated in the General Comment No. 2 of the UN Committee on the Rights of the Child.⁷⁵ The body is also recognised as a full member by the European Network of Ombudspersons for Children (ENOC), an organisation that links independent offices which have been established in European countries to promote the human rights of children. The organisation recognises two categories of member institution – full and associate. Full members are those which fully meet the standards of independence, whereas associate membership may be offered to institutions that demonstrate that they are actively seeking to meet the criteria.⁷⁶

70 Maccoby (2000).

71 Article 13(1)–(2), Ombudsman for Children Act.

72 Article 14, Ombudsman for Children Act. According to Article 219 of the 1997 Constitution, the Sejm adopts the state budget for a fiscal year by means of a budget (*ustawa budżetowa* - budgetary statute).

73 Article 13(3), Ombudsman for Children Act.

74 Article 13(4), Ombudsman for Children Act.

75 General Comment No. 2 (2002) of the UN Committee the Rights of the Child of 15 November 2002 on the role of independent national human rights institutions in the promotion and protection of the rights of the child, adopted at the Thirty-second Session of the Committee on 13–31 January 2003.

76 According to Article 4 of ENOC Statutes –

[t]here are two categories of membership of ENOC – full and associate. Full membership of ENOC is open to independent children's rights institutions within Council of Europe member-states which meet all of the following criteria: (1) The institution is established through legislation approved by parliament, which provides for its independence; (2) The institution has the function of protecting and promoting children's rights. This function is established through legislation; (3) There are no provisions in the legislation which limit the institution's ability to set its own agenda in relation to this function, or which prevent it carrying out significant core functions suggested in the Paris Principles and ENOC's Standards; (4) The institution must include or consist of an identifiable person or persons concerned exclusively with the protection and promotion of children's rights; (5) Arrangements for appointment of ombudspersons, commissioners and members of a commission must be established by legislation, setting out the term of the mandate

The Ombudsman for Children in Poland as possible model for Namibia

The Polish Ombudsman for Children is a good example of a well designed and effective institution that was recently improved by making the 2008 Amendment to its legal framework. The advantages of having such a body within the legal system have been acknowledged by other states. For example, the Polish Ombudsman for Children, P. Jaros, served as consultant for the purposes of creation analogical institutions in other European states. On 9 July 2003 he consulted the Parliament of the Italian Republic, whereas on 25-26 September 2003 he took part in the discussion with the ministers responsible for children's issues among the European Union Member-States and the then Candidate States.⁷⁷ On 25 May 2004 he also consulted the Government of the Republic of Hungary.⁷⁸ Currently, after the entering into force on the 2008 Amendment, the Ombudsman for Children, M Michalak, is also involved in a consultation process with several European states.

On the other hand, as it was stated above, the institution of the Polish Ombudsman for Children was originally modelled on the Norwegian model; however, it did not survive even a decade in this form. The Parliament, making the 2008 Amendment adjusted the institution to the needs and expectations of society. Poland became familiar with other national human rights institutions and legal organs, executing various judicial powers, such as the 'general' Ombudsman or the public prosecutor. That created a demand to empower the Ombudsman for Children and to close the gap between his position and the position of the 'general' Ombudsman. The lesson is clear – while designing new legal institution it is advisable to adjust it to local demands and expectations, taking into account the existing legal framework. However, this finding should not be interpreted as prohibiting the duplication of good practices confirmed by the practice and experience of other states.

In this context it may be stated that there are three pillars that make the Polish Ombudsman for Children unique, namely its independence, its autonomy and the scope of its powers.

It is vital to emphasise that having an independent human rights protection body dealing with the rights of the child is not a standard either in Europe or in the world. For example, as far as European institutions are concerned, of 35 ENOC members only 25 enjoy full membership. The rest lack the quality of independence.⁷⁹ It should be seen as an enormous advantage of the Polish legal system that it managed to develop a child-oriented

and arrangements for renewal, if any.

See ENOC's website, <http://crin.org/enoc/>; last accessed 17 September 2009.

77 *Informacja Rzecznika Praw Dziecka o działalności za rok 2003*, Warsaw 2004, p. 126.

78 Jaros (2006:99).

79 See again the ENOC's web-site <http://crin.org/enoc/members/index.asp>; last accessed 17 September 2009.

independent human rights institution, rather than adopting one of the ideas that would involve establishment of an administrative authority dealing with children's matters.

The issue of Namibia creating its own independent human rights institution for children is worth considering. The Polish example shows that such institution has its unique value to securing preservation of human rights in the context of child-related issues. The manner, however, of securing the Ombudsman for Children's independence should be adjusted to the local context and should be compatible with the legal system of Namibia.⁸⁰ An excellent domestic example exists already, as the institution of the Namibian Ombudsman enjoys the necessary foundations for its independence that have been built by many legal and constitutional provisions.⁸¹

The other asset of the Polish Ombudsman for Children is its autonomy, understood as its functional and organisational separation from any other institution, organisation or authority, such as the 'general' Ombudsman.

Of course, according to the General Comment No. 2 of the UN Committee on the Rights of the Child designing the independent human rights institution for children as autonomous body is not compulsory, as rule No. 6 reads as follows:

Specialist independent human rights institutions for children, ombudspersons or commissioners for children's rights have been established in a growing number of States parties. Where resources are limited, consideration must be given to ensuring that the available resources are used most effectively for the promotion and protection of everyone's human rights, including children's, and in this context development of a broad-based NHRI that includes a specific focus on children is likely to constitute the best approach. A broad-based NHRI should include within its structure either an identifiable commissioner specifically responsible for children's rights, or a specific section or division responsible for children's rights.

Also according to the ENOC Statutes, "institutions may be constituted separately or may form part of an independent national or regional human rights institution".⁸²

To support the argument that children deserve their own institution, one may quote the preamble to the Convention on the Rights of the Child that –

... children's rights require special protection and call for continuous improvement of the situation of children all over the world, as well as for their development and education in conditions of peace and security.

80 The remark refers, inter alia, to term of office, method of appointment and removal process, as well as the possibility to appoint proxies and the basic requirements for being appointed to the post.

81 Ruppel-Schlichting (2008:289).

82 Article 4, ENOC Statutes.

One may also argue that the 'general' Ombudsman is, from its very nature, associated with the world of adults, and naturally lacks children's trust.⁸³ Indeed, separation of the Ombudsman for Children may bring many non-judicial and non-economic advantages.

First and foremost it mainstreams children's issues and emphasises the pro-child approach present both in the legal system and the Government's policy.

Secondly, the specialisation focusing exclusively on the rights of the child may be perceived as an asset itself. It reduces reaction time and also influences the body's conduct, including the manner of dealing with individual cases.

Thirdly, autonomy of the institution may influence the way of perceiving the child-related issues by the Ombudsman for Children itself and the staff within the Office, making their approach the least paternalistic. That should indicate an increase of level of the children's trust in their 'own' human rights institution and, subsequently, that could encourage them to turn to it in crisis situations. The Polish experience shows that such trust can be gained by using certain child-oriented techniques, such as making social campaigns, writing letters to children that could be distributed at certain school events, establishing a children-friendly web-site or a hot-line or eventually even by blogging.⁸⁴ Such activities, if conducted by any respectful lawyer, preferably with an academic background and/or impressive judicial experience, appointed for the position of the 'general' Ombudsman, could be perceived as silly and childish, both in Poland and Namibia.⁸⁵ Whereas such acts while performed by the separate body seem to be acceptable, or even preferable, as they serve as tools for gaining the children's trust.

The third advantage of the Polish Ombudsman for Children is the scope of its powers. As it was stated above, the range of its competencies is very wide and unique in world terms, especially as far as its judicial powers are concerned. At the domestic level, however, it is neither wide nor unique, as the Ombudsman for Children shares similar powers to other national human rights institutions and legal bodies.

83 Such an argument was used inter alia by Senator M Łopatkowa in her article "Spór o Rzecznika Praw Dziecka" of 10 February 1995, published in the *Rzeczpospolita* newspaper, quoted in Jaros (2006:52).

84 It should be stated that in Poland blogging is rather a domain of the 'general' Ombudsman, whereas the Ombudsman for Children addresses children *via* regular post, sending his personal greeting on certain occasions, such as the beginning of the school year. See the Ombudsman for Children's website: <http://www.brpd.gov.pl/>; last accessed 17 September 2009. See also the Ombudsman's official blog: <http://blog.brpo.salon24.pl/>; last accessed 17 September 2009.

85 Reference is made to Namibian law and practice, as according to Article 89(4) of the Namibian Constitution, the selection criteria for the Ombudsman are rather restrictive. The candidate for the position should be either a Judge of Namibia, or a person possessing the legal qualifications which should entitle him or her to practise in all the Courts of Namibia. See Ruppel-Schlichting (2008:229).

