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FOREWORD

The first edition of the *Namibia Law Journal* is the fulfilment of a long dream. The legal fraternity saw several journals coming and going over the years: the magistrates had a small biannual journal before Independence, the Human Rights and Documentation Centre at the University of Namibia started the *Online Human Rights Journal* four years ago, and the list goes on.

However, a national law journal remained a dream. There were enough reasons not to even attempt a Namibia Law Journal: the lack of funding, the fact that Namibia is a small country, and the initial difficulty of getting the different sectors of the legal fraternity to cooperate on the project. All these obstacles were real. But they did not prevent the Law Society, the Supreme Court and the Faculty of Law at the University of Namibia from joining hands and making the impossible possible.

The Trustees have committed themselves to publishing a sustainable journal of high quality. I am advised that the *Namibia Law Journal* will not be an exclusive academic journal, although academic debates will be a definite part of it; instead, it will serve the needs of the broader legal fraternity: the profession, the judiciary, and legal practitioners in the Public Service.

The Trustees have appointed a distinguished International Advisory Board that includes acclaimed academics, judges and practitioners from several jurisdictions. Together with the editorial board, the Board of Reference will undoubtedly guarantee the highest professional standards and quality contributions to the journal.

May this edition of the *Namibia Law Journal* be the first of many that will find a special place on the shelves of the Namibian legal fraternity!

Peter Shivute

Chief Justice of the Supreme Court

INTRODUCTION

The first edition of the *Namibia Law Journal* has arrived – despite the difficulty of contributors being on holiday in Cape Town, Yemen, Zürich or unreachable destinations, slow Internet speeds, and the generally relaxed spirit of December in Namibia!

The Editorial Board are committed to making the journal accessible and relevant to the Namibian legal fraternity. Unfortunately, the practitioners were understandably not readily available to present articles at short notice with a December deadline. However, for future editions, every interested practitioner will have ample time to submit contributions. We have already received some excellent articles from legal practitioners for the July edition – for which the submission deadline is 15 March 2009. Submission can be forwarded to the editors, P.O. Box 27146, Windhoek, or to namibialawjournal@gmail.com

The first edition of the *Namibia Law Journal* deals with a variety of legal issues that relate to the local legal fraternity.

Prof. PJ Schwikkard, Dean of the Faculty of Law at the University of Cape Town, discusses the effects of the non-enactment of the Criminal Procedure Act, 2004 (No. 25 of 2004) on the evidence of sexual complainants. *Prof. Nico Horn*, Dean of the Faculty of Law at the University of Namibia, revisits the old racial discrimination case of *State v Smith* in the light of Namibia's State Report to the Convention of the Elimination of Racial Discrimination in 2008.

Prof. Gerhard Erasmus of the Trade Law Centre for Southern African (tralac), and formerly Professor of Law at the University of Stellenbosch, takes a fresh look at regional integration, while *Prof. Enyinna Nwauche* of River State University in Nigeria asks if immaterial property rights have anything to do with human rights.

The tremendous support from the Namibia office of the Konrad Adenauer Foundation, which goes far beyond the financial assistance for the journal, must be acknowledged.

May this be the first of many more *Namibia Law Journals* to come.

ARTICLES

The evidence of sexual complainants and the demise of the 2004 Criminal Procedure Act*

Pamela J Schwikkard**

Introduction

Namibia's history of gender activism in the non-government organisation (NGO) sector played a significant role in creating the context in which the Combating of Rape Act, 2000 (No. 8 of 2000) was promulgated.[1] The Act ushered in much-needed reforms to the legal framework regulating the prosecution of sexual offences, and was supplemented by the Criminal Procedure Amendment Act, 2003.[2] This paper focuses on the rules of evidence applicable in sexual offence cases, and assesses whether or not the apparent withdrawal of the Criminal Procedure Act, 2004[3] detracts from the advances made in 2000 and 2003.

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* The same subject material was considered in Horn & Schwikkard (2007) on the presumption that the Criminal Procedure Act, 2004 (No. 25 of 2004) was to be enacted.

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1 See Hubbard (2000:fn. 52): "For instance, numerous appeals for law reform in this area were made to the Ministry of Justice by a diverse spectrum of organisations over the years. In 1989, Women's Solidarity (an NGO which provides education on violence against women and counselling for victims) published a paper proposing law reform in this area, with specific recommendations backed up by comparative research. It continued to lobby relentlessly for these reforms, stating in 1994: 'We know of few other law reform issues which have received such a broad range of public support'.

A petition which included specific requests for the reform of the laws on rape was signed by ten different NGOs and presented to the Minister of Justice as part of the commemoration of International Women's Day in March 1993. Also in 1993, the Namibia Women's Agricultural Association made a formal request to the LRDC [Law Reform Development Commission] to consider the option of imposing a minimum penalty for convicted rapists. This proposal was supported by the Legal Assistance Centre, which provided the Government with detailed research on the constitutionality of such a step and on approaches to rape sentencing in other countries. Shortly, after this , the Namibian Law Society, which represents all practising attorneys, gave its official support to sentencing guidelines as well as a range of other rape law reforms. In May 1994 another petition on law reform, signed by representatives from five government ministries and ten NGO's and again including specific demands for reform of the law on rape was presented to the Ministry of Justice.

In 1995, in the wake of a brutal attempted rape of a woman journalist in Windhoek, the Namibia Media Women's Association presented a petition to the LRDC that included demands for stiffer sentences and the elimination of bail for accused sexual offenders. Violence against women in general has been the topic of a substantial number of grassroots demonstrations. In 1995 there was even a community-based group of *men* who called for law reform and made a broad range of recommendations on government and community strategies to combat rape."

2 Act No. 24 of 2003.

3 Act No. 25 of 2004.

Prior to 2000, the evidentiary regime applicable to sexual offences was determined largely by common law, with its roots in the English law of evidence and the Criminal Procedure Act, 1977,[4] which was a replica of a South African Act of the same name. Under common law, the law of evidence had developed specific rules to be applied where the commission of a sexual offence was at issue. Sexual offences were distinguished from other offences because of a belief that they had unique characteristics that gave rise to difficulties of proof and refutation.

These rules required the courts to make exceptions to the exclusionary rules applicable to previous consistent statements and character evidence. In addition, presiding officers had to apply a specific cautionary rule to the testimony of the complainant. If the complainant was a child, then the child would be subject to yet another cautionary rule applicable to children and to a competence inquiry.[5]

Previous consistent statements

There is a general rule of evidence which provides that, if a witness has previously made a statement out of court which confirms his or her testimony, evidence of such a statement is inadmissible.[6] The primary reason for the exclusion of such statements is their lack of relevance. Repetition does little to enhance an assessment of veracity and, obviously, if such evidence were admissible, it would be very easy to manufacture.[7]

In common law, there are a number of exceptions to this rule. One is the admission of evidence that the complainant in a sexual offence case made a complaint soon after the alleged offence. Although the content of the complaint is admissible, its probative value is restricted to showing consistency of conduct and absence of consent. However, it will never be considered as corroborative evidence as this would clearly infringe on the rule against self-corroboration.[8]

Before a prior complaint is admitted into evidence, a number of requirements have to be met. For one, the complaint must have been voluntary.[9] This does not exclude complaints elicited as a result of questioning. What amounts to an acceptable degree of prompting will depend on all the surrounding circumstances.[10] It is also important that the complaint be made at the first reasonable opportunity.[11] This does not necessarily mean that a complainant must blurt out her woes to the first person she encounters. What constitutes a

4 Act No. 51 of 1977.
5 See generally Hubbard (1991:134).
6 *Jones v South Eastern & Chatham Railway Co.'s Managing Committee*, (1918) 118 LT 802; *R v Manyana*, 1931 AD 386.
7 *R v Roberts*, [1942] 1 All ER 187 (CCA).
8 *R v M*, 1959 (1) SA 352 (A).
9 *S v T*, 1963 (1) SA 484 (A).
10 *R v C*, 1955 (4) SA 40 (N).
11 *R v Osborne*, [1905] 1 KB 551.

reasonable opportunity in the circumstances of the case will be determined by the exercise of judicial discretion.[12]

The complainant herself is also required to testify before such a prior statement will be admitted. Consequently, the admission of such evidence cannot be viewed as an exception to the hearsay rule.

The influence of English law on Namibia's law of evidence is clearly reflected in this exception to the rule prohibiting the use of previous consistent statements. The existence of the previous consistent statement rule has its roots in the old English law of 'hue and cry'. Its application to rape cases was recorded in the 13th century by De Bracton.[13] It required the victim to –[14]

> … go at once and while the deed is newly done, with hue and cry, to the neighbouring townships and there show the injury done her to men of good repute, the blood and clothing stained with blood, and her torn garments.

The rationale for this antiquated evidentiary practice was rooted in the belief that it was a product of centuries of judicial experience, which had shown that the evidence of a complainant in a sexual offence case must be treated with suspicion. Consequently, in order to overcome this suspicion, the courts were permitted to take previous consistent statements into account.[15] The basis of the suspicion that pervaded the approach taken by the courts in dealing with sexual offences is critically discussed under the section entitled "Cautionary rule" below. There are, however, a number of other criticisms directed at the practice of admitting previous consistent statements in cases of a sexual nature.

It can be argued that the admission of such evidence favours the complainant unfairly, in that the accused is prohibited from leading similar evidence. Conversely, this exception to the previous consistent statement rule is criticised on the basis that it enables the defence to exploit "the complainant's failure to complain timeously in order to cast doubt upon her credibility".[16] The negative inference that may be drawn from the complainant's failure to complain timeously reflects attitudes formulated in a time when there was little understanding of the psychology of the rape survivor. There are many psychological and social factors which may inhibit a rape survivor from making a complaint; consequently, the absence of a complaint can never be a reliable criterion in assessing credibility.[17]

12 *R v C*, 1955 (4) SA 40 (N).

13 See De Bracton (1968).

14 Ibid.:415.

15 This justification appears to have been received uncritically by the South African Law Commission in Project 45, *The Report on Women and Sexual Offences* (1985:53). See also *R v P*, 1967 (2) SA 497 (R).

16 See *R v M*, 1959 (1) SA 352 (A), which clearly established that a negative inference can be drawn from the accused's failure to complain timeously.

17 Brownmiller (1975:361ff); Burgess & Holmstrom (1974:37ff); Hall (1985); Medea & Thompson (1981:101ff); Temkin (1987); Toner (1982:225ff); Wilson (1978:62ff);

Sections 6 and 7 of the Combating of Rape Act, 2000[18] provide explicit recognition of the absence of any correlation between late reporting and unreliability, and of the strong body of social science evidence that indicates that victims of sexual offences may postpone reporting the offence for a considerable period. The sections read as follows:[19]

> 6. Evidence relating to all previous consistent statements by a complainant shall be admissible in criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature: Provided that no inference may be drawn only from the fact that no such previous statement has been made.
>
> 7. In criminal proceedings at which an accused is charged with an offence of a sexual or indecent nature, the court shall not draw any inference only from the length of the delay between the commission of the sexual or indecent assault and the laying of a complaint.

The prohibition of the drawing of an inference from the absence of a previous consistent statement is a non sequitur in that, for the matter to have come before the court, there would always have been a previous consistent statement. A *previous consistent statement* refers to a statement made out of court that is essentially similar to the statement made by the witness in court. For the matter to have come to court, the complainant must have told somebody about the incident. The issue in each instance is not whether a previous consistent statement was made, but when it was made – and this is where section 7 of the Act may well have an impact on the evaluation of credibility by prohibiting the drawing of an inference "only from the length of the delay" in reporting. However, the word *only* leaves open the possibility that an adverse inference may be drawn against the complainant if delay in reporting is coupled with some other evidence suggesting, for example, recent fabrication.

It is possible that the same effect may have been achieved by abolishing the exception to the previous consistent statement applicable to complainants in sexual offence cases and simply retaining the general exception that applies to all types of case and allows previous consistent statements to be admitted when there is an allegation of recent fabrication. This is the approach adopted by the Canadian legislature.[20] Indeed, it can be argued that, if previous consistent statements are irrelevant in relation to other categories of offence, it is difficult to see why they should be relevant in sexual offence cases.

The Criminal Procedure Act left these sections of the Combating of Rape Act intact, and although section 7 of the latter Act was an improvement on the common law position, scope remains for greater clarity. The withdrawal of the 2004 Criminal Procedure Act creates a real possibility that the ambiguities

18 Act No. 8 of 2000.

19 Similar provisions are contained in sections 58 and 59 of the South African Criminal Law (Sexual Offence and Related Matters) Amendment Act, 2007 (No. 32 of 2007).

20 Section 275 of the Canadian Criminal Code.

inherent in sections 6 and 7 of the Combating of Rape Act may be more effectively aligned with both the interests of the complainant and the accused in future legislation.

The cautionary rule

Sexual offences

There are a number of cautionary rules to be found in the law of evidence, in terms of which the courts are instructed to exercise caution when dealing with the evidence of certain witnesses. One such category of witness at common law was the complainant in a sexual offence case.

Cautionary rules are not inflexible. There is no fixed criterion that has to be met before a court will be convinced of a witness's trustworthiness.[21] Corroboration is not essential, although the cautionary rule will most often be overcome if there is some corroborative evidence.[22] If the requirements of a cautionary rule are met, it does not necessarily mean that proof beyond reasonable doubt has been established.[23] Despite the flexibility of the cautionary rules, however, there is no doubt that the application of the cautionary rule to the testimony of complainants in sexual offence cases was taken seriously. In *S v S*,[24] the South African Appellate Division held that mere reference to the cautionary rule applicable in sexual offence cases would not suffice. Eksteen, JA, held that it was not sufficient that the presiding officer be satisfied that the cautionary rule applicable to single witnesses had been overcome; even the presence of corroborative evidence would not suffice if the court did not clearly show it was conscious of the inherent dangers of such evidence in sexual cases.

The problem with this cautionary rule was that it appeared to have no rational basis. Instead, it demeaned women, and contributed to secondary victimisation and the non-reporting of cases.[25] Traditional arguments in support of the cautionary rule assert that it must be applied to the complainant in sexual offence cases because sexual offences frequently occur in private and leave no outward traces, making it very difficult to refute an assertion that there was no consent. The accused's difficulties are allegedly compounded by the danger that

21 *S v Artman*, 1968 (3) SA 339 (A); *S v Snyman*, 1968 (2) SA 582 (A); *R v J*, 1966 (1) SA 88 (RA).
22 See *S v Katamba,* 2000 (1) SACR 162 (NmS) at 170g, where O'Linn, AJA, notes as follows: "Even if it is conceded that the rule does not require 'corroboration' as such, how then does a Court distinguish it from corroboration? Some Courts consequently simply require corroboration …".
23 *S v Hlapezula*, 1965 (4) SA 439 (A); *Borcerds v Estate Naidoo*, 1955 (3) SA 78 (A).
24 1990 (1) SACR 5 (A).
25 There is a plethora of local and international materials exposing the absence of a rational basis for the existence of a specific cautionary rule applicable to sexual offences and reiterating the discriminatory and misogynist nature of the rule. These include Adler (1987); Bienen (1983:235); Birch (1990:667); Bronstein (1992:588); Brownmiller (1976); Burgess & Holmstrom (1974); Dennis (1984:316); Estrich (1986:1087); Estrich (1987); Fryer (1994:60); Hall (1985); Medea & Thompson (1981); Samson (1994); Smart (1989); Temkin (1987); Thomas Morris (1988:146); Toner (1982); Vogelman (1990); Wilmot (1992:211); Wilson (1978).

a sexual offence complainant may have some improper motive for laying the charge. The counter-argument is simple: there is a cautionary rule applicable to single witnesses which is invoked for all categories of offence. In addition, presiding officers –[26]

> … will have available the usual criteria of demeanour and coherence of the witness under cross-examination and the evidence of surrounding circumstances …

to assist them in assessing mendacity. The absence of outward traces is not an obstacle for the accused but an additional hurdle that the prosecution has to overcome in proving guilt beyond a reasonable doubt. The accused does not have to prove anything, and merely has to raise a reasonable doubt in the event of the prosecution establishing a prima facie case. There is no empirical data showing that more false charges are laid in respect of sexual offences than in any other category of crime. Available data indicates that sexual offences are greatly underreported. All arguments supporting the cautionary rule other than those pertaining to the dangers of a single witness's testimony are based on a misogynist assumption that women are duplicitous, sexually and otherwise.