There is no doubt whatsoever that executing such powers increase the effectiveness of its actions. As was stated by J Kochanowski, ⁻⁸⁶

[i]n those countries, including Poland, where the Ombudsman has the right to direct his legal measures to independent bodies – courts and tribunals – his role, position and effectiveness are greater. This effectiveness in Poland, in the case of cases ending at the level of administrative bodies, is around 20-25%. In cases, however, in which the Polish Ombudsman appeals against acts or administrative actions and court judgements to the appropriate courts and the Constitutional Tribunal, this effectiveness is around 85-88%.

The question is, whether Namibian legislators, accustomed to the Ombudsman following more the approach of alternative dispute resolution, would be eager to empower any independent human rights protection body with the coercive powers typical of formal justice systems.

Concluding remarks

National and international human rights protection mechanisms are present in every-day existence of modern societies all over the Globe, including Namibia and Poland. The question of whether the states should or should not respect their obligation to protect and promote human rights within their jurisdiction is no longer an issue. It is rather the segmentation and specialisation of the human rights protection system within the states that are a challenge in the world of today.

However, taking into account the developments in the field of human rights protection mechanisms that have occurred during the last decades at the international, regional and national level worldwide, it may be presumed that the process of segmentation and specialisation of such protection will continue. It is quite likely that one day not only children, but also women, persons belonging to vulnerable groups,⁸⁷ or even certain occupational groups as well as other sub-populations extracted on any possible grounds will be entitled to turn to bodies focused exclusively on their needs and expectations.

In this respect one may say that in 1997 Poland made its first move towards reaching a post-modern approach to the Ombudsmen system of human rights protection by establishing an institution designed exclusively for the protection and promotion of the rights of the child. In other words, within the national legal framework a body has been created to serve one, defined group within the population. In 2009 the Ombudsman for Patients, a central organ of patient's rights protection, executing similar powers to the 'general' Ombudsman and to the Ombudsman for Children, supervised by the Committee of Ministers, was established, in order to improve the level of state health care system.⁸⁸

86 Statement made by Dr J Kochanowski on 11 July 2006 in Vienna, p. 52.

87 Basically the notion of persons belonging to vulnerable groups may be associated with children, minorities, indigenous people, migrant workers, disabled persons. See Lawson & Bertucci (1996).

88 See the Rights of the Patient and the Ombudsman for Patients Act (Pol. ustawa o prawach

However, from today's perspective, it is still quite hard to judge whether the state would be eager to make further steps towards the break-up of the 'ombudsmen market', as national debate concerning possible establishment of the Ombudsman for Women and Equality⁸⁹ or Ombudsman for the Army⁹⁰ is, so far, at the very initial stage.

Another question is whether the Namibian legislator would be interested in the splitting of the domestic ombudsmen system. Should the answer be "Yes", it would be advisable to look for inspiration to other legal systems. Perhaps one day the Republic of Namibia will follow, at least to some extent, the Polish pattern, having adapted foreign ideas to the local situation.

References

- Chruściak, R & W Osiatyński. 2001. *Tworzenie konstytucji w Polsce w latach 1989–1997*. Warsaw: Instytut Sprawa Publicznych,
- Jaros, P. 2006. *Rzecznik Praw Dziecka, Ustawodawstwo i praktyka*. Warsaw: Oficyna Wydawnicza Łośgraf, pp 40–57.
- Lawson, EH & ML Bertucci 1996, *Encyclopedia of human rights*. Washington: Taylor & Francis, p 685.
- Maccoby, M. 2000. "Understanding the difference between management and leadership". *Research Technology Management*, 43(1):57.
- Peters, GB. 2001. *The politics of bureaucracy*. London: Routledge, p 319.
- Ruppel-Schlichting, KG. 2008. "The independence of the Ombudsman in Namibia". In Bösl, A & N Horn (Eds). *The independence of the judiciary in Namibia*. Windhoek: Macmillan Education Namibia, p 227.
- Rzewuski, M. 2007 "Definicja dziecka w Polsce. Uwagi de lege lata i de lege ferenda" *Rejent*, 4:186.
- Żelichowski, M. 2000. "Prawnokarna ocena pobierania embrionalnych komórek macierzystych". *Czasopismo Prawa Karnego i Nauk Penalnych*, 269.
- Żelichowski, M. 2003. "Najmniejszy Pacjent". *Rzeczpospolita*, 2:25.

pacjenta i Rzeczniku Praw Pacjenta) of 6 November 2008; Dziennik Ustaw of 2009, No. 52, item 417, with subsequent amendments.

89 See the outcome of the Polish Women's Congress (Pol. Kongres Kobiet Polskich), held on 20–21 June 2009 in Warsaw. L Kaczyński, President of the Republic of Poland; D Tusks, Prime Minister; B Komorowski, Sejm Marial; as well as other parliamentarians have already been acquainted with the idea by the Congress representatives. See the Congress website <http://www.kongreskobiet.pl/index.php/postulaty/parytety/47-parytet-i-rzecznik-oczami-politykow>; last accessed 17 September 2009.

90 See the project of the Ombudsman for the Army Act, prepared by the Social Democratic Party of Poland; available at the Party's website <http://www.sdpl.pl/index.php/ida/608/>; last accessed 30 October 2009.

Accessibility of social assistance benefits in indigenous African communities from a South African perspective

Gugulethu Nkosi

Background

Deaths caused by AIDS and the escalating rate of unemployment in the adult sector of society impacts dramatically on the degree of poverty¹ and hardships endured by the majority of South African children.² Children are increasingly becoming destitute as a result of parents dying of AIDS.³ Statistics show that by 2010 more than two million children will have been orphaned and will be fending for themselves.⁴

The rate of unemployment is high in South Africa. Statistics show that in 1996, 33% adults of a working age were unemployed. In 2001 this rate had risen to 37% and in 2002 to 41.8%.⁵ These statistics of unemployment clearly indicate the degree of poverty under which children of the unemployed live. It is not surprising that six out of ten children grow up in poverty.⁶

Because South Africa has a diverse profile of children living in poverty, it is essential that mechanisms aimed at curbing poverty take into account the various profiles of such children and the circumstances under which they live. Sensitivity to such diversity should be manifested in the manner in which issues of children and poverty are legislated. An analysis of the extent in which child care and social assistance legislation embrace the diverse scope of South African children will be given, looking at how social assistance grants are accessible to benefit such children.

1 Research shows that between 10 and 14 million children live in deep poverty; see Cassiem & Streak (2001).

2 See Sloth-Nielsen (2003), who describes the nature of the problem caused by HIV and AIDS on the lives of South African children.

3 (ibid.).

4 (ibid.:1).

5 ACCESS (2003).

6 Van Bueren (1999). See also ACCESS (2005).

Until 1983, legislation⁷ on protection of children was formulated for the benefit of mainly⁸ white children. Very few grants provided under the Child Protection Act reached African parents, let alone those living in rural areas.⁹ The enactment of the Child Care Act¹⁰ in 1983 was prompted, amongst other things, by the need to address the inequities that were in the Child Protection Act.¹¹

The statutory framework regarding the protection of children is set out in the Constitution¹² and in a number of instruments to which South Africa is a party. Section 28 of the Constitution makes provision for rights relating to children. Rights guaranteed in this section include: the right to family care or parental care or to appropriate alternative care when removed from the family environment;¹³ the right to basic nutrition, shelter, basic health care services and social services;¹⁴ the right to be protected from maltreatment, neglect, abuse or degradation.¹⁵

Furthermore, section 27 provides that everyone has the right to have access to: health care services;¹⁶ sufficient food and water;¹⁷ social security, including appropriate social assistance if they are unable to support themselves and their dependants.¹⁸ Section 27(2) further provides that the state has a duty to take reasonable legislative and other measures within available resources to achieve the progressive realisation of each of the rights contained in section 27(1).¹⁹

Instruments on child care that South Africa has signed include the Convention on the Rights of the Child (CRC) ratified in 1995 and the African Charter on the Rights and Welfare of the Child ratified in 2002. In terms of CRC every child has the right to social security benefits. The states parties are obliged to take necessary measures to achieve the full realisation of this right in accordance with their domestic laws.²⁰ The CRC further affords every child the right to a standard of living adequate for his or her physical, mental,

7 The Act applicable at the time was the Child Protection Act, 1913 (No. 25 of 1913).

8 Coloured children also benefited from this legislation. African women were largely excluded from accessing the SMG. An African woman was eligible for this means-tested grant if she has applied for financial support from her partner or the father of her children through a magistrate's court, and has been unable to get it; or if she was widowed or deserted. See Republic of South Africa (1996).

9 Liebenberg & Tilley (1998).

10 No. 74 of 1983.

11 SALC (2002:73).

12 Constitution of the Republic of South Africa, 1996.

13 Section 28(1)(b).

14 Section 28(1)(c).

15 Section 28(1)(d).

16 Section 27(1)(a).

17 Section 27(1)(b).

18 Section 27(1)(c).

19 *Grootboom v Oostenberg Municipality*, 2000 (3) BCLR 277 (C).

20 Article 26(1), CRC; see also Manamela (2004).

spiritual, moral and social development.²¹ The overriding principle of the CRC is that all actions concerning a child must always have the best interests of such child as a primary consideration.²² Some of the important provisions of the CRC include the following: children must not be separated from their parents, except by competent authorities for their well-being; parents have the primary responsibility for a child's upbringing, but states are required to provide them with appropriate assistance and develop child-care institutions; states shall provide parentless children with suitable alternative care. The adoption process must be carefully regulated and international agreements must be relied upon and assure legal validity if and when adoptive parents intend to move a child from his or her country of birth.

The African Charter on the Rights and Welfare of the Child mandates similar rights for children as the CRC.²³ Standards prescribed by the said instruments require exploitation of domestic laws in securing the best interests of a child. Indigenous African law is a recognised legal system in South Africa and therefore part of such domestic laws. Like any other law, indigenous African law ought to be explored and enforced for the benefit of a child whose interests are at stake.

Certain provisions entrenched by the instruments, particularly the provision in the CRC, that states shall provide parentless children with suitable alternative care is significant because an alternative child care structure within a South African context dictates the type of social assistance grant accessible to the child.

One of the functions of the Child Care Act, as 'mother' legislation on matters concerning a child, was to enforce the provisions of the Constitution and of the conventions ratified by South Africa. The adequacy of the Child Care Act in carrying out the mandate has been questioned, hence its review by the South African Law Reform Commission.²⁴ A shortcoming of the Child Care Act is that it is not flexible enough to accommodate the diverse needs of South African children in that it does not adequately respond to the emerging socio-economic challenges and the impact these challenges have on children. For instance vast numbers of children are left parentless owing, amongst other things, to AIDS.²⁵ This state of affairs compels these children to become heads of households.

21 Article 27(1), CRC.

22 Manamela (2004).

23 African Charter on the Rights and Welfare of the Child (1999). Article 1 provides that the Charter is not permitted to affect State Party laws which are more conducive to the realisation of the rights and welfare of the child. Article 25 provides that any child who is permanently or temporarily deprived of his family environment for any reason is entitled to special protection and assistance. Article 25 further provides that such child be provided with alternative care.

24 SALC (2002:73–74).

25 SALC (2002:215).

The review of the Child Care Act gave rise to the Children's Act²⁶ and the Children's Amendment Act.²⁷ The Children's Act is expected to adequately assimilate the principles contained in the Constitution pertaining to children, international instruments ratified by South Africa and legislation on social security.²⁸ Certain improvements in the new Children's Act and Children's Amendment Act can already be noted. For instance, unlike the Child Care Act, the new Children's Act and the Children's Amendment Act give detailed provisions on foster care and other forms of alternative care. The various alternative care options are individually provided for and not interlinked with each other as is the case in the Child Care Act.²⁹ The Children's Amendment Act makes reference to child-headed households.³⁰ Circumstances compel some children to become heads of households or live under the care of people other than their parents. The Child Care Act does not make provision for child-headed households. Such conditions need to be dealt with because they have become a reality in the lives of some children.

Despite the fact that indigenous African law is a recognised legal system and that there is a significant proportion of the South African population that is governed by such law,³¹ indigenous African law is not part of the basis upon which social security law and law relating to children is founded. This position puts children who live in alternative child care structures, typical of indigenous African people at a disadvantage. The current legal framework in South Africa makes classification of the alternative child care structures relevant for the purposes of accessing the correct social grant. At present, the different indigenous African child care structures are not recognised in social assistance legislation, as a result children in these alternative child care systems cannot enjoy appropriate benefits derived from such legislation.

Child care structures and social assistance benefits

The government is playing a distinctive role in eradicating poverty and providing a safety net for the poor. It has phased out the state maintenance grant (SMG) which had three major shortcomings. Firstly, it was accessible mainly to white people; secondly, the family model upon which it operated did not represent the meaning of family as understood in indigenous African communities; thirdly, it was not aligned with the needs of African children and the conditions in which they live.

26 The Children's Act, 2005 (No. 38 of 2005) was signed by the President on 8 June 2006, though only certain provisions have come into operation.

27 The Children's Amendment Act, 2007 (No. 41 of 2007) was passed by Parliament in November 2007, and the President signed it into law in March 2008.

28 Namely, the Social Assistance Act, 2004 (No. 13 of 2004) and the South African Social Security Agency Act, 2004 (No. 9 of 2004).

29 See Chapter 11, Children's Amendment Act.

30 Section 137, Children's Amendment Act.

31 De Koker et al. (2006).

The government has since introduced various social assistance grants aimed at benefitting a spectrum of society regardless of race.³² These include the grants for old age, disability, child support, foster care, care dependency and war-veterans. For the purposes of this discussion attention will be paid to grants aimed at children. These grants are: the Foster Care Grant (FCG), the Child Support Grant (CSG) and the care dependency grant. The care dependency grant is not relevant for the purposes of this discussion and will, therefore, not be discussed.

In this discussion it will be argued that despite interventions to reach as many children living in poverty, there are still children who cannot adequately benefit from social assistance grants owing to specific qualifiers in legislation which determine when a child may benefit from such grants. African indigenous child care structures are not adequately recognised in our legal system and as a result, children who live within these indigenous structures cannot fully enjoy social assistance benefits as stipulated in legislation.

Child Care and the Child Support Grant (CSG)

The CSG is provided for in sections 4 and 6 of the Social Assistance Act. It is payable to a needy primary caregiver of a child for the benefit of that child. The aim of the CSG is to support primary caregivers of children by making a contribution to supplement their resources to use towards providing for the adequate growth and development of children.³³

The meaning of a primary caregiver is not restricted to the biological parent of a child, it includes a person related and not related to the child, who is responsible for meeting the daily needs of such child.³⁴ Therefore members of extended families who are primary caregivers of a child can apply for the CSG to help children in their care.

To qualify for the grant, the primary caregiver is required to meet the income-based criteria set in the means test.³⁵ Further, both the primary caregiver and the child must be resident in South Africa at the time of the application for the grant and they must both be South African citizens.³⁶ The grant is payable to an unlimited number of one's biological children but it is limited to six non biological children living with the primary caregiver.³⁷

In the CSG and Foster Care Grant (FCG) there are discrepancies in terms of monetary value of the grant and age of the beneficiaries. These discrepancies are currently being

32 Chapter 2, Social Assistance Act.

33 Meintjes et al. [n.d.]; see also Goldblatt & Liebenberg (2004).

34 Section 1, Social Assistance Act.

35 Regulation 6(1)(b), Social Assistance Regulations, *Government Gazette* 31356.

36 Section 4(b), Social Assistance Act. See also *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC).

37 Regulation (1)(a); see also Footnote 36.

addressed.³⁸ Although the current position is that only children up to the age of 14 years can benefit from the CSG, there is a strong lobby for the extension of the grant to children up to the age of 18 years.³⁹ Monetary discrepancies between the two types of grants still remain.⁴⁰

Foster Care and the Foster Care Grant

In the Child Care Act a foster child is defined as any child who has been placed in the custody of any foster parent in terms of chapter three or six of the Act or in terms of section 290 of the Criminal Procedure Act.⁴¹ A foster parent means any person, except parent or guardian, in whose custody a child has been placed.⁴² Although fostering as a concept is not defined and not provided for in great detail in the Child Care Act, the Act does provide that a Children's Court has the jurisdiction to make orders for foster care⁴³ and adoption.⁴⁴ The Child Care Act also gives detailed information about institutions for children, including places of care, places of safety and children's homes.⁴⁵ Chapter 6 makes special provisions for custody matters regarding pupils and foster children, and transfer of such children from one custodian or institution to another.

In the Children's Amendment Act foster care results from a court-order. In terms of the Act if a child that is found to be in need of care and protection, that is, if the child has no parent or caregiver or has a parent or caregiver but that person is unable or unsuitable to care for the child, the court may order that such child be placed in foster care with a suitable foster parent.⁴⁶ Foster care is, therefore, one of the options for alternative care.⁴⁷ The Children's Amendment Act explains foster care as care for a child who has been placed in the care of a person who is not a parent or guardian of the child as a result of an order of a children's court; a transfer in terms of section 171; or discharge in terms of section 175.⁴⁸ Unlike the Child Care Act, the Children's Amendment Act⁴⁹ is more explicit on what foster care entails.