In *S v D*,[27] Frank, J, finding that there was no empirical data supporting the contention that in cases of this nature more false charges are laid than in any other category of crime, came to the conclusion that the reasoning behind the cautionary rule must be as follows:[28]

> All women are *prima facie* deceitful and act with hidden motives and all men are *prima facie* incorruptible and act without hidden motives.

The counter-argument was that the rule could not be discriminatory as it applied to both men and women. Frank, J, overcame this potential criticism by stating that the overwhelming number of total complaints of a sexual nature are laid by women and, therefore, the only purpose of the cautionary rule was to discriminate against women.[29] He then went on to conclude, in an obiter dictum, that the cautionary rule had no rational basis and was probably contrary to the Namibian constitutional guarantee of equality.[30]

A claim of gender neutrality is also difficult to sustain when the historical framing of the rule in terms of female psychology is taken into account. The traditional rationale is clearly expressed by Wigmore in the following passage:[31]

26 Dennis (1984:328).

27 1992 (1) SACR 143 (Nm). For further commentary on this case, see Wilmot (1992:211); Bronstein (1992:588).

28 At 146b–d.

29 See Hubbard (2007), who notes that between 2000 and 2005, 99% of reported rape victims were women. Summary of report accessed via 13/7/07:www.irinnews.org/Report.aspx?ReportId=72535.

30 Ibid.:146.

31 Wigmore (1970:para. 924A, p 736). This passage has often been quoted with approval by the

> Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the court in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defect, party by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offenses by men. The unchaste … mentality finds incidental but direct expression in the narrations of imaginary sex incidents of which the narrator is the heroine or the victim. On the surface the narration is straightforward and convincing. The real victim[,] however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.

Glanville Williams found justification for the cautionary rule on the following grounds:[32]

> Sexual cases are peculiarly subject to the danger of deliberately laying false charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed.

Schriener, JA, in the South African case of *R v Rautenbach*,[33] contributed the following:

> It is not only the risk of conscious fabrication that must be guarded against. There is also the danger that a frightened woman, especially if inclined to hysteria, may imagine that things have happened which did not happen at all.

The suggestion that the cautionary rule be jettisoned was adopted by the Namibian Supreme Court in *S v Katamba*.[34] However, the court reiterated that, although the cautionary rule should no longer be applied, this did "not mean that the nature and circumstances of the alleged offence need not be considered carefully".[35] The South African courts were a little slower than the Namibian courts in recognising the fallacious nature of this particular cautionary rule. The first change in the South African judicial tide occurred in 1997, in the case of *S v M*.[36] The court, assuming that it had no option but to apply the cautionary rule, held that "it is highly problematic to assume automatically that women lie about rape when approaching a court",[37] and held that the cautionary rule had to be applied in a way that did not undermine the unequivocal constitutional

South African courts. See e.g. *S v Balhuber*, 1987 (1) SA PH H22 at 40; *S v F,* 1989 (3) SA 847 (A) at 854. Bienen (1983) scrutinises the authorities upon which Wigmore relied for his assertions about the mendacity of young girls, and concludes that "Wigmore writes as a man convinced, apparently so convinced that he actually suppressed factual evidence contradicting his assertions".

32 Williams (1962:662); also quoted in *S v Balhuber,* 1987 supra and *S v F*, 1989 supra.

33 1949 (1) SA 135 (A) at 143.

34 2000 (1) SACR 162 (NmS).

35 At 177B–C, quoting from *S v D*, supra, at 146h.

36 1997 (2) SACR 682 (C).

37 Ibid.:685d.

commitment to gender equality.[38] Shortly after the decision in *S v M*, the Supreme Court of Appeal, in *S v Jackson*,[39] held that –

> … the cautionary rule in sexual assault cases is based on irrational and outdated perceptions. It unjustly stereotypes complainants in sexual assault cases (overwhelmingly women) as particularly unreliable.

It expressly held that the cautionary rule had no place in South African law,[40] and made it clear that the only instance in which the testimony of a complainant or any witness could be treated with caution was when there was an evidentiary basis for doing so.[41] This qualification subsequently led to some ambiguity in the application of *Jackson*,[42] which was resolved when the Criminal Law (Sexual Offences and Related Matters) Amendment Act came into force.[43]

Fortunately, the Combating of Rape Act ensures that no such ambiguity exists in Namibian law. Section 5 of the Act provides as follows:

> No court shall 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.

This was not altered by the Criminal Procedure Act, 2004, and any problems encountered in the application of section 5 in the Combating of Rape Act are unlikely to be remedied by legislative fiddling: rather, judicial training is required.

Children

A cautionary rule applicable to the evidence of children provides that a presiding officer is obliged to be aware of the dangers inherent in assessing a child's evidence. Their evidence has to be considered in the same light as the evidence of accomplices.[44] As a consequence, the court will seek corroboration in order to assist in determining whether the witness is credible. However, corroboration

38 Ibid.:685e–j.
39 1998 (1) SACR 470 (SCA), at 476e.
40 Ibid.:476e–f.
41 In *S v M*, 2006 (1) SACR 135 (SCA), Cameron, JA, held that the constitutional right to dignity requires that any allegation of malicious motive for laying a complaint in a sexual offence case needs to be canvassed in the complainant's evidence (at para. [271]). As noted by Cameron, complainants in other criminal cases are not subject to such speculation (at para. [273]) and there is no rational reason for exposing a complainant to the indignity of such speculation.
42 See e.g. *S v Van der Ross*, 2002 (2) SACR 362 (C); for further discussion of this case, see Schwikkard (2003:256).
43 Act No. 32 of 2007. Section 60 expressly abolishes the cautionary rule applicable to sexual offences, as follows: "Notwithstanding any other law, a court may not treat the evidence of a complainant in criminal proceedings involving the alleged commission of a sexual offence pending before that court, with caution, on account of the nature of the offence".
44 *R v Manda*, 1951 (3) SA 158 (A) at 163D.

is not essential for the requirements of the cautionary rule to be met.[45] The cases are not altogether enlightening as to precisely what the inherent dangers in children's evidence are. In the South African case of *R v Manda*,[46] Schreiner, JA, states that –

> … [t]he imaginativeness and suggestibility of children are only two of a number of elements that require their evidence to be scrutinised with care amounting, perhaps to suspicion …[,]

but unfortunately he did not elaborate on the other 'numerous elements'. More guidance is to be found in the dictum of Diemont, JA, in *Woji v Santam Insurance Co Ltd*:[47]

> The question which the trial court must ask itself is whether the young witness' [sic] evidence is trustworthy. Trustworthiness … depends on factors such as the child's power of observation, his power of recollection, and his power of narration on the specific matter to be testified. In each instance the capacity of the particular child is to be investigated. His capacity of observation will depend on whether he appears "intelligent enough to observe". Whether he has the capacity of recollection will depend again on whether he has sufficient years of discretion "to remember what occurred" while the capacity of narration or communication raises the question whether the child has the "capacity to understand the questions put, and to frame and express intelligent answers" … There are other factors … Does he appear honest[?] … [I]s there a consciousness of the duty to speak the truth[?] … At the same time the danger of believing a child where evidence stands alone must not be underestimated.

Although *Woji* should be applauded in that it recognises the individuality of children, it is clearly still based on the premise that children are inherently more unreliable than adults as witnesses. According to Spencer and Flin, this belief accords with societal and 'expert' views that were prevalent up until the 1960s.[48] However, subsequent research in cognitive psychology and child development has resulted in a reappraisal of earlier beliefs and a realisation that children's ability to give reliable evidence has been greatly underestimated.[49] This conclusion has been strengthened by research on the reliability of adult testimony, which has shown that adults' memories may be poor and susceptible to suggestion and misinformation.[50] The result has been awareness amongst

45 Ibid.; *Woji v Santam Insurance Co Ltd*, 1981 (1) SA 1020 (A).
46 *R v Manda*, at 163C–D.
47 Ibid.
48 Spencer & Flin (1990:286–287).
49 Ibid. It is interesting to note that this and other observations made by the author and first recorded in 1996 in *Acta Juridica* at 152 are reported verbatim as a record of counsel's submission in *S v Monday*, 2002 NR 167 (SC) at 192 and 194, with no acknowledgement of the source. See Schwikkard (1996).
50 Ibid.

social scientists that –[51]

> … the presumed gulf between the eyewitness abilities of children and adults has been seriously exaggerated.

It is not at all clear that the cautionary rule applicable to the evidence of children can withstand the test of social science evidence. The legal system's distrust of children's evidence has a discriminatory effect on an extremely vulnerable group. In the absence of a clear rationale it becomes difficult to justify this cautionary rule's inconsistency with a constitutional commitment to equality. It would seem to make much more sense to get rid of this cautionary rule and require, as articulated in *Jackson*,[52] that any cautionary approach to a witness must have an evidential basis, with a very clear proviso that the age or gender of the witness cannot provide the requisite evidential base. However, these arguments were unequivocally rejected by O'Linn, AJA, in *S v Monday*,[53] mainly on the basis that the relevant social science evidence had not been properly put before the court.[54]

The Combating of Rape Act was silent on the cautionary approach applicable to the evidence of children. Perhaps this was because it would not necessarily make sense to abolish the cautionary rule only in respect of children testifying in sexual offence cases. This lacuna in the rape reform provisions was remedied by the Criminal Procedure Amendment Act, 2003, which amended section 164 of the Criminal Procedure Act, 1977 by the addition of subsection (4), which read as follows:

> A court shall not regard the evidence of a child as inherently unreliable and shall therefore not treat such evidence with special caution only because that witness is a child.

The corresponding section (s 185) in the Criminal Procedure Act, 2004 made no reference to the cautionary rule. Since the 2004 Act was set to repeal the whole of the Criminal Procedure Act, 1977 as well as the Criminal Procedure Amendment Act, 2003, the cautionary rule applicable to children would have been revived. This fortunately will no longer be the case, but it is clearly a danger that should be taken into account by future drafters.

51 Ibid. See also Melton (1981:73). For a variety of perspectives on children's evidence, see Ceci et al. (1987, 1989).
52 1998 (1) SACR 470 (SCA).
53 2002 NR 167 (SC).
54 See also *S v Katamba*, supra.

Getting rid of the cautionary rule applicable to children is by no means a novel idea. In England, the cautionary rule applicable to children's evidence was abrogated by section 34(2) of the Criminal Justice Act of 1988, and well over a decade ago, the Supreme Court of Canada rejected the cautionary rule together with the notion that children's testimony was inherently unreliable and, consequently, needed to be treated with special care.[55] Nevertheless, the Canadian courts have recognised that children are not miniature adults and this should be appreciated on a case-by-case basis when assessing the credibility of children. This approach, which is not based on the notion that children are inherently unreliable, implicitly calls for judicial awareness of children's cognitive development. There are two ways of attaining this: (a) by judicial training,[56] and (b) by providing expert assistance in the courtroom. The financial cost and availability (or not) of experts to assist the court, as well as potential administrative difficulties that might contribute to increased backlogs in the court, may result in (b) being unattainable. However, judicial training is not so easy to dismiss. It can be argued that the transformation of any judicial system requires social context training. The legal system is imbued with internalised beliefs drilled in textbooks, law school training, and tradition; these internalised beliefs are not easily dislodged. Without social context training, the formal jettisoning of the cautionary rules on their own is unlikely to improve the quality of fact-finding. It is more likely that the prejudices represented by these rules will become an unarticulated factor influencing judicial assessment of credibility.

Testimonial competence of children

At common law, age is not the determining factor in deciding whether a child is competent to testify. Children will be competent to testify if, "in the opinion of the court, they can understand what it means to tell the truth".[57] Children need not give sworn evidence if the court believes that they do not "understand the nature and import of the oath or affirmation".[58] The fact that a child's evidence is unsworn does not necessarily mean that it will be accorded less weight.[59] Hoffmann and Zeffert summarise the 'competency test' as follows:[60]

> In each case the judge or magistrate must satisfy himself that the child understands what it means to speak the truth. If the child does not have the intelligence to distinguish between what is true and false, and to recognise the danger and wickedness of lying, he cannot be admonished to tell the truth – he is an incompetent witness.

55 *R v W (R)*, (1992) 74 CCC (3d) 134. See also *S v B (G)*, (1990) 56 CCC (3d) 200.

56 See Perry & Wrightsman (1991:56), who argue that "a working knowledge of the stages and issues of child development is essential to any person who interacts with children in the legal system".

57 Hoffmann & Zeffert (1988:375).

58 Section 164 of the Criminal Procedure Act, 1977 (No. 51 of 1977). See also section 41 of the Civil Proceedings Evidence Act, 1965 (No. 25 of 1965).

59 *R v Manda*, 1951 (3) SA 158 (A).

60 Hoffmann & Zeffert (1988:376). See also *S v T*, 1973 (3) SA 794 (A); *S v Monday*, 2002 NR 167 (SC).

In other words, a presumption of incompetence applies to children as they are required to pass a test before their evidence will be admitted.[61] No similar presumption applies to convicted perjurers or to other persons convicted of crimes involving an element of dishonesty. The effect of the 'competency test' is that there is the possibility that reliable testimony may be excluded and this may inhibit the effective prosecution of offences. *Truth* and *the duty to tell the truth* are abstract notions, which a young child may not be able to understand or explain; but this does not mean that they cannot give a reliable account of relevant events.[62]

Adults are presumed to be competent witnesses.[63] However, if their competence is placed in issue, there will be two inquiries: (i) the witness's ability to understand the nature of the oath,[64] and (ii) the witness's ability to communicate.[65] Where adults do not understand the nature of the oath, they may give unsworn evidence after being admonished to tell the truth.[66] The purpose of administering the oath or admonishing a witness to tell the truth is primarily to encourage the witness to tell the truth.[67] However, in assessing credibility, the court will place little weight, if any, on the fact that a witness took the oath or was admonished to tell the truth.[68] Instead, it will look to such factors as coherence under cross-examination, evidence of surrounding circumstances, and demeanour. The fact that a child cannot understand or articulate its understanding of the duty to tell the truth does not necessarily hinder a court in its assessment of credibility.[69]

The second leg of the competence inquiry is far more important. Clearly, a child who cannot communicate and who is unable to give an understandable account of the relevant events will be of little assistance to the court. On the other hand a child who does not understand the duty to speak the truth, but who is able to give an account of relevant events will be of great assistance. But does the court need to test a child's ability to communicate prior to the child testifying? Wigmore, recognising the difficulties and futility of assessing a child's credibility prior to the child giving evidence, wrote "it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may

61 See Birch (1992:265).

62 Spencer & Flin (1990:58).

63 See section 192 of the Criminal Procedure Act, 1977 (No. 51 of 1977) and section 42 of the Civil Proceedings Evidence Act, 1965 (No. 25 of 1965). A person who alleges that an adult is an incompetent witness bears the onus of proof.

64 Hoffmann & Zeffert (1988:372).

65 *R v Ranikolo,* 1954 (3) SA 255 (O).

66 Section 41 of the Civil Proceedings Evidence Act, 1965 (No. 25 of 1965) and section 164 of the Criminal Procedure Act, 1977 (No. 51 of 1977).

67 *S v Munn*, 1973 (3) SA 734 (W) at 734.

68 This is because the ability to reason morally does not mean that a person will behave morally. See Perry & Wrightsman (1991:129); Spencer & Flin (1990:334); Bussey et al. (1993:153).