The provisions of section 175 and section 186 of the Children's Amendment Act may be interpreted to mean that the placement of a child in foster care is a temporary

38 Until March 2003, the CSG was paid for children aged 0–7. This position has since changed and the CSG is now payable to children up to the age of 14 years. The FCG is payable up until the child turns 18. See also Van Rensburg (2005).

39 See ACESS (2003).

40 The CSG is R240 a month and the FCG is R680 a month. See SASSA (2009).

41 Section 1.

42 Section 1.

43 Section 15(1)(b).

44 Section 18(1)(a).

45 Chapter 5.

46 Section 156(1)(e)(i), Children's Act.

47 Section 167, Children's Amendment Act.

48 Section 180.

49 Chapter 12.

arrangement that can be terminated by the children's court when deemed to be in the best interests of the child.⁵⁰ Section 189 (2)(c)(i) however provides that before foster care can be terminated, one of the factors that the court must take into account are the prospects of achieving permanent care for the child by allowing such child to remain permanently in foster care with the foster parent. The court's decision on whether foster care should be terminated or not, rests primarily on what is in the best interests of the child. It is, however, important to emphasise that unlike the case of adoption, foster care is not meant to be a permanent placement of a child. Should the court deem it fit and in the child's best interests that the child remains with foster parents permanently, the normal procedure for adoption should follow.⁵¹

Once a child has been found to be in need of care in terms of section 14(4) of the Child Care Act and has been placed in the care of a foster parent, a foster parent becomes eligible to apply for a FCG in terms of the Social Assistance Act.⁵²

To qualify for a FCG, the foster parent and the child must be resident in South Africa at the time of the application.⁵³ The FCG is payable until a foster child turns 18. In comparison to the CSG, the amount of money received under the FCG is much higher and the monetary benefit received under the FCG can last longer than that received under the CSG.

Adoption and Social Assistance

Adoption is a process through which substitute family care is provided for a child whose natural parents are unable or unwilling to provide such care for the child.⁵⁴

In the Children's Act⁵⁵ the purposes of adoption are:

- to protect and nurture children by providing a safe, healthy environment with positive support; and
- to promote the goals of permanency planning by connecting children to other safe and nurturing family relationships intended to last a lifetime.

In the Child Care Act such purposes are interlinked with the factors that have to be satisfied before an application for adoption may be granted.⁵⁶ They are not as clearly stated as they are in the Children's Act.

Chapter four of the Child Care Act deals with adoptions. It lists people who are suitable to adopt⁵⁷ and the requirements that must be met before an application for adoption can be

50 Meintjes et al. ([n.d.]:6).

51 Section 231(1)(e), Children's Act.

52 Regulation 7(a), Social Assistance Regulations, *Government Gazette* 31356.

53 Regulation 7(c), Social Assistance Regulations, *Government Gazette* 31356..

54 SALC (2002:2).

55 Section 229.

56 Section 18(4).

57 See section 17.

successful.⁵⁸ The first requirement that needs to be satisfied for adoption is noteworthy. It provides that the applicant must have adequate means to maintain and educate the child.⁵⁹ This provision has serious implications for prospective parents who do not have adequate financial resources but are capable of providing an intimate and stable environment for the child. Further, this requirement impacts negatively on prospective adoptive children whose financial needs could be supplemented through social grants that are provided by the government.

However, this position has been changed by the Children's Act. The Children's Act provides that a person may not be disqualified from adopting a child by virtue of his or her financial status.⁶⁰ The Act further provides that any person who adopts a child may apply for means-tested social assistance where applicable.⁶¹

Informal Kinship Care Grant and Court-ordered Kinship Care Grant

Kinship care can be defined as a living arrangement in which children do not live with either of their parents are cared for by a relative or someone with whom they had a prior relationship.⁶² As one will see in the discussion below, relying on extended family members for support in child rearing is a common phenomenon in African indigenous communities.⁶³ However, inadequate support, statutory and otherwise, of this alternative child care system has put children living in this structure at a disadvantage. At present, there is no formal support for kinship child care structures in our legal system. The South African Law Reform Commission in its report recommended the introduction of the court-ordered kinship care grant and the informal kinship care grant.⁶⁴ As a result, the Children's Act defined kinship care.

The Children's Bill⁶⁵ defined informal kinship care as an informal arrangement that is made outside court, in terms of which a relative, who is not the parent or guardian of a child, cares for the child. The informal kinship care grant would be payable to the relative of the child who cares for such child and it would be subject to a means test.⁶⁶ This grant will, however, not be payable if the child receive the CSG.

The court-ordered kinship care grant was also proposed. In terms of section 198(2) of the Children's Bill, a child is in court ordered kinship care if the child has, in terms of a

58 See section 18(4).

59 See section 18(4)(a).

60 Section 231(4).

61 Section 231(5). The adoption care grant has not been implemented yet. The SALRC recommended that the adoption care grant be equal to the foster care grant. See Meintjes et al. [n.d.]; see also Goldblatt & Liebenberg (2004).

62 Geen (2004).

63 (ibid.).

64 SALC (2002:334).

65 See SALRC Bill, 2003.

66 SALC (2002:230).

court order, been placed in the care of a relative who is not a parent or guardian of the child. The court ordered kinship care grant would be payable to the kinship caregiver of the child or, if the kinship caregiver is not the primary caregiver of the child, to the primary caregiver.

The rationale for the introduction of the court-ordered kinship care grant was to overcome problems that some primary caregivers, who are related to the child, face in trying to access the FCG. It is said that there is reluctance by some commissioners of child welfare to authorise foster care where a child lives with a relative. This is based on the assumption that the child concerned is not considered to be a child in need of care. In terms of the proposed court-ordered kinship care grant, relatives who are primary caregivers of children may qualify as recipients of this grant when the court formally orders the placement of children in their care. It is, however, important to note that the proposed provisions on kinship care and kinship grant were omitted in the final legislation.

Child care in indigenous African law

In indigenous African communities there are alternative child care structures which are similar to adoption and foster care as provided for in legislation. Similar to adoption, is a process where one family agrees to give a child to another family, and the latter family receives the child as its own. The process of transferring the child from one family to the other is normally marked by reporting the matter to a traditional leader followed by a celebration.⁶⁷ The child may be transferred from one family to another for a number of reasons, including safeguarding the interests of the child, in the case where the biological parent(s) of such a child cannot maintain him or her and acquiring an heir by a person who does not have children of his or her own.⁶⁸ A system that is similar to foster care as provided in legislation, is when a child is temporarily sent by its family to live with a relative for various reasons which are not limited to the child being in need of care. A child may be sent to live with a relative in order to assist such a relative in the daily household activities.⁶⁹ It is, however, important to note that alternative child care structures in indigenous African communities are not always as easy to define because emphasis is on providing alternative care for the child rather than defining the system which provides such care. Some of the child care structures which are compromised because they are not defined in the legislation are mentioned below.

Generally, in indigenous African communities the responsibility of caring for children in need of care, particularly orphans, fell on other family members and various people in the community.⁷⁰ Members of the extended family and other members of the community play a prominent role in providing care for such children.⁷¹ Notably, people who assumed

67 Maithufi (2001).

68 (ibid.:392).

69 Bennett (1991).

70 Doctor (2004).

71 Chirwa (2002); see also Sloth-Nielsen (2003).

the responsibility of caring for such children assumed the various facets of the parental role,⁷² as would a parent who has obtained an adoption order. The difference is that the indigenous African child care system does not always follow as a result of a court order as is the case is when a family obtains an adoption order or fosters a child in terms of the legislative provisions. Also, the time-frames in terms of which a child will remain in the alternative care structure, are not as readily determinable as the case is with legislative foster care.

There are different forms of extended families in indigenous African communities that are of particular significance in providing alternative care for children in need. A typical example of a family structure which provides alternative care for a child is that of aunts and uncles taking in a child in need of care. It is also common for grandparents to assume the responsibility of caring for children in need of care.⁷³ Another example of an extended family occurs when siblings, particularly brothers, choose to live together under the headship of a senior brother. This type of extended family usually arises when one of the brothers is a minor, or at least unmarried at the time of the death of his parents and is thus dependent upon his older brother.⁷⁴

Communal structures, within which children in need of care can benefit, are borne from the principle of collective solidarity. Collective solidarity is a prominent characteristic of a typical indigenous African community. In an ideal situation, members of a community carry each other's burdens and they are a primary context in which the economic interests and psychological well-being of others are fostered.⁷⁵ It may be said that this quality of solidarity and communal way of living has its roots in the manner in which families were traditionally organised. People of the same '*isibongo*'⁷⁶ and later on even affiliates⁷⁷ of the people with the same *isibongo* lived in close-knit communities and regarded themselves as part of one another. Affiliation of this nature is found in the phenomenon of multiple fatherhood and motherhood. If for instance one calls a man his father, even if that man is not his biological father, the consequences of a father and a biological child will follow. One will rely on the man the way any other son would. One will have to call the man's children brother or sister and marriage between them will be prohibited.⁷⁸

72 Pakati (1992). Orphaned children are not the only example of children cared for by family and relatives, communities had systems in place to care for other children in need of care. See Moeno (1969).

73 Goldblatt et al. (2004:155); see also Maithufi (2001:392).

74 Hammond-Tooke (1974).

75 Ajayi (1982).

76 Literally translated, *isibongo* means "surname". It is, however, important to note that from the surname, secondary surnames, called *izithakazelo* in *isiZulu*, exist. Such secondary surnames are also significant in establishing relations because people with the same surname or secondary surname are related.

77 Ajayi (1982).

78 Afolayan (2004); see also Hammond-Tooke (1993).

Although black people, particularly those who live in urban areas, generally no longer live in the traditional family and communal organisations, this traditional way of living is still recognised in principle. Rural dwellers are generally traditional and still live in accordance with this type of organisation.

Yet, with the prevalence of unemployment and HIV/Aids, these support structures are strained and can no longer sustain the increasing volume of children in need of care.⁷⁹

Our current legal framework makes classification of the alternative child care structures relevant for the purposes of accessing the correct social grant. At present, the different indigenous African child care structures are not recognised in social security legislation, as a result children in these alternative child care structures cannot enjoy appropriate benefits derived from such legislation. Of course, benefits such as the Child Support Grant may be accessible to children cared for under such structures, this position however does not explain the omission of the Foster Care Grant from the list of benefits for such children. The need to treat adoption effected by legislation and adoption under indigenous African law as parallels may become relevant for the purposes of accessing the adoption grant.⁸⁰

Recommendations and conclusion

South Africa has an obligation to enforce international conventions to which it is a signatory and to advance the provisions of the Bill of Rights. Legislative formulation which promotes such obligations is therefore essential. Social assistance benefits aimed at benefitting children play a huge role in alleviating poverty. They are, therefore, of great use to people who can access them. However there is a need to ensure that our child care legislation in South Africa is adaptable so as to address the socio-economic challenges that South African children face.⁸¹

The above discussion shows that the different types of alternative care systems are not properly positioned and therefore cannot afford optimal benefit to potential beneficiaries.

Some of the shortcomings of the South African child care system as it stands in the Child Care Act and as initiated in the Children's Amendment Act are the following:

The legal processes of fostering and adopting a child are complex and are not inherent to indigenous African communities. Indigenous African people continue to provide alternative child care through their own traditional systems. This view is supported by the findings of the research conducted by the South African Law Commission. It found that there is a probability that in the majority cases, children in substitute family care do

79 Sloth-Nielsen (2003:15).

80 The adoption grant is under consideration; see SALRC Bill, 2003.

81 See Dlomo (2004).

not go through the children's court enquiry, but are simply absorbed into the extended family system.⁸² The challenge is, however, that this child care system is not sufficiently supported through legislative measures and as a result barely survives under the harsh economic conditions.

The process of absorbing children into the extended family system, as stated earlier, is not always defined in terms of legislation. In this process the focus is on affording care to children who are destitute. It is not always a concern to determine the legislative terms of taking these children into such care. As the indigenous African care system may not always fall within the parameters of the alternative child care systems recognised by legislation, children taken in under this system are deprived of benefiting from appropriate social grants. While the CSG is accessible to every primary caregiver of a child who is below the age of 15 and who is need of financial support, the FCG, which is higher in amount than the CSG, is only available for the benefit of children who have been placed in foster care in terms of a court order. The CSG is an obvious option for children living in indigenous African child care structures. Such children cannot enjoy the optimal benefits as they would if the FCG was accessible to them.⁸³ The proposed court-ordered kinship grant was meant to ensure that caregivers, who cannot benefit from the FCG, benefit from the court-ordered kinship care grant. Although this intervention is positive and welcome, the complex court processes that indigent caregivers in traditional communities cannot identify with create a barrier in accessing this type of a grant.

A suggested approach for efficient administration of social grants in the indigenous African care system is not to attempt to define the type of care system the child is in, particularly because even within the existing alternative child care systems that are regulated by legislation, monetary discrepancies which exist cannot be adequately justified.⁸⁴ An attempt, therefore, should be made to assess the needs of a child within the care structure and award a grant in accordance with those needs.⁸⁵

Traditional leaders⁸⁶ may be mandated to play an active role in assisting potential beneficiaries access social assistance benefits. They can effectively assess the needs of children who are in indigenous African child care structures and make recommendations to appropriate authorities on how those needs can be met. They can play a positive role

82 SALC (2002:73).

83 SASSA (2009).

84 Where a child is in foster care, continuation of payment of a FCG grant is possible where for instance a child has reached the age of 18 but is still at school. Such benefit for instance is not applicable where a child benefits from a CSG.

85 Goldblatt et al. (2004:153–154).

86 Section 19 of the Traditional Leadership and Governance Framework Act, 2003 (No. 41 of 2003) provides that a traditional leader performs the functions provided for in terms of customary law and customs of the traditional community concerned. Section 20(1) further provides that the national government or a provincial government, as the case may be, may, through legislative and other measures, provide a role for traditional councils or traditional leaders in respect of, amongst other things, welfare and economic development.

in inhibiting possible abuse of the system by monitoring and facilitating these processes. Traditional leaders are the closest authorities to people at the grassroots.⁸⁷ Therefore they are suitable people to carry out this task as they have a direct relationship with the communities which they lead.⁸⁸

In one of his addresses the former premier of Mpumalanga said “through partnership with traditional leaders, access to grants and social security pension have improved in Mpumalanga”. The offices of traditional authorities are being used as service points with trained permanent staff available to assist grant applicants.⁸⁹ This shows that there is some recognition of the role played by traditional leaders in promoting accessibility to social grants. Clearly traditional leaders are already playing a significant role in processes of accessing social assistance benefits. They can continue to play a meaningful role aligned with the recommendations made in this discussion.

Counsellors may be mandated to play a similar role to traditional leaders to assist caregivers of children residing in semi-urban and urban areas.

The government’s efforts in curbing poverty in South Africa are commendable. It is however essential that the government takes a further step of ensuring that the various child care structures that exist in indigenous African communities are recognised and provided for in legislation. The recognition of the said structures will not only benefit children cared for within these structures, but will also endorse the status of indigenous African law that it enjoys as a recognised legal system.

References

- ACCESS/Alliance for Children’s Entitlement to Social Security. 2003. *Submission on the Social Assistance Bill, 22 September 2003*. Available at http://access.org.za/home/index.php?option=com_content&task=view&id=26&Itemid=34; last accessed 6 November 2009.
- ACCESS/Alliance for Children’s Entitlement to Social Security. 2005. *Submission to the Department on the Regulations in terms of the Social Assistance Act 13 of 2004, 14 March 2005*. Available at <http://access.org.za/home/images/stories/3%20projects%20and%20campaigns/2%20promoting%20comprehensive%20social%20security/3%20all%20poor%20children/2%20submissions%20and%20commentary/Submission-DOSD-on-Social-Assistance-Act.pdf>; last accessed 6 November 2009.
- Ajayi, J. 1982. “Solidarity in African societies in crisis”. In International Institute for Labour Studies. *Towards solidarity in the management of African societies: Misgivings and certitudes*. Geneva: The institute, pp 8–9.
- 87 Osaghae (1997:110).
- 88 Fortes (1940:44).
- 89 Address by Premier NJ Mahlangu at the opening of the Mpumalanga legislature, Riverside Government Complex, 13 February 2004. Available at <http://www.info.gov.za/speeches/2004>; last accessed 1 October 2009.