69 See Melton (1981:79), where he persuasively argues that "[a]sking a child to tell the meaning of 'truth', 'oath' or 'God' probably tells more about his or her intellectual development than about the child's propensity to tell the truth".

seem worth".[70] In England, the Pigot Committee gave the following reasons for abandoning the competency requirements applicable to children:[71]

> In principle it seems wrong to us that our courts should refuse to consider any relevant understandable evidence. If a child's account is available it should be heard … Once this evidence is admitted juries will obviously weigh matters such as the demeanour of the witness, his or her maturity and understanding and the coherence and consistency of the testimony, in deciding how much reliance to place upon it … [T]he present approach … appears to be founded upon the archaic belief that children below a certain age or level of understanding are either too senseless or too morally delinquent to be worth listening to at all. It follows that we believe that the competence requirement which is applied to potential child witnesses should be dispensed with and it should be not be replaced.

In accordance with the Committee's recommendations, section 33A was inserted into the Criminal Justice Act.[72] In terms of this section, the English courts were no longer required to inquire into the competency of children as a class, although they retain the power to declare a child incompetent.[73] This has subsequently been replaced by sections 53 and 54 of the Youth Justice and Criminal Evidence Act 1999. In terms of section 53, all witnesses – whatever their age – will be presumed to be competent, provided they can understand the questions that are put to them and are able to give answers which can be understood. Section 53 is subject to section 54, which provides, inter alia, that when competency of a witness is put in issue, the party calling the witness needs to satisfy the court that, on a balance of probabilities, the witness is competent to give evidence in the proceedings.[74]

Provided an accused is afforded the opportunity of challenging the evidence of a child witness, it is difficult to see how the abandonment of the competence inquiry could in any way diminish trial fairness. On the other hand, the requirement that a judge be satisfied that a child understands the duty to speak the truth before that child is considered a competent witness "singles out some of society's most vulnerable members for treatment that effectively deprives them of the protection and vindication of the criminal justice system".[75]

Birch comments that "child abuse occurs in part because of the inequalities between child and adult in size, knowledge and power", and that these

70 Wigmore (1970:509, 601).
71 Pigot Committee (1989).
72 Inserted by virtue of section 52(1) of the Criminal Justice Act 1991.
73 According to Birch (1992:268), the correct interpretation of section 33A is that a child will only be declared incompetent when he or she cannot communicate effectively.
74 In the United States, the Federal Rules of Evidence do not distinguish between children and adults. Consequently, a child can testify without a preliminary testing of competency; see McGough (1994).
75 Harvison Young (1992:19).

inequalities "have been institutionalised by one-sided rules of evidence".[76] It would appear that there are strong grounds for arguing that the abandonment of the 'competency test' is necessary for effective equality. It will also increase the potential for successful prosecutions, and will buttress a child's constitutional right to security and freedom from abuse.

The Combating of Rape Act was silent as regards the testimonial competence of children. However, the Criminal Procedure Amendment Act, 2003 introduced some significant changes – the effect of which made the ability to communicate with the court the sole criterion for competency in respect of children.[77] The amended section 164 does not require an inquiry into the child's ability to understand the nature and import of the oath and affirmation, and simply requires the presiding officer to admonish the child to speak the truth. Subsection (3) was inserted and provides as follows:

> (3) Notwithstanding anything to the contrary in this Act or any other law contained, the evidence of any witness required to be admonished in terms of subsection (1) shall be received unless it appears to the presiding judge or judicial officer that that witness is incapable of giving intelligible testimony.

These amendments were retained in section 185 of the Criminal Procedure Act, 2004. However, as withdrawal of the 2004 Act simply means that section 164 remains intact, it appears that, in this respect at least, there will be no negative consequences for the child complainant.

However, the ability of children to give evidence was further facilitated by the incorporation of provisions similar but not identical to those contained section 5 of the Criminal Procedure Amendment Act, 2003,[78] into section 245 of the Criminal Procedure Act, 2004. This section effectively departed from the principle of orality and provided another route[79] for the admission of hearsay as well as previously recorded statements (when the child testifies) to be admitted into evidence – provided the presence of requisite safeguards was established. Section 245 reads as follows:

> 245.(1) Evidence of a statement made by a child under the age of 14 years is admissible at criminal proceedings as proof of any fact alleged in that statement if the court –
>
> (a) is satisfied that –
>
> (i) the child who made the statement is incapable of giving evidence relating to any matter contained in the statement; and

76 Birch (1992:269).

77 See section 2 of the Criminal Procedure Amendment Act, 2003 (No. 24 of 2003).

78 Inserting section 216A into Act 51 of 1997.

79 The other route is to be found in section 244, which applies to all hearsay evidence.

(ii) the statement, considered in the light of all the surrounding circumstances, contains indications of reliability; and

(b) having regard to any prejudice to a party to the proceedings that the admission of such evidence might entail, it is of the opinion that such evidence should be admitted in the interests of justice.

(2) If a child under the age of 14 years gives evidence in criminal proceedings, evidence of the statement made by that child is admissible as proof of any fact alleged in the statement if that child gives evidence to the effect that he or she made that statement.

(3) Evidence of a statement contemplated in subsection (1) or (2) may in criminal proceedings be given in the form of –

(a) the playing in court of a videotape or audiotape of the making of that statement if the person to whom the statement was made gives evidence in such proceedings;

(b) a written record of that statement if the person to whom the statement was made gives evidence in such proceedings;

(c) oral evidence of that statement given by that person to whom the statement was made, but only if it is not possible to give evidence in the form contemplated in paragraph (a) or (b).

(4) This section does not render –

(a) admissible any evidence that is otherwise inadmissible;

(b) inadmissible any evidence that is otherwise admissible under section 244 as hearsay evidence.

The withdrawal of the 2004 Act means that this aspect of children's testimony remains covered by section 216A of the Criminal Procedure Act, 1977. Section 216A does not contain a provision corresponding to section 245(1)(b), which requires the court to take into account prejudice to all parties in admitting the evidence in the interests of justice. This provision, which is directed at ensuring trial fairness, is an unfortunate loss. Section 216A also has no provision corresponding to section 245(4), which would have played an important role in retaining consistencies in evidentiary standards, as well making it clear that the more principled and flexible approach to hearsay set out in section 244 of the Act was also applicable to statements made by children.

The advantages of allowing the pre-recorded evidence of a child to be admitted into evidence is that it has the potential of enhancing the truth-seeking function of the court by providing evidence of a better quality. Trial delays mean that witnesses frequently have to testify months or even years after the incident in

question. In all witnesses, the ability to recall diminishes with time – but this is particularly acute with young witnesses. It also allows evidence to be made available to the court when a child is incapable of giving evidence. However, it is only when the child is incapable of testifying that they will be exempt from the trauma of testifying at trial. If they are capable of testifying, then they need to enter the witness box and confirm that they made the earlier statement. They are then inevitably obliged to be subject to cross-examination, both on the prior statement and any discrepancies that might arise between their prior statement and their testimony in court. This scenario has the potential of being extremely stressful for the child. This would have been the case under the amended 1977 Act as well as the 2004 Act. However, section 244 of the 2004 Act may well have provided the needed flexibility. Section 244 offered another route for the admission of hearsay evidence and allowed hearsay to be admitted –

- where the party against whom it is adduced consents to its admission
- the person on whose credibility the probative value of such evidence depends testifies, and
- if it is in the interests of justice that the hearsay be admitted.

Section 244(1)(c) sets out a number of factors that a court has to take into consideration in determining whether it is in the interests of justice to admit the hearsay evidence. Consequently, it is possible that, if there were sufficient guarantees of reliability at the pre-trial recording – such as the presence of the accused's legal representative and cross-examination, the child's pre-recorded evidence may have been admitted in terms of section 244 although the child was capable of testifying.[80] This may well have been a path worth pursuing, when testifying would clearly create significant trauma for the child. It would indeed be unfortunate if the much-needed amendment to the common law hearsay rule, which would have occurred if section 244 had been enacted, is further delayed by legislative indecision.

Evidence of psychological effects of rape

Section 8 of the Combating of Rape Act remains intact. It is an interesting section in that it would seem superfluous if the ordinary rules of relevance where consistently applied by presiding officers. The section reads as follows:

> 8.(1) Evidence of the psychological effects of rape shall be admissible in criminal proceedings at which an accused is charged with rape (whether under the common law or under this Act) in order –
>
> (a) to show that the sexual act to which the charges relate is likely –

80 For a general discussion of pre-recorded child testimony, see Simon (2006:56), where she notes that there are a number of jurisdictions that permit pre-recorded statements to be admitted, and that, in Canada and America, such provisions have passed constitutional muster – provided the appropriate safeguards are in place.

(i) to have been committed towards or in connection with the complainant concerned;

(ii) to have been committed under coercive circumstances;

(b) to prove, for the purpose of imposing an appropriate sentence, the extent of the mental harm suffered by that complainant.

(2) In estimating the weight to be attached to evidence admitted in terms of subsection (1), the court shall have due regard to –

(a) the qualifications and experience of the person who has given such evidence; and

(b) all the other evidence given at the trial.

It must be presumed that a legislative need was identified as a consequence either of presiding officers failing to admit such relevant evidence or legal representatives failing to tender such evidence (or both). Although in principle superfluous, hopefully section 8 will continue to serve an educational function.

Evidence during criminal proceedings of similar offences by accused

An equally puzzling addition was made by section 16 of the Combating of Rape Act, which inserted section 211A in the Criminal Procedure Act, 1977, and was replicated in section 237 of the Criminal Procedure Act, 2004. In essence, the addition simply states that the general rule and the exceptions applicable to similar fact evidence also apply when similar fact evidence is sought to be admitted against an accused charged with a sexual offence. The addition reads as follows:

237.(1) Subject to subsection (2), in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, evidence of the commission of other similar offences by the accused must, on application by the prosecutor, be admitted by the court at such proceedings and may be considered on any matter to which it is relevant, but such evidence must only be so admitted if the court is satisfied that it has significant probative value that is not substantially outweighed by its potential for unfair prejudice to the accused.

(2) Evidence of previous similar offences by an accused is not admissible only to prove the character of the accused.

(3) The court's reasons for its decision to admit or refuse to admit evidence to previous similar offences must be recorded and those reasons form part of the record of the proceedings.

Section 237 is a useful codification of the common law similar fact rule applicable in all cases, but is inexplicably restricted to sexual offence cases. If there is indeed reluctance on the part of presiding officers to apply the similar fact rule to evidence adduced against the accused, subsection (3) in particular will play an important role in ensuring that judicial minds are properly focused in determining the admissibility of such evidence.

Prior sexual history

In all criminal cases where the complainant testifies, he or she may be cross-examined; and the cross-examiner may ask questions that are pertinent to exposing the witness's credibility or lack thereof. However, the general rule is that the character or disposition of the complainant is not relevant to credibility. Consequently, evidence which is solely directed at establishing that the complainant is of bad character is prohibited – as is evidence of good character. But once again, there is an exception to the general rule: in a case involving a charge of rape or indecent assault, the defendant may adduce evidence as to the complainant's bad reputation for lack of chastity.

Prior to the Combating of Rape Act, 2000, section 227 of the Criminal Procedure Act, 1977 provided that, in sexual offence cases, the admissibility of evidence as to "the character of any female" would be determined by the application of the common law. This enabled the defence to question the complainant as to her previous sexual relations with the accused.[81] The accused was prohibited from leading evidence of the complainant's sexual relations with other men.[82] However, she could be questioned on this aspect of her private life in cross-examination as it was viewed as being relevant to credibility. Evidence to contradict any denials could only be led if such evidence was relevant to consent.[83]

Evidential rules permitting the admission of evidence of prior sexual history appear to have been adopted by the English courts in the 19th century,[84] the underlying assumption behind these rules being that no decent women engaged in sexual intercourse outside of marriage.[85] One of the strongest criticisms of the rule permitting evidence of prior sexual history is that, while cross-examination concerning prior sexual history traumatises and humiliates the victim, the evidence it elicits is irrelevant. At most, this evidence may establish a general propensity to have sexual intercourse. Evidence of this nature is held to be inadmissible in other cases, and there are no grounds for admitting it where the case is of a sexual nature. The admissibility of this evidence deters victims from reporting the offence.[86]

81 *R v Riley*, (1887) 15 QBD 481.
82 *R v Adamstein*, 1937 CPD 331.
83 *R v Cockcroft*, (1870) 11 Cox CC 410; *R v Cargill*, [1913] 2 KB 271.
84 Temkin (1987).
85 South African Law Commission (1985:50).
86 South African Law Commission (1985:49–50); Temkin (1987:120).

Most of the arguments against reform were based on the assertion that cross-examination is an essential component of the adversary system, all relevant information has to be put before the court, and the rights of the accused have to be protected. These arguments ignore the fact that such evidence of general propensity is inadmissible in other cases, and that such evidence is irrelevant to proving guilt or innocence.

The Combating of Rape Act amended section 227 so as to make it applicable only to the accused's character, and inserted section 227A. These sections were repealed by the Criminal Procedure Act, 2004 but substantially re-enacted in section 258 of the 2004 Act. The withdrawal of the 2004 Act consequently makes no substantial difference, as section 227A remains in force. It reads as follows:

> 227A (1) No evidence as to any previous sexual conduct or experience of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, [sic] shall be adduced, and no question regarding such sexual conduct or experience shall be put to the complainant or any other witness in such proceedings, unless the court has, on application made to it, granted leave to adduce such evidence or to put such question, which leave shall only be granted if the court is satisfied that such evidence or questioning –
>
> (a) tends to rebut evidence that was previously adduced by the prosecution; or
>
> (b) tends to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to the fact in issue; or
>
> (c) is so fundamental to the accused's defence that to exclude it would violate the constitutional rights of the accused:
>
> Provided that such evidence or questioning has significant probative value that is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right of privacy.
>
> (2) No evidence as to the sexual reputation of a complainant in criminal proceedings at which an accused is charged with rape or an offence of an indecent nature, [sic] shall be admissible in such proceedings.
>
> (3) Before an application for leave contemplated in subsection (1) is heard, the court may direct that the complainant in respect of whom such evidence is to be adduced or to whom any such question is to be put, [sic] shall not be present at such application proceedings.
>
> (4) The court's reasons for its decision to grant or refuse leave under subsection (1) to adduce such evidence or put such question shall be recorded and shall form part of the record of the proceedings.

Under this section, evidence of the sexual reputation of a complainant is prohibited in all circumstances. Evidence as to prior sexual conduct may be admitted in only three circumstances, namely –

- to rebut prosecution evidence
- where it is necessary to explain a physical condition of the complainant, and
- where it is constitutionally required for the accused's defence.

Even where the evidence fits into one of the above three categories, relevance has to be established by the defence and, in assessing relevance, the court has to take into account any potential prejudice to the complainant's dignity and right to privacy. An application has to be made to lead the evidence, and the court may direct that the complainant is not present when the application is made. Significantly, the court is required to record its written reasons for its decision to grant or refuse an application made in terms of section 227A.

Section 227A leaves the court with a significant degree of discretion in determining relative prejudice and whether or not the evidence "is fundamental to the accused's defence".[87] This is no doubt in deference to the constitutional right to a fair trial and the Canadian experience, which saw legislation that placed significant constraints on the court's discretion being struck down as it allowed the possibility of evidence that was relevant to the accused's defence being excluded.[88] However, this means that there is the danger of old practices continuing. Nonetheless, subsection (4) provides an extremely important safety net in requiring judicial officers to give reasons for allowing such evidence.

Vulnerable witnesses

Section 1 of the Criminal Procedure Amendment Act, 2003 amended the Criminal Procedure Act, 1977 by inserting section 158A. The latter section contained special provisions for vulnerable witnesses. These provisions were repealed by the Criminal Procedure Act, 2004 but substantially re-enacted in section 189 of the 2004 Act: so, again, the withdrawal of the 2004 Act is of no particular significance. Section 158A is an extremely long section that makes special provision for vulnerable witnesses. The definition of *vulnerable witness* is broad (and specifically excludes the accused), and includes –

- children under the age of 18[89]
- complainants in sexual offence and domestic violence cases, and[90]
- witnesses suffering from a mental or physical disability or who may be intimidated or otherwise suffer undue stress and as a consequence be unable to give reliable evidence.[91]

87 Section 227A(1)(c).

88 *R v Seaboyer*, [1991] 2 SCR 577. Section 276 of the Canadian Code was consequently amended and now confers a more flexible discretion. English law also contains legislation restricting the admission of character evidence in respect of complainants and other witnesses, but this, too, confers a relatively wide discretion on presiding officers (section 100 of the Criminal Justice Act 2003).