- Afolayan, F. 2004. *Culture and customs of South Africa*. Cape Town: Greenwood Press.
- Bennett, TW. 1991. *A sourcebook of African customary law in southern Africa*. Cape Town: Juta.
- Cassiem, S & J Streak. 2001. *Budgeting for child socio-economic rights: Government's obligations and the child's right to social security and education*. Cape Town: Institute for Democracy in Africa.
- Chirwa, W. 2002. "Social exclusion and inclusion: Challenges to orphan care in Malawi". *Nordic Journal of African Studies*, 11(1):100.
- De Koker, C, L de Waal & J Vorster. 2006. *A profile of social security beneficiaries in South Africa*. Stellenbosch: Department of Sociology and Social Anthropology, University of Stellenbosch.
- Dlomo, N. 2004. *Strategies for socio-economic empowerment of traditional leaders*. Master's thesis, Rand Afrikaans University. Available at <http://ujdigispace.uj.ac.za:8080/dspace/handle/10210/1239>; last accessed 6 November 2009.
- Doctor, H. 2004. "Parental survival, living arrangements and school enrolment of children in Malawi in the era of HIV/AIDS". *Journal of Social Development in Africa*, 19(1):32.
- Fortes, M (Ed.). 1940. *African political systems*. Oxford: Oxford University Press, p 44.
- Geen, R. 2004. "The evolution of kinship care policy and practice". *The Future of Children*, 14(1):132.
- Goldblatt B & S Liebenberg. 2004. "Giving money to children: The state's constitutional obligations to provide child support grants to child headed households. *South African Journal on Human Rights*, 20:152.
- Hammond-Tooke, WD (Ed.). 1974. *The Bantu-speaking peoples of Southern Africa*. Boston: Routledge & K Paul.
- Hammond-Tooke, WD. 1993. *The roots of black South Africa*. Johannesburg: Jonathan Ball Publishers.
- Liebenberg, F & A Tilley. 1998. "Poverty and inequality hearings, social security theme". Unpublished background paper for SANGOCO, the South African Human Rights Commission and the Commission for Gender Equality, 28 April.
- Maithufi, I. 1993. "Adoption according to customary law – *Kewana v Santam Insurance Co. Ltd* (4) SA (Tk) Followed". *De Jure*, 1(34):391.
- Manamela, T. 2004. "Children in poverty and child benefits in South Africa". *South African Public Law*, 19:161.
- Meintjes, H, Budlender, D, Giese S and Johnson L. [n.d.]. "Children in 'need of care' or in need of cash? Questioning social security provisions for orphans in the context of the South African AIDS pandemic". *Joint Working Paper of the Children's Institute and Centre for Actuarial Research*. Cape Town: University of Cape Town.
- Moeno, S. 1969. "The urban African family disorganisation with special reference to the problem of illegitimacy". Unpublished Master's thesis, University of South Africa.

- Osaghae, E. 1997. "The role and functions of traditional leaders and indigenous groups in Nigeria". In De Villiers, B (Ed.). *The rights of indigenous people: A quest for coexistence*. Pretoria: Human Sciences Research Council.
- Pakati, E. 1992. "Trends in adoption behaviour in the African family and the role of social work". Unpublished doctoral thesis.
- Republic of South Africa. 1996. *Report of the Lund Committee on Child and Family Support.* Available at <http://www.info.gov.za/otherdocs/1996/lund.htm>; last accessed 4 November 2009.
- SALC/South African Law Reform Commission. 2002. *Project 110: Review of the Child Care Act*. Pretoria: SALC.
- Sloth-Nielsen, J. 2003. "Too little? Too late? The implications of the *Grootboom* case for state responses to child-headed households". *Law, Democracy and Development*, 7(1):113–136.
- SASSA/South African Social Security Agency. 2009. *You and your grants 2009/10*. Available at www.sassa.gov.za; last accessed 5 November 2009.
- Van Bueren, G. 1999. "Alleviating poverty through the Constitutional Court". *South African Journal on Human Rights*, 15:52–74.
- Van Rensburg, LJ. 2005. "Xhosa and Mahlaule case – Opening the door for the inclusion of all children in the child support grant?". *South African Public Law*, 20:103–130.

In search of a focus: Methodological provocations in the quest for the recognition and implementation of children's rights and legal entitlements

Julie Stewart

Introduction

Like most challenges that are thrown at one, there is a moment of pause, a moment of panic, and then a resigned acceptance. I have to admit that the challenge to write a piece on children's rights forced me to interrogate my perceptions of the rights of the child and their efficacy. The span of human rights and basic legal provisions needed to provide for comprehensive rights for children is extensive and fortunately readily to be found in multiple conventions and legislation. Thus there is guidance available to states as to what is required in terms of legislation, policy and government action to provide for and deliver the basic rights and entitlements to children.

Yet, even when the necessary legal and policy measures have been put in place in countries in relation to human rights delivery fulfilment this is but the start of the process. It is common cause that there are enormous barriers to the attainment of children's rights universally.¹ To tackle these barriers we need to have a thorough and detailed understanding of their nature, shape and form and, especially, who the actors are who sustain or maintain those barriers. I would argue, it is as much the barriers, and those who erect and people them, that we need to tackle, as it is the putting in place of the reforms or potential implementation plans.

What we very obviously need to tackle

Even if we confine ourselves to looking at just two of the instruments that deal with the rights of children – the Convention on the Rights of the Child (CRC)² and its African

1 Some children may benefit, but they are likely to be the already economically privileged, those who already have access to education, to good health care, and experience liberal social, cultural and religious attitudes.

2 The most extensively ratified instrument that augments the Universal Declaration of Human Rights (UDHR) is the Convention on the Rights of the Child, 1989. The CRC has been

counterpart the African Charter on the Rights and Welfare of the Child (ACRWC) there has to be broad based interrogation of the current constitutional, legal, institutional and economic capacity of states to deliver on these rights across the board.

States have to address issues such as education, development both personal and resource-based and the cultural and religious aspects of life as they affect children. Access to health care is an indispensable area to be interrogated as is that of child labour and its complex components from minor home-based family-oriented assistance to child employment that deprives the child of a normal childhood, especially of education and leisure. Other areas that require interrogation are barriers to the full and enjoyable pursuit of childhood, the security of a family, and the need to have membership of some form of family which is supported and protected whilst at the same time ensuring that the family is not a source of violence, exploitation and insecurity. One can move right by right and list the interrogations that need to be made also one by one. My work in relation to delivery of human rights to women indicates that it is possible to create a background interrogation template that raises a general awareness of the sometimes hidden problems and barriers that still need to be tackled regardless of the legislation and the policy frameworks that may already be in place.

What we often fail to tackle

In using a human rights based approach the real difficulties are not the conceptualization of the rights, there great progress has been made, but rather in how we work to effect delivery of the rights. There has been trenchant criticism of and disillusionment with a rights-based approach in some quarters because despite the provision of rights on paper, change that penetrates to the neediest of children is very slow or seemingly non-existent.

I would suggest that to a large extent criticism and disillusion have come about because, obviously, rights are not self-implementing. However, it is not the rights that are the problem, nor at a purely conceptual level is there a problem in using a rights-based approach. A rights framework defines basic minimum standards. The international policy approaches, such as the Millennium Development Goals, embellish the frameworks laid out in the instruments as do the reports and recommendations from the oversight committees. Countries may have domesticated all or part of international children's rights instruments and even put in place institutions to further the rights and interests of children. Yet there is still a gap between aspirations expressed and children's grounded experiences. I now seek to provide some tools, largely in the form of provocations (questions) to be directed at rights agendas in an effort to locate where the 'sticking points' are in their implementation.

largely replicated within the African context by the African Charter on the Rights and Welfare of the Child (ACRWC), 1990.

Suffice it to say that identifying the ‘sticking points’ does not mean that we have an easy quick fix available, the reality is that it will probably require further and deeper investigations. But at the very least understanding of the problems and barriers should be heightened and this should mean realistic interventions can be considered.

Thus whatever the right or the entitlement that is sought, contemplated, is being legislated about, is being put into policy frameworks or is being implemented, it is important to pause and interrogate that initiative.

The most important provocations that have to be raised, the questions that have to be asked are:

- How is this supposed to benefit children?
- How will it benefit children in real terms?

It is important to know whether the interveners have:

- Identified all the potential child beneficiaries of the interventions
- Located the children who need to be targeted, not merely by hypothesising, but by exploring the issue of who is in need of interventions and their location.
- Identified the range of situational needs that the various categories of children will probably have in relation to the intervention/s.

Self-evidently these interrogations answer some questions but immediately raise a host of new ones; that is the purpose of the process; the answers came only come if the appropriate questions are asked.

Sex and gender as tools for interrogating the delivery of rights

Firstly, it is vital that as rights-based approach development practitioners we can identify and understand the issues that affect children, from the sex and gender perspectives of the boy child and the girl child. What this, inevitably, must involve is a serious engagement with sex gender mainstreaming but from the perspective of the targeted children. Let me explain why this is so vital.

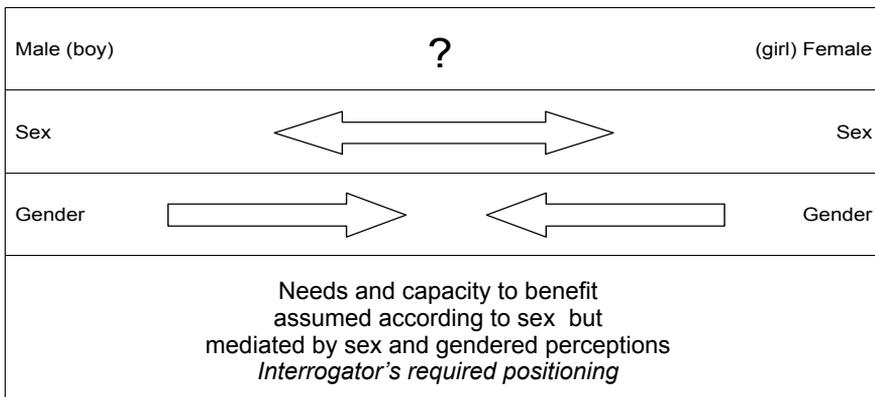
Sex is more or less a biological given, but gender is a cultural construction, yet both greatly influence how individual children will experience life and the opportunities that life offers even if they come from the same ‘nuclear’³ family and the same social background. One of the most profound divisions that effects implementation of rights

3 I use the term ‘nuclear’ to describe the one mother family, even though the mother maybe in a polygynous relationship she herself is frequently limited to one partner – thus she is monogamous but her partner may not be, however her children will, probably, have, in theory, similar basic potentials. The reality may be different from our assumptions, being affected by circumstances extraneous to the family which affect attitudes and opportunities.

and the capacity to benefit from such rights is that of sex and gender. Sex and gender profiling of individuals creates distinctions and arenas of discrimination which are often not perceived as such, rather because they are consistent with what is culturally and socially normal and thus discrimination is not perceived as such, 'it is not a problem'.

If one tries to stand, metaphorically, in the middle of the sex and gender continua, which is what a serious gender mainstreamer must do, it becomes apparent that no matter what rights one is contemplating the capacity to benefit, pursue and effectively utilize those rights is inextricably linked to both one's sex and one's gender. The table seeks to show how males and females are not sharply defined as such by sex, although there are certain criteria that physiologically define the male and the female but the matter is neither clear cut nor obvious.⁴ However whatever that sex maybe biologically, it is not necessarily the same as one's gender and the gender roles and life circumscribing perceptions that are ascribed to an individual. One's sex and gender may or may not coincide and one can located anywhere along the gender continuum and this may change over the years, but one's sex is not normally so mutable.

Figure 1⁵



4 We are inclined to regard biological (physiological) sex, as something which is clear and pre-determined. Of course it is not always clear which sex some individuals belong to, the recent distressing and publicly debated case of Caster Semanya of South Africa starkly illustrates the uncertainty for some of processes of conception and development of physiological sex. Caster's is not initially a problem of gender, but of manifesting externally a sex which appeared female but was physiologically ambivalent when her other sexual characteristics are taken into account. Repeated press and other media statements referred to gender testing, actually they were tests to reveal a sex profile. As to gender; that is for Caster to determine. Is Caster socially and culturally female or male or someone who fits somewhere in the middle regions of the sex continuum? How Caster feels about gender identity is the combination of a sense of sex based identity and a perception of where one is located on the male female gender continuum. Where that is, is not entirely of one's own making.

5 See for a further explanation of this approach, but based on adults Stewart (2004).

In an ideal world one's sex-based needs and entitlements should be a matter that at worst requires management, and that should mean that gender becomes a minor factor in mediating one's life opportunities and challenges. But, it is not an ideal world so sex-based differences which require a management approach become transformed into barriers built on perceptions of fundamental capacity and competence.

Whereas we can say that the 'child is the mother or father of the person whom she or he will become' the projection by those around a child of the person they think will eventually emerge profoundly influences who he or she will become. Thus whether it is thought you will become a future 'mother' or 'father' potentially circumscribes how a child will be socialized, acculturated, educated and exposed to the opportunities and challenges of life.

Interrogating rights delivery interventions

Thus, there are issues that we have to tackle by explicitly placing ourselves in the middle of the sex and gender continua and interrogating initiatives and the rights that inform them closely:

- How will it benefit the girl child?
- How will it benefit the boy child?

This leads to asking:

- Are there specific needs for the boy child to be able to benefit from this right?
- Are there specific needs for the girl child to be able to benefit from this right?
- Are there age-related factors that have also to be considered for females and males in relation to the right being considered?
- Are there factors that will influence the capacity of the girl child to benefit from this right?
- Are there factors that will influence the capacity of the boy child to benefit from this right?

Is there after such an interrogation a need to:

- Make adjustments to meet the needs of the girl child?
- Make adjustments to meet the needs of the boy child?

For example, if we are talking about provision of schooling and the facilities that ought to accompany that schooling, it is important to ascertain whether the specific sanitation needs of the girl child have been taken into account. Are the means for managing menstruation in place, such as suitably discreet toilets and sanitary waste disposal facilities? They can be simple, locally built; the question is have they been factored into the rights implementation agenda? Schools may be in place, but might the girl child who reaches puberty suddenly find school attendance problematic because she cannot cope with the products and stress of menstruation.⁶

⁶ Stewart (2007); Dengu Zvobogo (2004); Moyo et al. (2004).

Especially in rural areas, but not exclusively so, a gender based consideration is how far does a child have to travel to school and by what means? For a girl child this can be problematic, if she lives far from the school her initial enrolment may be delayed till she can travel the distance comfortably on foot, but then as she nears and reaches puberty there may be concerns about her physical and sexual safety based on the gendered and deeply embedded perceptions about the vulnerability of the girl child. So her schooling is truncated at both ends, and is often curtailed on a daily basis because of the gendered chores that she must undertake in the home such as care of younger siblings, collecting water, helping with cooking, washing and general household chores.

In rural areas the boy child may enrol in school later than the girl child, he too may have chores and responsibilities such as cattle herding, but he probably has more spare time than the girl child and there are fewer fears about his safety so he may be retained in school for much longer. So his potential to enjoy the right to education may be greater than that of the girl child who is, in other respects, on par with him. So if we place ourselves in the middle of the sex-gender continua table above and analyze how girls and boys will be affected by physiological realities and gendered perceptions of who they are and their life potentials we can see that without further interventions that actively respond to these factors rights will in all probability be differentially experienced.⁷

At this point it is important to realize that these are but the first set of broad general interrogations, we have not even considered issues of ethnicity, religion or social and economic factors, issues of geopolitics, educational foundations and a host of other variables that largely determine how a child, male or female will 'enjoy' or be excluded from the enjoyment of rights and policy interventions. Further, the examples used are only in relation to toilets and access to schools in the geographical sense. So far we have not even touched on curriculum, or sports activities or the myriad of other issues that affect school, school attendance and general benefit of and from school as an educational and social space. Each one of these needs to be interrogated in the manner set out above, constantly building on the prior assessments and evaluations produced in attempting to obtain a holistic picture of the operation and efficacy of rights based approaches.

Understanding the context for interventions

Perhaps one can feel a sense of relative comfort when working from the overarching human rights norms, but this does obviate the duty, at the level of implementation, to ensure that there is a fit between the rights and the actual implementation processes. Is there sex and gender awareness? Has sufficient care been taken to ensure that whatever

⁷ I am not going to delve into what those interventions should be, some I have already mentioned, others such as reconsidering distances between available schools, local parental protection groups for children (escorting children) lie within the purview of the state or might be addressed at the level of local initiatives. For the purposes of this chapter the critical issue is that there is awareness that sex and gender are significant factors which can inhibit a child benefiting when it seems that everything else is in place.

is being undertaken, mooted or considered is going to be context sensitive, especially where issues of culture and religion may affect acceptance of interventions?

There is usually a need as societal boundaries are crossed and efforts are made to spread the message and content of rights to be sure as to whether or not there is understanding of the problem it sought to rectify. Do we know what the points of resistance might be to our actions, who the resisters will be and how to interact with them.? This is similar to the interrogation undertaken when women's rights are being pursued, although in that case the issue is whether or not men have been brought on board and are aware of women's rights and why women ought to be able to exercise those rights.

So, as with the case of women, children's rights organizations are often very able in informing and advising children of their rights, but have they also laid the groundwork in the wider society, especially with families, communities and religious leaders for them to accept the rights of children? We need to be aware that a child is far less likely to be able to take up his or her rights than adults. If women have problems pursuing their rights, how much more difficult will it be for a child, especially a girl child.

This is not to suggest that rights should not be put in place, that programmes and interventions should not be devised and implemented. We cannot lose sight of the reality that it is adults who by and large take up the rights of children, but it is adults who are able to pervert and deny rights to children at all levels of our societies. Thus we need to mainstream our thinking once again and this time take the position in the middle of the sex and gender frame and ask:

- Are children aware of the right, opportunity, or intervention that is being offered?
- Are girl children aware?
- Are boy children aware?

Although one would hope awareness would not be differentiated by sex and gender there is a distinct possibility that this might be the case because of the different places where boys and girls interact, congregate, and the different people they come into contact with. Once again mainstreaming, or centralizing our interrogatory position on children's rights is important.