89 Section 158A(3)(a).

90 Section 158A(3)(b) and (c).

91 Section 158A(3)(d).

Subsection (2) sets out the various steps that the court may take in attempting to put the vulnerable witness at ease in order to facilitate the most coherent form of testimony. These include creating an informal environment, ensuring that the intimidatory presence is out of sight of the witness, which may include the use of such devices as closed-circuit television. Whatever steps are adopted, the court and defence must be able to see and hear the vulnerable witness and any 'support person' who may be present. A court may allow an appropriate support person to accompany the vulnerable witness while he or she gives evidence. The support person's role at this stage is restricted to giving physical comfort and alerting the court should the witness experience undue stress.[92]

This section can be viewed as ameliorating the inevitable disadvantages suffered by vulnerable witnesses in an adversarial criminal justice system. However, the effective protection of vulnerable witnesses will have significant resource implications, and it will be interesting to see how frequently these protections materialise. The legislature was clearly aware of the resource implications; this is reflected is section 158A, which requires the court to take the following factors into account before ordering that special arrangements be made for a vulnerable witness:

(a) the interests of the State in adducing the complete and undistorted evidence of a vulnerable witness concerned;

(b) the interests and well-being of the vulnerable witness concerned;

(c) the availability of necessary equipment and locations; and

(d) the interests of justice in general.

Conclusion

The withdrawal of the Criminal Procedure Act, 2004 will not significantly disadvantage complainants in sexual offence cases. The 2004 Act, in most instances, simply consolidated the gains made by victims of sexual offences in the Combating of Rape Act and the 2003 Amendment Act and, in one instance, appeared to take a step backwards, namely in apparently reinstating the cautionary rule applicable to children. The withdrawal of the Act leaves scope for the clarification of the rule applicable to previous consistent statements in sexual offence cases, and the abolition of the cautionary rule applicable to children by the 2003 Act intact. However, the loss of the reforms to the hearsay rule contained in the 2004 Act does deprive vulnerable witnesses of potential relief.

Hopefully, the legislature will continue to pursue the hearsay reforms, and future legislative interventions will take the opportunity to consolidate all the procedural provisions applicable to sexual offences in one Act.

92 Section 158A(4) and (5).

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Regional trade arrangements: Developments and implications for southern African states

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Why do nations trade?

Nations trade because it makes sense. No state can prosper in isolation. Economic theory explains the rewards of trade in terms of comparative cost advantages, increased competition and specialisation. International trade allows domestic economies to specialise and to produce goods in areas where they enjoy a relative cost advantage. This helps economies to employ their resources so as to ensure higher returns on their investment. Consumers benefit as a result of the availability of more effectively produced goods and there is an increase in the 'wealth of nations'. It means that protectionism and isolation should be avoided: they undermine the benefits flowing from the freeing up of markets and the liberalisation of trade.

Liberalised international trade directly contributed, through the promotion of economic development, to the reduction in global poverty that has occurred to date. The most dramatic recent example is provided by the People's Republic of China, where decades of isolation and orthodox communism have been followed by roaring growth and an export-led wealth boom. As a result, millions have been lifted out of poverty. China joined the World Trade Organisation (WTO) in 2000 and actively pursues the gains of international and global integration. Trade also promotes peace and security and has other advantages such as the transfer of technology and ideas.

In order to reap the benefits of more freedom in international trade, certain building blocks must be in place, in addition to the capacity to produce competitively priced tradeable goods and services. This involves inter-state arrangements, as well as laws, administrative measures, and governmental structures within states. Producers and traders need access to international markets as well as certainty and predictability for their commercial transactions. These aspects are provided through a vast network of international and regional trade agreements and organisations. However, these trade arrangements can only function properly if supported and extended by national laws and domestic structures operating in tandem with international and regional legal instruments and bodies.

The present article provides an overview of some contemporary developments and their implications for southern Africa. It emphasises the need for domestic and regional reforms in order to provide for better rules-based arrangements.

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The southern African states are at an important historical junction as the preferential trade arrangements which have benefited them for decades are being replaced by WTO-compatible agreements. Regional integration in Africa is also on the increase.

How do nations trade?

From a legal perspective, international trade has always – at least since the existence of the nation state – been about the movement of goods, services, investment and (sometimes) people across state borders. Thus, *trade liberalisation* is essentially about removing obstacles such as tariffs and quotas, imposed by governments at their borders, which hinder the movement of goods across jurisdictional boundaries.

Trade in services is not about the movement of tangible goods, but rather involves selling and providing services within other jurisdictions. The liberalisation of trade in services also requires international arrangements, permitting service providers to do business elsewhere, whether in banking, insurance, telephony or tourism, etc. The WTO regime now regulates the trade-related aspects of intellectual property rights – trademarks, copyright, patents, etc. – as well, and does so through the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS).

This does not mean that international trade or 'globalisation' should go unchecked. In certain situations, governmental regulation may be very necessary. Examples can be found in areas such as the protection of the environment and essential national interests. International and regional trade arrangements recognise these as legitimate goals and provide for exceptions to accommodate such needs. Article XX of the General Agreement on Tariffs and Trade (GATT) is an example of "general exceptions" permitted by the WTO. The Article provides for the protection of public morals; the protection of human, animal or plant life; the conservation of exhaustible natural resources; etc. Article XIX of GATT allows for safeguards against imports when increased quantities of foreign goods cause serious injury to domestic producers. When invoking these clauses, however, governments need to simultaneously respect the rules as to, for example, the duration of protective measures, compensation, transparency, and justification. These exceptions are circumscribed by the applicable rules and may only be imposed when necessary and in order to protect legally recognised objectives; they cannot be imposed as a matter of unfettered discretion.

The endeavour to liberalise trade faces two traditional challenges: the sovereignty of states, and the fact that governments, as a rule, do not trade.[1] States exercise jurisdiction over their own territory and over commercial transactions concluded on their soil, but trade is not predominately an intergovernmental matter.

1 There are qualifications in areas such as public procurement: governments are also major consumers of goods and services.

International trade involves private parties. States adopt the agreements for establishing international organisations, liberalising trade, and regulating the formalities. Within that legal framework, which includes national laws to implement international arrangements, private parties will conduct their cross-border commercial activities.

A state can impose restrictions such as tariffs on the movement of goods across its borders. The purpose behind international trade agreements is to make it easier for trade to take place and to dismantle the obstacles that prevent the free flow of goods.

International trade law consists of all those legal instruments (primarily international agreements) that regulate trade flows and deal with associated matters. These include all the multilateral legal instruments underpinning organisations such as the WTO. It also covers many bilateral regional and lateral trade agreements and, eventually, the domestic rules within states in terms of which governments comply with their international obligations and implement their own trade policies.

There is no world parliament, but there would be chaos if no international rules on inter-state conduct existed. There can be no development, prosperity or peace unless it is possible to deal with the realities and consequences of sovereignty. The interdependence of states and the effects of 'globalisation' demand joint responses to cope with international crime, the spread of disease, climate change, the sharing of common resources or the utilisation of the high seas. There must be rules on predictable behaviour and systems to ensure compliance. International law is the instrument which allows states to deal with these concerns – mostly through the conclusion of international agreements.[2] The same logic applies to international trade.

International agreements are negotiated when delegations (mandated to represent their governments) meet and discuss the content of a new agreement. Once the negotiating process is complete, the text of a new legal instrument is ready, but it is not yet binding. In order to become so it has to be ratified. *Ratification* is the process in terms of which a particular state party indicates that it is prepared to be bound by the treaty in question. Ratification also involves those provisions in national constitutions (or state laws) dealing with international law and the domestic status of international agreements. In most countries, important international agreements will require some form of parliamentary approval. The domestic procedures for ratifying and implementing agreements form part of this bigger legal picture.

Once the domestic approval process has been completed, the international ratification of the agreement will follow.

2 The other sources of international law are customary international law and general principles of law – a subsidiary source.

This involves the depositing by governments of instruments of ratification with the organisation or foreign government chosen as the depositary. The agreement will enter into force once the required number of ratifications has been deposited. Because of the legal consequences of sovereignty, states are only bound by those international agreements to which they have become a party – either through ratification or subsequent accession. The opposite is also true: a state cannot escape its international legal obligations by invoking its national law or its own constitution. If that were possible, we would have no international law.

The WTO agreements now cover a vast area that includes trade in services (GATS) and trade-related aspects of intellectual property rights (TRIPS). Another important institutional aspect of the WTO is its dispute settlement system. It provides for panels to hear trade disputes between member states, and includes the Appellate Body. The dispute settlement system has been hailed as very successful. It is a unique international arrangement, and all WTO members are automatically under its jurisdiction. They cannot opt out when confronted by another member state's claims. Unfortunately, African states are mostly absent when it comes to the use of this important multilateral mechanism.[3]

The multilateral trade dispensation of the WTO is *rules-based* and constitutes a single undertaking.[4] For traders, service providers and consumers, it means that they can plan their transactions and commercial activities within a framework of certainty and predictability. Should disputes ensue, their justiciability should be guaranteed: both within the national sphere and between states.

Regional trade arrangements form an important part of the fabric that regulates trade among nations. They, too, are increasingly founded on rules-based arrangements in order to provide for certainty and because regional trade arrangements are circumscribed exceptions to the GATT's non-discrimination (most-favoured nation, or MFN) rule. Free trade areas and custom unions are the typical examples of regional trade arrangements. They provide for duty free trade on "substantially all trade" between the states involved. Trade with other WTO members is conducted in terms of the applicable WTO schedules, and MFN rates will apply.

International trade agreements are, as a rule, not self-executing. Governments are required to play an active role when it comes to the implementation of such agreements.

3 The reasons have to do with lack of capacity, preferential arrangements based on waivers, and their marginalised position: if you do not trade you will not be involved in legal disputes.
4 The member states are bound by all the WTO agreements and by the dispute settlement mechanism; they cannot pick and choose their obligations.

They must adopt a range of domestic measures in order to give effect to their international obligations and to regulate the many facets of international trade. This includes the accommodation of foreign entities within their own jurisdictional sphere.

Transparency is one of the salient features of rules-based arrangements. For states to comply with their international trade obligations and to attract foreign investment, they have to provide for transparent domestic arrangements and for legal certainty, in addition to being attractive targets for investors. For their own citizens and companies to enjoy the benefits of trade remedies (such as measures against dumped or subsidised imports and for promoting fair competition), there have to be national rules and procedures for invoking the legal remedies allowed by trade agreements. Such domestic arrangements must be WTO-compatible.

Implications for African states

Where do African states stand with respect to these developments and the challenges that they entail? The general picture is not encouraging and the required domestic legal regimes are often lacking.[5] These countries put forward their lack of expertise and the burden that the implementation of international trade agreements brings as justification for this state of affairs. The lack of resources and of technical capacity, coupled with the failure to undertake timely domestic reforms, have added additional burdens to existing developmental needs. The result is that the integration of their economies into the global economy is hampered, while their nationals forfeit many of the benefits associated with clear, rules-based trade arrangements. African regional arrangements frequently lack firm implementation mechanisms.[6]

It is true that least-developed countries in particular often face many technical constraints. Certain domestic programmes may be more urgent than the implementation of 'sophisticated' international agreements. However, the failure to deal with the challenges of global integration comes at a cost. More can and should be done to address these problems (as has happened in many Asian developing nations) and not all of the required remedial measures need to be duplicated in each and every state. There can be shared arrangements in regional organisations. That is precisely one of the beneficial consequences of regional integration.

In some instances we have very little choice but to implement domestic reforms. The changing technical environment in which developing countries operate and trade is an example. Trade with the European Union (EU), Africa's major trading

5 In the five SACU member states, only South Africa has legislation on trade remedies. Namibia and South Africa are the only two members with national competition regimes in place.
6 Most of the SADC protocols, for example, are not yet implemented.

partner, has always been based on preferential treatment and non-reciprocity. These arrangements have not been WTO-compatible, and have depended on waivers. One example is the WTO waiver granted for preferential trade in goods under the trade chapter of the Cotonou Agreement.[7] It benefited some 77 developing nations from Africa, the Caribbean and Pacific, but expired at the end of 2007. That arrangement has to be replaced by new, WTO-compatible agreements with the EU. For this reason, all African states – as well as the Caribbean and Pacific nations – are presently negotiating Economic Partnership Agreements (EPAs) with the EU.[8] All indications are that these EPAs will introduce new rules-based regimes, complete with dispute settlement provisions, detailed health and safety standards, regulation of services, customs cooperation, etc. Africa is not ready for many of the implications of these new agreements.

The increase in the number and scope of regional trade arrangements in Africa should also be noted. The African Union (AU) pursues the ideal of integration for the whole continent through the establishment of regional economic communities (RECs) to include all African states. This is the model for promoting South–South trade, a neglected area. Many of these plans are over-ambitious in terms of time frames, and the technical consequences will be beyond the domestic capacity of many. However, this is the official line of thinking. In southern Africa there are plans for transforming the Southern African Development Community (SADC) and its 15 members into a customs union by 2010. There are similar plans for the East African Community (EAC) and for the Common Market for Eastern and Southern Africa (COMESA). In July 2008, at a summit of the leaders of these three organisations, a decision was taken to merge all of them into a Free Trade Area. This could have many beneficial effects for trade liberalisation, but the technical implications should not be underestimated – particularly when it comes to the adoption of harmonised national trade measures and the same tariff regimes.

Will these arrangements be rules-based and will they provide for formal dispute resolution? All three organisations – SADC, COMESA and the EAC – already have regional tribunals. They have decided only a limited number of cases, and national legal fraternities still pay limited attention to these supranational courts. However, they are bound to play a bigger role in future. The SADC Tribunal, for example, recently delivered its first rulings, involving land redistribution issues in Zimbabwe. The applications were brought by private parties. More of these types of disputes will follow as regional integration moves ahead and the need for legal certainty and for formal remedies increases.

It will make little sense to accept dispute resolution obligations on the multilateral level and vis-à-vis the EU, but not for nationals or when trading with next-door neighbours. The new trade arrangements under EPAs will provide for legal remedies to foreign traders, investors and service providers alike. Failure to protect local traders will similarly result in unnecessary legal complications,

7 For the text, see WTO Doc WT/MIN(01)/15 of 14 November 2001.
8 Negotiations on the CARIFORUM EPA were concluded by the end of 2007.

uncertainty, and disadvantages. It may also result in domestic constitutional challenges.[9] The acceptance of compulsory dispute settlement arrangements may not have been the traditional approach on the African continent, but this will have to change as new agreements are concluded and tribunals begin to render rulings on trade issues.

It will only be possible to implement these plans if they are guided by proper national and regional policies. This calls for innovative thinking and more serious effort. Too much emphasis on the 'sovereignty' of the state undermines the adoption of rules-based regimes, the implementation of domestic reforms and the development of common policies.

The picture in southern Africa: From SACU to the SADC EPA

The Southern African Customs Union (SACU) is a well-established regional organisation and is the world's oldest customs union. It was first established in 1910 between the then Union of South Africa and the High Commission Territories of Basutoland, Bechuanaland and Swaziland. Following the independence of these territories, SACU was relaunched in 1969. When Namibia became independent in 1990, it joined SACU in its own right.

The present SACU Agreement was signed in 2002 and entered into force in 2004. Its members are the governments of the Republic of Botswana, the Kingdom of Lesotho, the Republic of Namibia, the Republic of South Africa, and the Kingdom of Swaziland.[10]

From a technical point of view SACU, is a customs union. This means that it constitutes a single customs territory for all five of its member states, and it has a common external tariff (CET). The member states trade freely with each other, without the typical measures, such as customs duties, normally associated with border controls between states. These duties (tariffs) constitute a form of tax. Tariffs are not levied on goods traded between members of a customs union.[11] Trade with third parties is conducted on the basis of their CET; the same tariff will apply to goods originating from third parties, irrespective of their point of entry into SACU.[12]

Customs unions are WTO-compatible exceptions to the WTO's non-discrimination rule, provided such unions comply with the applicable rules.[13] All the SACU states are WTO members.

9 Constitutional rights to equality, administrative justice and fair procedure may be implicated.

10 The Agreement allows for new members to join SACU.

11 The same applies to trade in a Free Trade Area (FTA), which does not have a CET.

12 This tariff on goods from third parties will be the most-favoured-nation (MFN) duty levied in terms of WTO commitments, or the special duties provided for in other preferential trade agreements such as the SADC Trade Protocol, or the Trade, Development and Cooperation Agreement between South Africa and the EU.

13 Article XXIV of GATT allows for FTAs and customs unions (CUs). Trade between the members of a CU must cover "substantially all trade", in addition to the requirements for a CET and a single customs territory. SACU complies with these requirements.

The 2002 SACU Agreement brings about several changes in the operations and 'philosophy' of the organisation. The 2002 Agreement also lays the foundation for further growth in SACU, while introducing new legal, institutional and policy features. For example, provision is now made for a permanent Secretariat, a Tariff Board, and a Tribunal.[14] Common policies are to be adopted and disputes about the application and interpretation of the Agreement will fall under the jurisdiction of the new Tribunal.

The five SACU member states are also members of SADC. SADC is not a customs union: it is a Free Trade Area (FTA) – although it has plans to become a customs union by 2010. When these plans materialise, certain important adjustments will be required because no state can be a member of more than one customs union at the same time.

SACU displays some features which are not typical of other customs unions. The most important of these differences is the mechanism in terms of which customs revenue and excise duties are paid into a Common Revenue Pool and then shared between the members in terms of an agreed formula.

SACU wants to be a modern and dynamic regional organisation, but this will bring new challenges. Historically, it covered trade in goods only, with special emphasis on revenue-sharing among the members. Services and other trade-related matters such as intellectual property rights or competition are not addressed.[15] This should change as the organisation consolidates itself and expands its coverage to include other disciplines and trade-related issues. Competitiveness in the global economy requires that trade in goods is supported by financial, transport, insurance, legal and other services.

South Africa still performs important functions on behalf of SACU, such as the administration of trade remedies[16] and the management of the Common Revenue Pool. This will presumably also change as the new SACU institutions become operational.[17]

The 2002 SACU Agreement foresees further institutional, policy and legal developments within the organisation. This can happen via the adoption of additional annexes, which form an integral part of the Agreement. SACU's legal framework consists of the 2002 Agreement and all annexes adopted subsequently.[18] The rulings of the Tribunal, which will be final, will add to SACU's legal fabric.

14 At the time of writing (December 2008), the Tariff Board and Tribunal had not yet been established, although preparations to do so were advanced.

15 However, the Agreement does deal with transport – an important services sector.

16 Trade remedies apply when unfair trade practices such as dumping or subsidised importation occur. The South African institution responsible for their administration within SACU at present is the International Trade Administration Commission (ITAC).

17 The new SACU Agreement was signed in 2002 already, but SACU's Tariff Board, Tribunal and Common Negotiating Mechanism are still to be established.

18 The first annexes have been concluded and several are under preparation.

A SADC Interim Economic Partnership Agreement (SADC IEPA) between the EU, on the one hand, and SACU members (excluding South Africa) and Mozambique, on the other, has been negotiated over the past two years. This IEPA was initialled at the end of 2007.[19] Angola, who is part of this group, has not initialled the Agreement. The document covers trade in goods only. Further negotiations on trade in services and investment are still under way.

In the end, the initialling of the IEPA text proved to be quite a diplomatic challenge. This can partly be explained by the fact that the SADC IEPA is a complex arrangement: obligations in terms of existing structures have to be taken into account, and there are new legal and institutional challenges. South Africa had already concluded its own bilateral FTA (the Trade, Development and Cooperation Agreement) with the EU in 2000. The failure to finalise internal integration policies for SADC beforehand added to the complications.

The implications for SACU may be even more serious. The membership of this organisation is divided over further negotiations with the EU, and the implementation of the interim arrangements for trade in goods will pose considerable challenges. The five SACU states are all members of SADC, but they have not agreed on strategies for promoting regional integration, building rules-based dispensations, or ensuring that both SACU and SADC pursue the same game plan. Deeper regional integration has been on the agenda of African regional bodies and the AU for a long time. These plans are mostly unrealistic and often emphasise 'political integration' – whatever that may mean. The rules-based nature of regional institutions and a serious commitment to the domestic implementation of community obligations continuously stumble on the rocks of national sovereignty and a lack of technical capacity.

The principal challenge for the SADC EPA group is to complete negotiations towards a comprehensive EPA (for those who have decided to include services and investment). This process will not involve Namibia. South Africa seems to be out of the picture altogether, although diplomatic efforts to rescue a more inclusive deal are continuing.

The implementation of regional integration schemes is, by definition, about joint action. It requires an ongoing process among the parties to the arrangement. However, the manner in which the SADC EPA is now unfolding undermines joint action within SACU. It may also bring about new facts and realities detrimental to the promotion of deeper integration in southern Africa, at least for existing structures. The 15 SADC members are negotiating their EPAs with the EU in four different configurations.[20]

The exclusion of South Africa from the SADC EPA, the fact that Mozambique (who is not a SACU member) is a party, SACU members' different policy decisions

19 Namibia initialled some months later.

20 They are the SADC EPA, as well as the EPAs for the EAC, Eastern and Southern Africa, and for Central Africa.

regarding the second phase of negotiations, and the reservations expressed by Namibia before it initialled the SADC IEPA text are some of the problem areas still to be addressed. Angola will apparently only join the negotiation process when it is ready to do so, although subsequent accession to a final agreement is possible.[21] South Africa and Namibia have already indicated that they would not participate in the second phase, when trade in services and investment are negotiated.

Article 31(3) of the SACU Agreement remains another obstacle. It requires the consent of all members before new trade agreements with third parties can be entered into. Before the SADC EPA can enter into force, this issue will have to be resolved; and South Africa holds the key, at least in terms of the letter of the law. There is no clear procedure as to how Article 31 consent should be demonstrated or shown to have been obtained. This is a problem that a Common Negotiating Mechanism (which Article 31 also calls for) could have solved. SACU has no formal Common Negotiating Mechanism as yet.

It's not only about trade

Regional integration involves more than trade liberalisation, and globalisation has consequences in many areas. For example, SADC has adopted more than 20 protocols and, in addition to trade matters, they deal with water, tourism, technical standards, transport, energy and many other areas of inter-state cooperation. This is testimony to the fact that states cannot survive and prosper in isolation, and that effective trade and development require a host of other conditions. In African states in particular, infrastructural needs are acute in areas such as transport. Inadequate road, rail and port facilities mean very high transportation costs when moving goods from local producers to overseas markets. To transport a container from the typical landlocked African state to the nearest port is generally more expensive than the total cost of a sea passage to the final destination.

Water is a neglected area of inter-state cooperation, and the grave consequences of this neglect may come to haunt us. In June 2008, the Intergovernmental Panel on Climate Change (IPCC) produced a report of which one of the main findings (made with "high confidence") was that many semi-arid and arid areas such as the Mediterranean Basin, the western United States, southern Africa, and north-eastern Brazil are particularly exposed to the impacts of climate change. They are projected to suffer from decreased water resources.[22]

One of the SADC protocols deals with the transboundary management of regional water courses. Regional bodies such as the Orange–Senqu River Commission (ORASECOM) have been established to facilitate interstate cooperation. These structures should be used more extensively and, if they are not sufficiently equipped for the tasks of joint management of regional water resources, they should be strengthened.

21 Articles 110 and 111, SADC IEPA.
22 Bates et al, (2008:3).

Countries such as Namibia, which has no perennial internal rivers, need to take stock of their water needs and plan for the future. Namibia faces certain unique challenges, such as the fact that the border on the Orange River is not a settled matter, with constitutional ramifications. Article 1(4) of the Namibian Constitution defines the national territory of Namibia as –

… the whole of the territory recognised by the international community through the organs of the United Nations as Namibia, including the enclave, harbour and port of Walvis Bay, as well as the off-shore islands of Namibia, and its southern boundary shall extend to the middle of the Orange River.

Following Namibia's independence, the South African government adopted legislation to provide for the transfer to Namibia of Walvis Bay and the off-shore islands. However, the Orange River boundary remains an unfinished constitutional mandate for Namibia. A joint commission between Namibia and South Africa was set up after the 1994 South African elections. This body has not produced any results to date and all indications are that this has become a dormant matter.

The colonial boundary between South Africa and Namibia goes back to an Anglo–German agreement of 1890. It established the boundary alignment in terms of –[23]

… a line commencing at the mouth of the Orange River, and ascending the north bank of that river to the point of its intersection by the 20th *degree of east longitude*.

The present position is that the water in this river has an international status and does not belong to South Africa. However, the continued uncertainty about this border, which has never been demarcated, will make utilisation of the water a complicated issue. With growing water needs, this matter may become a bone of contention between the two nations. Additional problems may ensue with the extension of this border from the mouth of the Orange River when maritime boundaries have to be determined and the exploitation of resources on the continental shelf has to be regulated.[24]

Concluding remarks

Trade arrangements are not an end in themselves. They do not guarantee that trade will take place, but provide for an enabling framework and for opportunities; they should, if properly utilised, add to wealth creation and economic development.

In these matters, governments play a very important regulatory and facilitating role. They adopt the laws and administrative measures and establish the structures necessary for reaping potential benefits and complying with

23 Brownlie (1979:1276).

24 For a discussion of some of the issues, see Erasmus & Hamman (1987:49ff).

international obligations. They must develop appropriate policies, and provide for transparency and governance. This daunting task is unavoidable. As regional integration is pursued more actively, new opportunities arise for joint efforts and regional strategies.

This article has provided an overview of some contemporary trade developments and challenges facing southern Africa. Governments are not fully in control of the unfolding events, and there may be new challenges in the form of changing policies about how the southern African region will develop. There are, for example, indications in South Africa of concerns about the revenue-sharing formula in the SACU Agreement.[25] If changes to this Agreement are contemplated and implemented under present conditions, they will come about in the absence of a proper development policy for the southern African region. What consequences will that bring? Who will take the initiative for developing such a policy and when will this happen? What elements and concerns should be included?

Examples of regional integration plans and the need for cooperation with neighbouring states have been cited to emphasise a rather obvious point: the governments in southern Africa have their work cut out for them. The law is an inevitable and necessary tool – and the foundation – for tackling these challenges. However, domestic reforms and regional plans need to be prepared well. They should be inspired by comprehensive studies of the problems to be resolved and all implications that that entails. Legal academics, officials and practitioners should join hands in these efforts. The debate should continue and should involve interdisciplinary research and joint efforts.

The world of international trade law is vast and often complicated. It poses very specific challenges to governments and civil society. We need effective and realistic policies and arrangements within nations in order for them to be active participants in the globalised economy. This includes 'at-the-border' arrangements (such as customs control), but also many 'beyond-the-border' measures (e.g. to regulate trade in services). It also involves adherence to national constitutional requirements about the relationship between international law and municipal law, the incorporation of treaties, and how to provide for legal remedies to affected parties.

These challenges cannot be avoided. There may be competing priorities and technical constraints, but the adoption of legal instruments are not beyond the means of most states in the region. The task can also be made easier by adopting common policies and by establishing common institutions in critical areas.

A number of specific responses are required. They include the following:

- The adoption of realistic national and regional integration policies

25 See Erasmus (2008).

- The implementation of well-targeted domestic reforms
- The development of technical capacity, and
- The establishment of new institutions.

These are the tasks of government planners (while engaging the private sector) and involve macroeconomic policy reforms. There is also a need for specific technical skills and expertise to deal with the demands of rules-based trade. That is why lawyers and legal disciplines stand to play an important role in these developments.

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Freedom of expression and hate speech in Namibia

Nico Horn*

Introduction

The case of Elvis Kauesa,[1] a junior police officer who challenged the constitutionality of a section in the Police Act prohibiting him to publicly criticise senior officers, is in many ways a benchmark decision for Namibia. It defined freedom of speech extremely widely, and set a very liberal example of purposive constitutional interpretation.

Not only did it determine the scope of freedom of expression in terms of the stare decisis rule, it also influenced later cases dealing with the limitation of constitutional rights.

The Kauesa case has placed Namibia in the category of constitutional states that will not lightly deviate from the constitutional right to freedom of expression. In the process, the Namibian Supreme Court has followed the Canadian example, staying clear of the egalitarian liberal approach of an almost non-derogated right to freedom of speech, but also extensively limiting the grounds for derogation. There are not many liberal democracies in the world where a section in a Police Act prohibiting junior officers to criticise their seniors in public will be declared an overbreadth and unconstitutional by the highest court in the country.

In the traditional discussion, especially in the United States, the question has always been whether freedom of speech was absolute or whether there could be derogations. The egalitarian liberals such as Dworkin[2] have always insisted that freedom of speech is absolute. Western European countries were strongly influenced by anti-Nazi legislation after World War II in West Germany: it became standard practice in many states to limit the scope of freedom of speech by enacting anti-hate-speech legislation.

The German Penal Code is the most extreme example of derogative measures limiting free speech. It makes a denial of the Holocaust a crime, prohibits even a debate about the values of Nazism, and includes a clear prohibition of racial hate speech.

With the growth of the pornographic industry in the 1960s, voices went up in the United States to restrict the publishing and distribution of violent hard-core pornographic material. The discussion is ongoing. Kateb[3] argues that

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1 *Kauesa v Minister of Home Affairs and Others*, 1995 NR 175 (SC).

2 Dworkin (1977, 1985).

3 Kateb (1989).

pornography and racial hate speech may offend, but it does much less harm than political speeches and religious sermons. Political speeches are often mere spin, and politicians have no intention to fulfil their election promises. They can humiliate their opponents and create unrealistic expectations. Yet, no one will argue that political speeches should be prohibited. The same, Kateb says, goes for religious sermons: they are often authoritarian, fundamentalist, and without scientific foundation; and they can have extremely negative effects on their listeners. He doubts that pornography or hate speech can create nearly as much harm.[4]

Feminists, on the other hand, have argued that the objectification of the female body is enough reason to limit the distribution of pornographic material legally. Langton[5] argues that egalitarian liberals such as Dworkin should be in favour of the action against pornography because of its degrading and inferior attitude towards women.

Brugger[6] points out that neither constitutional law nor international law explicitly and consistently permits or prohibits hate speech. He identifies two possibilities to look at hate speech from an a priori acceptance of the basic principles of freedom of speech. The one is the radical North American view that sees freedom of speech and expression as an almost non-derogable right. These countries prioritise freedom of speech over interests such as dignity and privacy. On the other hand, several Western European countries followed Germany and developed anti-hate speech legislation:[7]

The opposing view, shared by Germany, the member states of the Council of Europe, Canada, international law, and a minority of US authors, views hate-filled speech as forfeiting some or all of its free-speech protection. This group of nations assigns a higher degree of protection to the dignity or equality of those who are attacked by hate speech than to the verbally aggressive speech used to attack them. Under this system, hate speech is not only unprotected, it is frequently punishable under criminal law, and individuals or groups who are the victims of hate speech frequently prevail in court.

Brugger[8] points out that this development is closely linked to the Federal Republic of Germany's experience after World War II. The new government and nation wanted to set themselves apart from the previous regime and its hate speech and hate crimes. The Penal Code contains several sections concerning hate speech, specifically the general sections 186–200 dealing with Beleidigungsdelikte (criminal defamation) or Delikte gegen die persönliche Ehre (delicts of insults to personal honour). The courts allow groups to launch complaints if they can be

4 Ibid.
5 Langton (1990:311ff).
6 Brugger (2002).
7 Ibid.
8 Ibid.

targets of defamation, provided one can clearly identify the group as separate and if each of the members of such group is clearly included in the insults or defamation. The defamation does not have to be a public act: it only needs to be in the presence of a third person.

Similarly, sections 84–91 of the German Penal Code deal with collective defamation, including propaganda by unconstitutional and National Socialist organisations, and the display of Nazi symbols such as the Nazi salute and the swastika.