From information to utilization

Of course the possible interrogations are endless, but it is important to ensure that given the multiple factors that may lead to indirect, and often unarticulated and even unintended discrimination that we continue the interrogation:

- Do both girl children and boy children have equal opportunity to take advantage of what is being done or offered?

- Are adults, who have the power to mediate access to the rights on the part of children to offers and opportunities, aware of these rights, opportunities and offers?
- Have adults been brought 'on board' so that they understand and accept these interventions, opportunities and offers for the improvement of children's lives?

We might also ask in this context whether the methods of information dissemination, the processes for raising awareness have been thorough, appropriate and adequate. Have children be appropriately targeted for their age groups, their culture, in the context of their religion, their geographical location, their economic situation?

We might ask:

- Are these rights attainable for the children being targeted at a particular place or moment?
- Are the facilities available for them to benefit, given where the children are located?
- Are there costs involved, whether economic or social, that might inhibit capacity to benefit?
- Are we raising false hopes for a future that cannot be?

If the answer is yes to any or all of these questions, it is no reason to abandon the pursuit of rights or the delivery of rights but clearly it is a warning that more needs to be done in terms of research, planning, policy formulation and implementation strategies if we are to succeed in the rights based approach.

Are we using the right language? Are children's rights cast in appropriate language?

Over the years I have turned sharply away from acceptance of the legal drafting rubric that 'the male implies the female unless the contrary is indicated' to what I have crudely termed 'in your face drafting' where both the male and female pronouns must be used together unless it is an issue which affects only one of the sexes or genders.

I have come to appreciate the value of sex and gender explicit drafting, the message is then unequivocal. Perhaps of greatest significance in this change of the state of my legal mind have been the comments of my non-lawyer masters students, some of whom have expressed shock and actively alleged discrimination in legislation where the male would be taken to imply the female. Of course their lawyer colleagues leap to the drafter's defence and explain the drafting convention, but this is dismissed as 'lawyers' games'. And, arguably, so they are, law needs to be explicit, and unequivocal as do human rights. So it was somewhat surprising to discover that in relation to children's rights, especially at the African regional level, there is laxity and confusion in the use of language relating to sex and gender and gender confused language. It is not quite so problematic at the

international level. One of the reasons that I raised the sex and gender interrogations of rights in a very general sense is because of this very problem of lack of explicit sex and gender focus in the instruments. But even where there is articulation of both the male and the female in relation to being a rights holder, the sex and gender interrogations still need to be undertaken. Merely mouthing ‘he’ and/or ‘she’ does not indicate that the sex and gender differentiations and potential discriminations will be revealed, tackled or corrected.

When I was searching for a focus and a direction for this chapter I read the CRC and, especially the ACRWC and was somewhat surprised by the sex and gender laxity of the language.

My perusal of these two major conventions on children’s rights, CRC and the ACRWC, revealed that they are written in ‘sex and gender neutral’, or ‘sex and gender equal’, or fortunately less frequently ‘sex and gender implied to be equal’ language. Sex and gender neutral language is language that uses, for example, the words child or children to automatically embrace and articulate the needs and the ensuing rights of both the boy child and the girl child as if they are synonymous. Sex and gender equal language is language that uses he and she, his and her as if there are identical needs and concerns and identical remedies for the male and female child in terms of deprivation of rights and entitlements, and the route to equality of rights and entitlements. Sex and gender to be implied language, is language which presumes, or so it seems,⁸ in accordance with legal drafting conventions that the male is taken to imply the female unless the contrary is indicated.

Sex and gender neutral and sex and gender equal language are used throughout the CRC with the exception of the following in the Preamble which is from the earlier Declaration of the Rights of the Child which uses the male to subsume the female:

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, “the child, by reason of *his* physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth” [Emphasis added].

Yet, it is important to appreciate that where sex and gender neutral language is used that the reality of children’s lives is that they are not lived out in sex and gender equality – rather children’s lives are the nurturing and embedded sites of the sex and gender inequalities that permeate the whole spectrum of human life.

8 Where the different forms are used in one document it might be argued that the document is to be read literally and that the female cannot be read to be included in the male. Although one hopes judicial commonsense would prevail where problems of interpretation arise and that the implication would be made.

As discussed earlier the ACRWC is inconsistent, sometimes using sex and gender equal language which is sometimes combined with gender neutral language but frequently lapsing into sex and gender implied language, for example, one finds the following in the Preamble:

RECOGNIZING that the child occupies a unique and privileged position in the African society and that for the full and harmonious development of *his* personality. the child should grow up in a family environment in an atmosphere of happiness, love and understanding, RECOGNIZING that the child, due to the needs of *his* physical and mental development requires particular care with regard to health, physical, mental, moral and social development, and requires legal protection in conditions of freedom, dignity and security.

[Emphases added]

Given the acknowledged male privileging in many African societies and countries it is disturbing, albeit probably not sinister, that *his* is used alone in these two paragraphs with her being omitted, one hopes as an oversight not as a deliberate exclusion.

Such sloppy drafting arguably create a distinction which could, but one would sincerely hope not, be restrictively interpreted as being applicable to males only and not equally males and females. At the very least they are embarrassing drafting lapses and could be extremely embarrassing were such an approach ever to be raised. In the current sex and gender awareness political context one would hope that the interpretation would be that the male clearly implies the female. Nonetheless these are problematic lapses that it is preferable not to see still in existence and, more particularly, which fail to consistently 'put issues of female, male child equality in the face of the public'.

Does it matter?

Interestingly the other articles in ACRWC that adopt, or display, a sex and gender implied approach are: Articles 6, Name and Nationality; Article 10, Protection of Privacy; Article 11, Education; Article 13, Handicapped Children; Article 17, Administration of Juvenile Justice; Article 19, Parent Care and Protection; Article 23, Refugee Children; and Article 31, Responsibility of the Child. One could construct a sinister interpretation of the use of the male only given that the bearing of the family name in many African societies vests in the male child, that the life of a girl child is frequently focused on the reproduction of the family and that her sexuality needs to be controlled – so is she entitled to the same notions of privacy as the male child? Education is, interestingly, inappropriately couched in sex neutral terms in Article 11 unless the intention is to cover both males and females as the authors of a pregnancy within its ambit:

6. States Parties to the present Charter shall have all appropriate measures to ensure that children who become *pregnant* before completing their education shall have an opportunity to continue with their education on the basis of their individual ability.

Although one doubts that sex inclusivity was intended, this is one occasion where sex specific drafting is required – *girl* or *girls* should have been used instead of *children*.

A male based reference to the rights of handicapped children again raises a concern that this might have been a conceptual slip in that it is often the male handicapped child who presents the problem of family representation and continuation in a way that a female child would not.

A final general provocation

Put differently, I am asking the reader to interrogate the image that comes into the minds of the drafters and politicians when they envisage the child or children on whom they are conferring rights. The realities of children's lives is that they are not lived out in arenas of equality economically, educationally, socially, religiously, medically or in sex and gender equality. Rather they are the nurturing and embedded sites of inequality, especially the sex and gender inequalities that permeate the whole spectrum of human life. So I am back at the start of my explorations and provocations on the rights of the child.

So after much rambling about as a chapter in search of a focus, that was it – the importance of evolving methodologies to interrogate the human and legal rights of children and, more especially, interrogating the factors that effect their implementation for children themselves. Especially so for those children being in greatest need of the human rights based interventions and their reformative powers.

References

- Dengu-Zvobogo, K, C Zvobgo & D Moyo. 2004. "The impact of school management of menstruation [on] girls' participation at school". In Stewart, JE (Ed.). *Life skills, sexual maturation and sanitation: What's (not) happening in our schools?*. Harare: Weaver Press.
- Moyo, S, FS Makoni & J Ndamba. 2004. "An evaluation of National Sanitation Policy: With an emphasis on sexual maturation needs of girls vis-à-vis menstruation". In Stewart, JE (Ed.). *Life skills, sexual maturation and sanitation: What's (not) happening in our schools?*. Harare: Weaver Press.
- Stewart, JE. 2004. "Sex? Gender? So what? Mainstreaming gender concerns". In Welpe, I, B Thege & S Henderson (Eds). *The gender perspective: Innovations in economy, organisations and health within the Southern African Development Community (SADC)*. Frankfurt-am-Main: Peter Lang.
- Stewart, JE. 2007. "Why I can't go to school today (Human rights implications for girls of the management or mismanagement of sexual maturation and menstruation in school in Zimbabwe)". In Hellum, A, J Stewart, S Sardar Ali & A Tsanga. *Human rights, plural legalities and gendered realities: Paths are made by walking*. Harare: Weaver Press