The prohibition of hate speech became a vehicle for getting away from the sad history of the past. Moreover, the hate speech provisions are not seen as contradicting the freedom of expression clause in the post-WWII constitution or Grundgesetz ("Basic Law").[9]

The Kauesa[10] case did not deal with hate speech but with the personal defamation of senior officers in the Namibian Police by a junior staff member. In this instance, the Supreme Court took an unequivocal decision in favour of the freedom of expression. In the proportionality test applied by the Court, the importance of an open and free discussion of past oppression, in a society where race was the most fundamental aspect of one's existence, exceeded the interests of individual police officers.

But Kauesa did not address the issue of harmful and hate speech in general. It dealt with a special case and a specific Act, which the Court felt would limit future discussion and debate on issues such as Affirmative Action and proactive programmes to redress the past.

State v Smith

After the Kauesa case, Namibia was confronted with constitutional challenges based on anti-racial discrimination and anti-pornographic legislation, the first being a product of the independent post-apartheid Parliament, the second based on the Calvinist moral legislation of the colonial apartheid power.

In the case of State v Smith and Others,[11] the constitutionality of yet another Act limiting freedom of speech was tested.[12]

9 *Grundgesetz für die Bundesrepublik Deutschland. 1949; vom 23. Mai 1949 (BGBl. S. 1), zuletzt geändert durch Gesetz vom 28. August* 2006 (BGBl. I S. 2034). The freedom of expression clause is Article 5(1), which reads as follows: *"Jeder hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten und sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten. Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet. Eine Zensur findet nicht statt."*

10 1996 (4) SA, 965 (NMS).

11 1996 NR 367 (HC).

12 It is interesting that the first significant case of contravening the Act only came in 1996, five years after its enactment. Also in 1996, at the 47th Session of the Committee of the Elimination of Racial Discrimination, one of the Commissioners, Adv. Andrew Chigovera, asked the Namibian

This time it was section 11 of the Racial Discrimination Prohibition Act, 1991 (No. 26 of 1991). The specific section reads as follows:

(1) No person shall publicly use any language or publish or distribute any written matter or display any article or do any act or thing with intent to –

(a) threaten, ridicule or insult any person or group of persons on the ground that such person belongs or such group of persons belong to a particular racial group; or

(b) cause, encourage or incite disharmony or feelings of hostility, hatred or ill-will between different racial groups or persons belonging to different racial groups;

(c) disseminate ideas based on racial superiority.

The case emanated from an advertisement in a Windhoek newspaper congratulating the Nazi Rudolph Hess on his birthday. In an obiter dictum in the initial Kauesa case,[13] a full bench of the High Court found section 11 to be constitutional. However, as we have seen, the judgment was overturned by the Supreme Court.

The Judgement

After defining the sufficiently significant object of the Act, the Court applied the tests of the Canadian benchmark case of Rex v Oakes,[14] (also applied in the Supreme Court Kauesa case) to determine if the derogations from Article 21(1) and (2) of the Constitution –[15]

were reasonable, and rationally connected to the objective

representative, Mr Utoni Nujoma, if the fact that the Prosecutor-General had to institute all prosecutions under the Act did not limit its application. It is also clear from Namibia's State Report that no significant prosecutions took place under the Act. The question was still on the agenda in 2007. Committee on the Elimination of Racial Discrimination (1996).

13 *Kauesa v Minister of Home Affairs and Others,* 1994 NR 102 (HC).

14 1986 (26) DLR 4 200.

15 See the quote in the text of *Rex v Oakes,* supra: "… once a sufficiently significant objective is recognised, then the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. This involves 'a form of proportionality test': *R v Big M Drug Mart Ltd*, supra. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in the first sense, should impair 'as little as possible' the right or freedom in question: *R v Big M Drug Mart Ltd,* supra. Thirdly, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

impaired the right to freedom of expression to the least extent possible, and

were reasonable in a democratic society.

Frank, J (as he then was) failed the Act on every requirement. The Court clearly sees the Act as a bridge from the old apartheid order to the new democratic, constitutional era.[16] The significant objective of the Act is the prevention of a recurrence of the type of racism and its concomitant practices, which prevailed prior to independence in Namibia. The Act is the bridge over which a racist society needs to cross from the apartheid-based values and morals to a new democratic, constitutional era, where people are respected, regardless of their race or ethnic origin.

Consequently, the Court concluded that groups of persons who had never featured in the pre-independence era and were never part of or party to the social pressure amongst the various peoples in Namibia could not be seen as objects justifying the restrictions of freedom of speech described in Article 21 (a) and (b) of the Constitution.

The definition of racial group in the Act goes beyond what is required. In this specific case, the insult to the Jewish people by the heroic treatment of a Nazi war criminal and the sensitivities of the Jewish people were not sufficient justification to derogate from a broad interpretation of the constitutional freedom of speech.[17]

It is not clear exactly what the Court has in mind when it excludes groups of persons –[18]

… who never featured in the pre-independence of this country and were never part of or party to the social pressure amongst the different people … making up the population that was occasioned by the erstwhile racist policies.

Does it mean that only previously disadvantaged groups can expect the Act to protect them from a continuation of the humiliation of the apartheid era? Or does it mean that the Act and its implementation are reserved for all the groups who represented different interests before independence?

In both these instances, the interpretation of the Court seems too narrow. While the sad colonial history of Namibia was undoubtedly the inspiration for and the background to the Act, its objectives seem to be more than just redressing the past. It includes a preventative element, something like the slogan of the Jewish people after the Holocaust: Never again! In other words, the sufficiently significant objective of the Act also includes the prevention of discrimination against all groups, racial and ethnic, irrespective of their place and role in pre-independent Namibia.

16 The metaphor was first used by the late Etienne Mureinik; see Mureinik (1994:31).
17 *S v Smith and Others*, supra, p 372.
18 Ibid.

The illustrations of the Judge reveal the flaw in his argument. In his understanding, the animosity that Namibians felt towards Spanish pirating of Namibian fishing resources and the negative feelings they expressed towards the Batswana people as a result of the island dispute between Botswana and Namibia[19] should not be protected by the Act. Protecting the Spanish and Batswana can clearly not be related to the prevention of racism or social pressure between groups of people within Namibia.

However, since these animosities can easily change into xenophobia and discrimination against all Batswana living in Namibia, or worse, include Tswana-speaking Namibians, a broad interpretation of the term racial group is needed in crossing the bridge from a racist to a non-racial society.

The Jewish community, once a major role player in Namibian society, has dwindled to a very small, yet influential group in Namibia. Taking into account Namibia's history, including the strong National Socialist party that operated in Namibia before and during World War II, as well as the fact that the Jewish community is a very small minority, their sensitivities to the advertisement were not taken into account.[20]

When the South African version of this Act, the Promotion of Equality and Prevention of Unfair Discrimination Act, was discussed in an open forum of the Joint Committee of Parliament, the Jewish Board of Deputies in South Africa requested that hate speech be criminalised:[21] a clear indication that the Jewish community still experience abuse in South Africa.

Following the Oakes case, the Court criticised the Act for not allowing language or publications that might be offensive to certain groups if the facts contained therein were true. Offensive language or even views shocking and disturbing to the state or to sectors of the population were needed to build a democratic society, the Court found.

The Namibian Act, unlike the Canadian Criminal Code,[22] does not provide for statements that may cause disharmony, but are intended to oppose and remove racist practices. Consequently, the Court found that the Act, as it stands, did not impair freedom of expression to the least degree possible, in that the Act inhibited and stifled public debate on important issues such as Affirmative

19 At the time of the judgment, Namibia and Botswana were at loggerheads over the ownership of what Namibians referred to as *Kasikili Island*. The International Court of Justice later ruled in favour of Botswana.

20 It seems as if the judge had problems with the case from the outset. David Lush of the Media Institute of Southern Africa reported that, on the first day of the hearing, the defence requested further particulars, more specifically which parts of the advertisement had led to the charges. Thereupon Justice Frank reportedly stated: "What is the case against these people and who did they insult?" See Lush (1995).

21 Parliamentary Monitoring Group (1999).

22 Sections 318 and 319.

Action and historical assessments; moreover, it found that section 11(1) was overbroad and unconstitutional.[23]

Consequences of the judgment

The State did not appeal against the judgment and Parliament opted to amend the Act. The amendments followed the case almost to the letter.[24] The new section 14(2) exonerates racist language and publication envisaged in section 11(1) if it is a subject of public interest, part of a public debate, and the truth – or on reasonable grounds believed to be true. It also excludes prosecution if someone contravenes section 11(1) with the intention to improve race relations and to remove racial insult, tension and hatred.[25]

The exclusions are extremely broad. It is no surprise that no one has been prosecuted under section 11(1) since the Smith case. Even in cases where prosecution should at least have been considered, neither the public not the authorities even mention prosecution under the Act. A case in point is the outburst of the SWAPO Party of Namibia Councillor Mandume Pohamba against the Oukwanyama Traditional Authority.[26] Pohamba called the Traditional Authority sell-outs and traitors, and as having betrayed the liberation struggle. He added that they were working against the wishes of the majority. He also threatened that SWAPO would act against teachers and public servants who joined the new political party, the Rally for Democracy and Progress (RDP)

The Chairman of the Traditional Authority, George Nelulu, complained in writing to the Regional Governor, using the words of section 11(1) in his petition:[27]

23 *S v Smith*, supra, p 374.

24 The Racial Discrimination Prohibition Amendment Act, 1998 (No. 26 of 1998).

25 The full text of the changes reads as follows:

11 (1) No person shall publicly use any language or publish or distribute any written matter or display any article or do any act or thing with the intent to:

(a) Threaten or insult any person or group of persons on the ground that such person belongs or such persons belong to a particular racial group; or

(b) Cause, encourage or incite hatred between different racial groups or persons belonging to different racial groups; or

(c) Disseminate ideas based on racial superiority.

14 (2) No person shall be convicted of an offence under subsection (1) of section 11 –

(a) if the act complained of was, at the time of the commission thereof, relevant to any subject of public interest, the discussion of which was for public benefit, and if on reasonable grounds such person believed the statement or statements concerned to be true; or

(b) if such person, in good faith and with the intention of removing matters tending –

(i) to threaten or to insult any racial group or any person belonging to such racial group; or

(ii) to cause, encourage or incite hatred between different racial groups or between persons belonging to different racial groups; or

(c) if it is established that the language, publication or distribution complained of communicated the truth and that the main purpose thereof was to so communicate the truth and not to cause any of the acts referred to in that subsection.

26 Shivute (2008).

27 Ibid.

People like Pohamba are sowing seeds of hatred, ethnic division and tension, and engage in hate speech that stirs political tensions.

The background to the attack is increasing tension between the two major Owambo tribes, the Oukwanyama and the Ondonga, as well as between the RDP – led by former SWAPO stalwart Hidipo Hamutenya – and SWAPO, the ruling party.

Human rights activist Phil ya Nangolo sees it as part of a systematic marginalisation of the Oukwanyama. While several people, including the Traditional Authority, took offence at Councillor Pohamba's statements, no one even mentioned the possibility of prosecution under section 11(1) of the Act. Furthermore, neither the Police nor the Office of the Prosecutor-General made any effort to take the matter further. Have the Namibian public lost faith in the Act since its amendment? Or does the narrow understanding of the objectives of the Act by the bench in the Smith case play a role? Is the Act only seen as a tool to deal with white-on-black hate speech and tension?

Do the historical disparity and the apartheid society determine what racism in Namibia is? While this part of former Judge Frank's judgment did not find its way into the amendment of the Act, it seems to be an interpretive tool in deciding on prosecution. In 2005, activist Methusal Matundu – also known as Malcolm X Matundu – carried a placard stating "Kill all whites" during a public demonstration in Windhoek. He stated the reason for his placard at the court (after his first appearance) as follows:[28]

The intention was to solicit the support of black people to employ that strategy, because the Mau Mau school of thought, of which I'm the head, believes that killing all white people is the only way that we will get people to take black people seriously.

While the facts seem to be clear, the case was postponed several times and eventually withdrawn in order to give the Police more time for investigation. It is unlikely that the Prosecutor-General considers the facts of the case to be one of the exceptions of section 14 of the Act that would make prosecution impossible: Matundu can hardly be said to believe on reasonable grounds that the killing of whites is a practical necessity in Namibia. Neither can his harsh position be an invitation to meaningful debate, for his outrageous position obviously excludes debate. The only logical conclusion one can reach as regards the withdrawal of the case is that the unfortunate narrow perception of the objectives of section 11(1) of the Act, together with the 1998 amendments, has limited its application to such an extent that aggrieved Namibians are forced to the old common law remedy of crimen injuria.

In preparation for its eighth State Report to the Convention on the Elimination of all Forms of Racial Discrimination, the treaty body requested Namibia to explain

28 Menges (2005).

why no prosecutions had been executed under the Racial Discrimination Prohibition Act.[29] In response, Namibia blamed the amendments to the Act.[30] The report goes on to point out that it is no longer an offence to ridicule anyone on the grounds that such person belongs or such persons belong to a particular racial group, as originally provided for in section 11(1)(a) of the Act, or an offence to cause, encourage and incite disharmony or feelings of hostility or ill will between different racial groups or persons belonging to different racial groups as originally provided for in section 11(1)(b).[31]

Aggrieved people who have been insulted and humiliated on the grounds of their race or on the grounds of belonging to a specific group have effectively lost the remedy of section 11 of the Racial Discrimination Prohibition Act. The Prosecutor-General now has to go back to the common law crime of crimen injuria in order to prosecute cases of hate speech, racial or group humiliation, or offensive acts. The alternative was to follow the egalitarian position and see freedom of speech as an absolute right.

The existence of the Racial Discrimination Prohibition Act is a clear indication that government wanted legislation to deal with racial abuse and hate speech. Both the Kauesa Supreme Court case and the Smith case agreed that freedom of speech was not absolute. However, the amendment of the Act came close to shutting the door on derogations in cases of hate speech and of racial or group ridicule or humiliation.

The Smith case, while following Kauesa in its broad interpretation of freedom of expression, made some crucial legal errors. The understanding of the Act as a mere bridge to take Namibia from its apartheid past to a democratic society is but one of the intentional objectives of the Act: it is not only the oppressed of the previous dispensation that need protection against racial discrimination.

Examples of oppressed-turned-oppressor abound. Moreover, those groups who were not part of the Namibian scene in the pre-independent era – the economic refugees from other African countries, political refugees, and foreigners working in Namibia – are all vulnerable and in need of protection against racial discrimination. Even the strong Oukwanyama may become vulnerable if they are attacked by political opponents.

It makes no legal sense to limit the application of the Racial Discrimination Prohibition Act to the pre-1990 context. The Act itself needs a thorough redraft.

29 It seems as if the Committee on the Elimination of Racial Discrimination was concerned that a white Prosecutor-General, having been part of the old apartheid dispensation, was not serious in prosecuting under the Act. In terms of section 18, all prosecutions under the Act must be instructed by the Prosecutor-General in person. However, developments after the retirement of Adv. Hans Heyman (who is white), indicated that the lack of prosecutions has more to do with the amendments to the Act than the person of the Prosecutor-General.

30 Republic of Namibia (2007:10).

31 Ibid

To make truth an exception to the violations of section 11(1) does not make sense either. In which form can the truth be justification for insulting a group or for creating disharmony, hostility or hatred between groups? Was the judge thinking of references to the historical oppression of the majority of the people by the white minority? If so, why do we need the truth test? After all, the mere fact that something is true does not mean that it cannot stir emotions and eventually result in people being abused on the ground of their race or ethnic origin. Think of the mentioned "Kill all whites" placard: would the placard be more acceptable if the author added "… because they committed genocide against us during the Herero–German War"? Or can we conclude that such utterances are allowed if a public speaker claims that whites can never be trusted because of their colonial and apartheid histories, or in the light of the historical truth of an oppressive pre-independent society?

'Publicly' or privately?

The fact that the Act demands a public statement or publication also makes it difficult to prosecute offenders. It seems as if the Office of the Prosecutor-General interprets this section extremely narrowly. The Namibian State Report comments that the public element of section 11(1) is also problematic for prosecutors and is one of the reasons why no prosecutions have been instituted in terms of it.[32]

The problem lies in the interpretation of the word publicly. During the author's period of employment a Police docket was forwarded to the Office of the Prosecutor-General for decision concerning racial remarks by the headmaster of a school to a teacher.[33] The suspect's lawyer submitted a request for withdrawal. He argued that the only way to give meaning to the word publicly was to interpret it as a statement in an open forum or publication accessible to the general public.

In terms of this interpretation, a high school staff room does not qualify as a public place. It is a closed meeting place for staff members only. Publicly demands something more: a public lecture, speaking at a rally, or any other event open to the broad public. This narrow interpretation was possibly accepted by the prosecutorial authority, hence the comment in the State Report. Most hate speech legislation goes much further than that. The Canadian Criminal Code uses the words statements other than in private conversations.[34] The German Penal Code makes provision for a heavier sentence if a conviction emanates from a public statement, but also criminalises private statements.[35] The South African Act even excludes the word publicly.[36]

32 Ibid.:11.

33 In terms of the confidentiality of the employer/employee relationship, the detailed facts of the case cannot be disclosed.

34 Canadian Criminal Code. RSC 1985, section 319(2).

35 *Strafgesetzbuch – (StGB)* BGBl 1974/60, section 185–187.

36 Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (No. 4 of 2000), section 10.

Since the Act only applies to public utterances, the most vulnerable people are not assisted in their quest for self-worth and the eradication of racist or discriminatory language used against them. The workers on a building site, on a farm, or in a factory are extremely vulnerable – and the Act does not help them. Their only remedy remains the common law crime of crimen injuria, as the Namibian State Report to the Committee on the Elimination of Racial Discrimination has indicated.

Reaction from the Government

Given the time of the judgment, it is surprising that the government did not appeal. The best explanation for their decision is possibly the fact that the Smith decision seems to be in line with the strong defence of freedom of expression in the Kauesa case.

However, the Kauesa case was never intended to be an egalitarian option for unrestricted freedom of expression. The proportionality test of the Oakes case was used and, within the historical context of post-apartheid Namibia, the Supreme Court decided that Regulation 58(32) was an overbreadth:[37]

… its objective is obscured by its overbreadth and … there is no rational connection between the restriction and the objective.

Justice Dumbutshena made it clear that an unfavourable report which was true could be seen in the same light as an untruthful unfavourable report. In terms of Regulation 58(32) of the Police Act, however, any unfavourable report by a police officer constitutes a breach of the Regulation.[38] Nonetheless, there is a difference between hate speech, as envisaged in the Racial Discrimination Prohibition Act, and a national debate on the necessity for transformation in the Namibian Police. This difference was never fully recognised in the Smith case.

A better way to approach the Racial Discrimination Prohibition Act would have been to make the objectives clear in the amendment, which did not happen. The South African Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (No. 4 of 2000),not only included a long preamble, it also contained a section explaining the objectives of the Act.[39]

37 1996 (4) SA at 981.

38 Ibid.:984.

39 See e.g. the objectives that deal with hate speech and harassment:

2(b)(v) the prohibition of advocacy of hatred based on race, ethnicity, gender or religion, that constitutes incitement to cause harm as contemplated in section 16(2)(c) of the Constitution and section 12 of this Act;

(c) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment. particularly on the grounds of race, gender and disability;

(d) to provide for procedures for the determination of circumstances under which discrimination is unfair;

(e) to provide for measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination, hate speech and harassment;

(f) to provide remedies for victims of unfair discrimination, hate speech and harassment and

A preamble similar to the one in the South African Act could have helped to clarify the differences between the Kauesa judgement and the Racial Discrimination Prohibition Act on this issue. While Justice Dumbutshena made specific provisions in his interpretation of the Constitution for the transition from apartheid to constitutionalism, the Act did not clarify why certain deviations from the right to free speech should be limited for the sake of a harmonious change from oppression to a democratic society. The first paragraph in the preamble of the South African Act refers to historical inequalities, while the second points to progress having been made in restructuring and transforming society:[40]

… systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy.

The last paragraph of the preamble expresses the need for caring and compassionate relationships and guiding principles:

This Act endeavors [sic] to facilitate the transition to a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom.

If an addition similar to the South African preamble and its objectives were made part of the Act, most of the amendments might have been unnecessary. While a democratic society needs an open interaction on ideas and ideology, and especially issues relevant to the restructuring and transformation of the post-apartheid society, it also needs to take cognisance of the importance of relationships built on equality, fairness, human dignity and freedom. In that sense, the emphasis on a free and aggressive right to debate all aspects of the transformation process and the simultaneous emphasis on the equality and dignity of the debating partners do not contradict each other.

A democratic Namibia needs to guard against the development of unequal relationships in language and conduct, as much as it has to facilitate debate on the content and form of the new society it is building.

In South Africa, the anti-hate speech sections of the Act survived an amendment in 2002. The academic debate moved away from the mere question of how to minimise the application of the restrictions on freedom of speech, to more substantive issues such as the question as to whether the word harm in the Act referred to physical harm only or included psychological harm; whether hate speech may limit freedom of expression, etc.[41] These issues have, unfortunately, never been discussed in Namibia.

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persons whose right to equality has been infringed.

40 Preamble, Promotion of Equality and Prevention of Unfair Discrimination Act.

41 See Albertyn et al. (2001); De Waal & Currie (2005:320ff); Marcus & Spitz (1999:20ff); Thechner (2003:349ff).

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The public interest in Namibian copyright law

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Introduction

Since information is the building block of knowledge, it is of such crucial importance that its availability or restriction should be of concern to all societies. This is more so for developing countries where, for a number of reasons, information is often restricted. One of the reasons why information may not be free-flowing in society is due to the nature of its intellectual property protection system.

Embodying all creative manifestation is information – which is often represented by products, such as books, music, machinery, and drugs. The information that leads to the production of these goods is important for the survival of society because it is employed by other creators to produce other goods. Yet it is equally important that those who have created goods receive a recompense for their work: both to stimulate them, and to encourage others. Every system which seeks to protect creativity, including the intellectual property system we know today, must grapple with these fundamental tensions to bring about a meaningful state of equilibrium between or among them for the greater good of societal development.

All intellectual property rights – patents, designs, and trademarks – are intricately interwoven with the availability of information. This is even more so in the case of copyright, because it protects expressions of ideas, and these expressions – be they books, music, artworks, photographs, or computer software – affect the information people receive and their ability to engage in creative activity. Since copyright instrumentally affects how information is made available, every society and its legal system needs to address how proprietary systems such as copyright are conceived, sustained and elaborated.

The ability of copyright to affect access to information is multi-dimensional and can be understood in two principal ways. On the one hand, copyright protection is an incentive for creative minds to continue in their work, ensuring that they can, in turn, generate new works in the market, based on the information that their novelty has brought. This is an issue of crucial public interest.

It is also in the public interest that, in certain defined conditions, the public should have free access to copyrighted works because this sustains the innovation cycle that feeds societal development and renewal.

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On the other hand, the economic rights of copyright owners can inhibit access to information because such economic rights restrict access to the copyright work except with the consent of the copyright owner. These barriers to access, which include the price of the work and other permissions, constitute the private interests of the author. It is obvious, therefore, that most legal systems should engage in a balancing exercise that ensures that the public and private interests in copyright ownership are given equal play. It should be self-evident that all legal systems should strive for such a carefully calibrated copyright system.

For developing African countries (including Namibia), where there is not much creativity, a serious question is whether copyright is a hegemonic strategy of foreign authorship. In these countries, the enforcement of copyright serves principally to protect foreign works and leads to capital flight. In a sense, these countries are confronted by a 'double' public interest, where copyright should – ideally – ensure access to works and, at the same time, reward and encourage creativity.

For developing African countries, the march of globalisation – especially as manifested with the advent of the World Trade Organisation's Uruguay Round of Talks and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) – ensures that the homogenising effect of the TRIPS Agreement in ensuring a level playing field in market access for intellectual property goods severely affects the ability of developing countries to construct a responsive copyright regime. If they were free to do so, many developing countries would construct a copyright regime that privileges the public interest. The model of copyright protection cast by TRIPS and its variants privilege the private interest in copyright to such an extent that, at first blush, most people believe that copyright is only about the interests of the copyright owner. Firstly, TRIPS and the like speak to the exclusive interests of the copyright owner while the public interest is represented principally as exceptions and limitations on such exclusive rights. Furthermore, the exceptions and limitations need to pass the three-step test, which essentially requires that the economic interests of a copyright owner should be the determinant of how national legal systems allow free access to copyrighted works. There are perhaps no exceptions or limitations that do not strike at the economic interest of the copyright owner.

However, as the architecture of the international intellectual property system and national legal systems elaborated the author-centric system, little attention was paid to the public interest represented by fundamental human rights in national constitutions. What duty did they place on countries with respect to access to information and knowledge, and how these countries sought to fulfil their constitutional obligations to their people?

Thus, this paper elaborates on the mechanisms that are designed to enhance the public interest in matters of copyright. In the following section, the paper presents an overview of the public interest in copyright law. This is followed by an overview of Namibian copyright law in particular, and focuses on the public

Interest in such law by examining the application of the three-step test in some detail. The fourth section continues the elaboration of the public interest by examining how the latter is represented by fundamental rights and freedoms in the Namibian Constitution. The section also contains an analysis of a possible conflict between the Namibian Copyright Act and the Namibian Constitution, and it examines the implication of regarding copyright as a human right under the Constitution. The recognition of exceptions as a user right rather than a privilege is explored in the fifth section, while the sixth speaks to the role of Namibian collecting societies in enhancing the public interest because they represent Namibian and foreign right holders in negotiating with the public as regards access to their works. Section seven brings up the rear with some concluding remarks.

The public interest in copyright law: An overview

Copyright, which can simply be defined as the ability of a copyright owner to control how the public has access to his/her work, has both a private nd a public interest aspect.[1] A copyright owner has exclusive rights representing his/her private interest, which enables him/her to determine how third parties have access to the work. These exclusive rights include the right of reproduction, translation, public performance, distribution. The public interest represents the mechanisms by which the general public is allowed to have access to copyrighted works. The *public interest* is different from the *public domain* – which includes the public interest as well as works that are not subject to copyright. The principal mechanisms for the public interest in a copyright regime are exceptions and limitations. Every copyright regime is, therefore, a balance between the public and the private interest. How this balance is struck varies from country to country. As perceptively recognised by the South African publishing industry, the question that occupies the attention of developing countries' policymakers – and which applies to Namibian copyright policymakers – is put thus:[2]

What kind of copyright regime would contribute most effectively to the availability of relevant and affordable information in developing countries? And how can developing countries most effectively address the needs of poorer readers and learners, while still fostering the growth of local knowledge and local publications.

In my opinion, a copyright regime primed for development is one that accords equal priority to private and public interests in copyright.[3]

The dichotomy between ideas and their expression is often advanced as beneficial to the public interest. This is true to the extent that copyright protects

1 Davies (2002:7) holds that "Copyright systems are recognised as having two-fold purpose: to accord exploitation rights to those engaged in literary and artistic production and to answer to the general public interest in the widest possible availability of copyright material".
2 See PICC (2004).
3 For more, see Nwauche (2007).

only expressions and not ideas. The said dichotomy ensures that the public have access to ideas that can sustain different expressions. However, in many cases, an expression completely embodies an idea – such that, unless the expression is accessed, the idea cannot be grasped. In other cases, the expression contains such vital information that it becomes critical for further creativity. Since knowledge creation is often a cooperative and cumulative enterprise, today's copyright work becomes the shoulders on which future creative minds stand to create new works.

In its simplest form, the public interest enables free and unrestricted access to specified works. It is also possible that the public interest could involve a fee that may be more reasonable than the market value. Charging a reasonable fee as a condition for gaining access to a work is a possible compromise to enhance the public interest. The compromise is reached between the private and public interests, i.e. the private interest gains by being paid and the public interest gains by having access to the information. In the next section, the paper contextualises the public interest by setting out an overview of the Namibian copyright law.

An overview of the Namibian copyright law

Copyright is protected in Namibia by the Copyright and Neighbouring Rights Protection Act, 1994 (No. 6 of 1994, as amended). Section 2 of the Act protects –

- literary works
- musical works
- artistic works
- cinematograph films
- sound recordings
- broadcasts
- programme-carrying signals
- published editions, and
- computer programs.

The exclusive rights of a copyright owner are set out in sections 7 to 14 of the Act, which list the rights accorded to each copyright work. Generally, they are *exclusive* rights, which enable a copyright owner to –

- authorise the reproduction of the work in any manner or form
- publish the work, if unpublished

- perform the work in public
- broadcast the work
- cause the work to be included in a diffusion service
- make an adaptation of the work, and
- include the work in a cinematograph film or television work.

Sections 15 to 24 contain detailed provisions of the exceptions regarding each of the works recognised by the Act. For literary and musical works, section 15(1) of the Act provides that copyright –

… shall not be infringed by a fair dealing in the use of a literary or musical work

(a) for the purpose of research or private study by, or the personal or private use of, the person using the work;

(b) for the purpose of criticism or review of the work or of another work; or

(c) for the purpose of reporting on a current event –

(i) in a newspaper, magazine or similar periodical; or

(ii) by means of broadcasting or in a cinematograph film,

provided in the case of paragraphs (b) and (c)(i), the source and the name of the author if that name appears on the work, are mentioned.

Other exceptions in the Act include –

use of the work for purposes of judicial proceedings[4]

use by way of quotation, provided that the quotation is compatible with fair practice, the extent of the use does not exceed that justified by the purpose, and the source and name of the author is acknowledged, and[5]

use by way of illustration in a publication, broadcast or sound or visual recording for teaching purposes, provided such use is compatible with fair practice, and the extent of the use does not exceed that justified by the purpose.[6]

Exceptions for literary and musical works include using the work for the lawful broadcasts of broadcasting organisations,[7] and reporting in the press any public

4 Section 15(2).
5 Section 15(3).
6 Section 15(4).
7 Section 15(5).

lecture address or other work of a similar nature.[8] This may include articles published in a newspaper, magazine or similar periodical on a current economic, political or religious topic.[9]

Section 15(8) of the Act provides that –

… no copyright shall subsist in –

(a) the official text of any work of a legislative, administrative or legal nature, or an official translation thereof;

(b) a speech of a political nature or a speech delivered in the course of judicial proceedings; or

(c) publications or broadcasts of news of the day.

These exceptions often apply in different terms to the other works recognised for copyright. What applies to all the reproduction exceptions under the Act are the provisions of section 16, which require that the reproduction –

… is not in conflict with a normal exploitation of the work and is not unreasonably prejudicial to the legitimate interests of the owner of the copyright.

It is only the reproduction exception that is so circumscribed: other exceptions are left without such restriction.

Indeed, the Act follows a unique pattern. Firstly, there is no general fair dealing exception. Secondly, even though the exceptions are similar, they are tailored to each work. For example, while there is an exclusive right of reproduction for each of the works, it is only with respect to literary and musical broadcasts, and works and published editions, that there are reproduction exceptions. Therefore, the Act can be said to describe the exceptions and limitations in great detail. This legislative style is capable of ensuring that the judiciary has little room for manoeuvring in determining permitted uses. It may be interpreted that the statutory cast of the exceptions and limitations reflects an agreeable and satisfactory compromise between the private interest of a copyright owner and the public interest.

If one compares the Namibian Act with other African copyright legislation, the nature and extent of their respective exceptions are brought into sharp relief. The first basis of comparison is the teaching exception. With regard to the use of works for teaching, section 15 of the Botswana Copyright and Neighbouring Rights Act, No. 8 of 2000 provides thus:

(1) The following acts effected for the purposes of teaching shall be permitted without authorisation of the author, or other owner of copyright –

8 Section 15(6).
9 Section 15(7).

(a) the reproduction of a short part of a published work for teaching purposes by way of illustration, in writings or sound or visual recordings, provided that reproduction is compatible with fair practice and does not exceed the extent justified;

(b) the repro-graphic reproduction, for face-to-face teaching in education institutions the activities of which do not serve direct or indirect commercial gain, of published articles, other short works or short extracts of works, to the extent justified by the purpose, provided that –

(i) the act of reproduction is an isolated one occurring, if repeated, on separate and unrelated occasions, and

(ii) there is no collective licence available, offered by a collective administration organisation of which the educational institution is or should be aware, under which such reproduction can be made.

While the teaching exception in the Botswana Act seems broad, it is nonetheless important to note that section 15 is carefully calibrated; for this reason, it is likely that course packs may be difficult to assemble for teaching purposes. The requirement that the act of reproduction is isolated can limit the possibility of a regular annual production of course packs.

Furthermore, the reference to a collective licence points to the fact that collective administration[10] will surely defeat the exceptions. If collective administration for reprography exists,[11] it will be an uphill battle to prove that a collective licence does not exist. Assuming that the parties are not able to reach a licensing agreement, the exception cannot be used. It is only where there is no collective administration that the exception is relevant.[12]

Compared with Botswana's provisions regarding the teaching exception, the Namibian Act is grossly inadequate. Furthermore, it appears that teachers in Namibia cannot employ copyright works for teaching in a classroom. Again, the exceptions do not support the production of course packs for students.

Apart from the teaching exception, there are no other exceptions that support

10 See later herein.

11 Section 7 of the Botswana Copyright and Neighbouring Rights (Amendment) Act, 2005 introduces a collective administrative body to be known as the Copyright Society of Botswana. The Society is to be a non-profit-making company limited by guarantee, and will be responsible for the following:

(i) The negotiation and granting of licences in written agreement with the owners of copyright for the adaptation of works, performances and sound recordings, the insertion of works, performances or sound recordings in other scopes; and the use of works for publicity purposes

(ii) The setting of rates for royalties in accordance with acceptable international standards, and

(iii) The collection and distribution of royalties to appropriate copyright owners.

12 See Rens et al. (2005).

educational establishments in their quest for access to information. For example, students and other learners may need to make copies of articles and other materials from their school library. These photocopies are often the only way that students can access some of the materials. In this regard, section 16 of the Botswana Act provides as follows:

Any library or archive whose activities do not serve direct or indirect gain may, without the authorisation of the author or other owner of copyright, make a single copy of the work by repro-graphic reproduction –

(a) where the work reproduced is a published article, other short work or a short extract of a work, and where the purpose of the reproduction is to satisfy the request of a person, provided that –

(i) the library is satisfied that the copy will be used solely for the purposes of study, scholarship or private research;

(ii) the act of reproduction is an isolated case occurring, if repeated, on separate and unrelated occasions; and

(iii) there is no collective licence available, offered by a collective administration organisation of which the library or archive is or should be aware, under which such copies can be made; …

Moreover, there are no library exceptions allowing the libraries to make copies of works in the Namibian Act. For example, the Nigerian Copyright Act 2004 (c.C38) allows libraries to make three copies of works that are not locally available.[13] This exception is also found in section 16(b) of the Botswana Act, which provides as follows:

(b) where the copy is made in order to preserve and, if necessary replace a copy, or to replace a copy which has been lost, destroyed or rendered unusable in the permanent collection of another similar library or archive, provided that it is impossible to obtain such a copy under reasonable conditions, and provided further that the act of reprographic reproduction is an isolated case occurring, if repeated, on separate and unrelated occasions.

One of the factors affecting the public interest in Namibia is the protection of copyright in a digital environment. In this regard, Namibia is a signatory to the World Intellectual Property Organisation (WIPO) digital treaties, namely the WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty (WPPT).[14] These treaties are designed to protect copyright in a digital

13 See para. Q of the second schedule to the Nigerian Copyright Act: "The making of not more than three copies of a book (including a pamphlet, sheet music, map, chart or plan) by or under the direction of the person in charge of a public library for the use of the library if such a book is not available for sale in Nigeria".

14 Namibia signed the treaties on 20 December 1996.

environment. In this regard, a Copyright Amendment Bill is currently before Parliament. The Bill is designed to incorporate the obligations arising from these treaties.

In the digital environment, the small window which exceptions and limitations present to the public is even more threatened. The widespread copying enabled by the digital environment has led to the development of technological tools that deny access to copyrighted works held by the Internet. In addition, all those who use technological devices to circumvent these access-restricting technologies are liable to be convicted for criminal offences. Consequently, if care is not taken by copyright administrators, these technological measures in a digital environment suffice to completely restrict the access granted by exceptions and limitations in a non-digital environment. This is possible because the technology is blind and needs to be configured to recognise legitimate access. In this regard, African countries are increasingly amending their legislation to conform to the WIPO digital treaties. However, it is important that, in their domestication of these treaties, the continent takes care to ensure that existing exceptions can be enjoyed within the digital environment as well.[15]

The Namibian Act and the Three-step Test

The Three-step Test is found in international intellectual property treaties such as the Berne Convention for the Protection of Literary Works;[16] the World Trade Organisation (WTO) Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS);[17] the WCT; and the WPPT – to mention but a few. An example of the Test is found in Article 13 of TRIPS, which requires that limitations of or exceptions to rights granted to copyright owners are only permitted in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. An equivalent of the Three-step Test in the Namibian Act is found in section 16.

The cumulative nature of the Test ensures that exceptions and limitations – and, therefore, the public interest – are severely threatened. It is difficult to imagine an exception or limitation that does not, for example, impact on a right holder's income. If the Three-step Test is pursued to its logical conclusion, copyright will become an exclusive protection for authors. A survey of recent decisions on the Test will clearly illustrate this point. In a 2000 decision,[18] a WTO panel stated the following:[19]

We believe that an exception and limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work …

15 See the WCT and the WPPT.
16 See Nwauche (2005:361).
17 See Article 13 of the TRIPS Agreement.
18 Panel Report of 15 June 2000, United States, Article 110(5) of the US Copyright Act, WT/DS160R/R. Available at www.wto.org/english/tratop_e/dispu_e/cases_e/ds160_e.htm; last accessed 6 January 2009.
19 Para. 6.183–6.184.

if uses that are in principle covered by that right but exempted under the exception and limitation, enter into economic competition with the ways in which the right holders normally extract economic value from that right to the work (i.e. the copyright) and thereby deprive them of significant or tangible commercial gains. In developing a benchmark for defining normative connotation of normal exploitation, we recall the European Communities['] emphasis on the potential impact of an exception rather than on its actual effect on the market at a given point of time, given that, in its view, it is the potential effect that determines the market conditions.

More recently, in a judgment dated 28 February 2006, the French *Cour de Cassation*[20] interpreted the Three-step Test to set aside an exception that allowed the private copying of a DVD holding that was incompatible with the normal exploitation of a work.

It is important, therefore, that national courts are flexible in the manner in which the manifestation of the Test is interpreted. Thus, a Namibian court ought to be careful of the interpretation of section 16 and the like. An interpretation of the Test that is favourably disposed to the public interest[21] can be based on the recognition that such interest may in certain circumstances approximate to constitutionally guaranteed rights. The paper now turns to this consideration.

The public interest as a fundamental human right under the Namibian Constitution

Our consideration of the exceptions in the Namibian Act in the previous section indicates clearly that a number of the rights and freedoms are protected by the Namibian Constitution. In this regard, two rights -- freedom of speech and expression, and the right to education – are germane.

Firstly, Article 21 of the Namibian Constitution grants all persons freedom of speech and expression. The right to freedom of expression is not only about being able to communicate: it is also about receiving ideas.[22] As the Constitutional Court of South Africa put it in *South African Broadcasting Corporation v The National Director of Public Prosecutions*, –[23]

[a]ccess to information and the facilitation of learning and understanding are essential for meaningful involvement of ordinary citizens in public life. This corresponds to the vision in the Preamble to the Constitution of laying the foundations for a democratic and open society in which government is based on the will of the people. It also reflects the foundational principle of democratic government which ensures accountability, responsiveness and openness.

20 Cass. 1re civ., 28 February 2006; an English translation of the case can be found in International Review of Intellectual Property and Competition Law, 2006, 36:760.
21 Generally, see Geiger (2007) and Senftleben (2004).
22 See Tushnet (2004:101).
23 2007 (1) SA 523 (CC) (hereafter SABC), para. 28.

Freedom of expression is also critical in the enjoyment of other rights. Thus, the South African Constitutional Court stated that freedom of expression is –[24]

… part of a web of mutually supporting rights enumerated in the Constitution, including the right to "freedom of conscience, religion, thought, belief and opinion", the right to privacy and the right to dignity. Ultimately, all of these rights together may be conceived as underpinning an entitlement to participate in an ongoing process of communicative interaction that is of both instrumental and intrinsic value.

Namibian courts have been emphatic about the importance of freedom of expression. In *Kauesa v Minister of Home Affairs and Others*,[25] the Supreme Court adopted what it describes as the "moving speech" of Justice Barndeis in *Whitney v California*[26] to illustrate and buttress its stance that freedom of expression is important in any democracy. In *Fantasy Enterprises v Nasilworski*,[27] the Namibian High Court adopted Prof. T Emerson's[28] exposition which examined the rationale of the freedom of expression, to strengthen the need to jealously protect the right to freedom of speech and expression.

Secondly, Article 20, which deals with the right to education,[29] states the following:

(1) All persons shall have the right to education.

(2) Primary education shall be compulsory and the State shall provide reasonable facilities to render effective this right for every resident within Namibia, by establishing and maintaining State schools at which primary education will be provided free of charge.

A combination of the right to education and freedom of expression supports the assertion that some learning materials – including copyrighted works – are required to be made available to Namibians if such rights are to be meaningfully enjoyed. It is noteworthy that Article 20(2) makes this obvious with respect to primary education. It is also clear that reference to "learning materials" certainly contemplates books, articles, etc. protected by copyright. Since public primary education institutions are required to provide free education, it behoves the State to ensure that access barriers like copyright do not put a price tag on information. The principles of equality and non-discrimination recognised by the Namibian Constitution in Article 10 further require that all public schools

24 See Mokgoro J in Case v Minister of Safety and Security 1996 (3) SA 617 (CC); hereafter Case.
25 1996 (4) SA 965 (NmSC); hereafter Kauesa.
26 274 US 375.
27 1998 NHC 1; hereafter Fantasy Enterprises.
28 The Court quotes from pp 6–7 of Emerson (1970).
29 Namibia´s constitutional provision is in line with the provisions of international instruments on education, such as Article 26 of the Universal Declaration on Human Rights; Articles 13 and 14 of the International Covenant on Economic, Social and Cultural Rights; and Articles 28 to 30 of the Convention on the Rights of the Child.

offer the same "reasonable learning facilities" to learners. Allowing copyright protection to introduce a demarcation between those who are able to afford the books and those who are not will be a breach of this right. Accordingly, the State is obliged to provide learning materials to pupils or, at the very least, ensure that they are available at school libraries and the like. Similar considerations apply to post-primary and tertiary education.

The importance of education cannot be overestimated, and there needs to be a conscious effort to ensure meaningful access to learning materials that make a difference in the quality of education. Clearly, however, free access to copyrighted works will affect the private interests of copyright owners, leading to a loss of their income. What is needed, therefore, is a carefully constructed public interest to ensure that, within the regime of such interest, there is enough incentive to encourage creativity – especially in developing countries like Namibia.

The importance of constitutional norms lies in the fact that the provisions of legislation such as a copyright Act are subordinate to the supreme law of the land – a constitution. It is likely that constitutional rights will ground efforts to introduce new exceptions or even to interpret existing exceptions in a flexible manner. Given the manner in which the Three-step Test is currently interpreted, it is important that constitutional obligations on national governments should weigh on national courts as they interpret the exceptions to copyright control. Clearly, the "fair dealing" requirements in the Namibian Act are subject to varying interpretations. Indeed, any human rights framework should ensure that *fair dealing* is interpreted in an expansive way. A few examples will illustrate the point being made here.

If a work can be accessed for the purpose of research, it is possible that the right of fair dealing can be enjoyed by an individual and also by an institution such as a library or archive. For an individual, the amount of the work to which s/he is entitled to access is important. In this regard, can a person copy a whole work, or only half or a quarter of it? Can s/he copy a journal or only a percentage of it, i.e. one or two articles only? Can all the students in a class turn up to copy a work and claim the research exception? Can a non-profit library utilise the research exception and provide a copy of the work for the use by any number of researchers? What quantity of copying will amount to "a conflict with a normal exploitation of a work and prejudicial to the legitimate interests of a right owner", as stipulated in the Namibian Act, for example? Looking at the cast of section 16 in the latter Act closely, can it be said that the educational interests of Namibian students are a legitimate pursuit and, therefore, outside the legitimate interests of a right owner? As Geiger points out, –[30]

… the right holder cannot have the power to control all uses of his work, as some prejudices may be justified in light of values deemed superior to the interests of the right holder.

30 Note 22.

I would submit that an expansive research exception should enable individuals to copy substantial portions of copyrighted works – if not the whole work. Accordingly, libraries of educational institutions at least should be allowed to keep copies of books that are used by students and are not readily available, even in terms of the price.

The analysis above assumes that the combined right to education and freedom of expression range against the provisions of the Namibian Act. A different scenario would apply if copyright and other intellectual property rights were human rights, however. In my opinion, they are – and juridical support for this contention can be found in Article 15(1) of the International Covenant for Social Economic and Cultural Rights:

(1) The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

In addition, Article 27 of the Universal Declaration of Human Rights provides as follows:

(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

In many African constitutions, however, there is no fundamental right to intellectual property.[31] Nonetheless, a number of other rights capture the essence of intellectual property rights. These rights include freedom of expression, the right to privacy, and the right to property.

Since the Namibian Constitution is an example of a national constitution that in

31 In the certification process leading up to the adoption of the Final Constitution (FC) there was a proposal to include in it the right to intellectual property. When the Constitution of the Republic of South Africa came before that country's Constitutional Court, the Court was urged to recognise the right to hold Intellectual property because it is a universally accepted human right. The Court held that the right to hold intellectual property was not a universally accepted fundamental human right, however, and that the FC was not thereby defective. See In re: Certification of the Constitution of the Republic of South Africa, 1996 10 BCLR 1253 (CC), para. 75).

fact does recognise these three rights, it is important to illustrate how the right to intellectual property can find meaning in these other rights. Let us first address freedom of expression. If, as was pointed out above, one of the meanings of the public interest of copyright is the possibility that, by incentivising creativity, copyright serves to make copyright goods available to the public, then insofar as copyright is an engine of free expression,[32] freedom of expression contemplates copyright. However, if the private interest of copyright conceived as the economic interests of a right owner constrains access to copyrighted works, then copyright becomes an external value competing against freedom of expression.

Secondly, in the right to privacy,[33] it is essentially the private interests of an author that are implicated when copyright is said to interact with privacy. An individual asserting a right to privacy wishes to *seclude information from the public*, while copyright may be deployed to *secure access to information by the public*.

Thirdly, with respect to the right to property, it is still a matter of some controversy as regards whether or not intellectual property is part of the constitutional protection of property. In the European Union[34] and United States,[35] there is no such doubt. If copyright is regarded as constitutional property, it is obliged to receive the same nature of constitutional protection offered to other property forms.[36]

32 For example, in Harper & Row Publishers Inc. v Nation Enterprises, 471 US 539 at p 558, the United States Supreme Court observed as follows: "[T]he Framers intended copyright itself to be the engine of free expression. By establishing the marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas".

33 Article 13 of the Namibian Constitution provides that "(1) No persons shall be subject to interference with the privacy of their homes, correspondence or communications save as in accordance with law and as is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals, for the prevention of disorder or crime or for the protection of the rights or freedoms of others. (2) Searches of the person or the homes of individuals shall only be justified: (a) where these are authorised by a competent judicial officer; (b) in cases where delay in obtaining such judicial authority carries with it the danger of prejudicing the objects of the search or the public interest, and such procedures as are prescribed by Act of Parliament to preclude abuse are properly satisfied".

34 See Anheuser-Busch, Inc. v Portugal, Application No. 73049/01 (Grand Chamber, 2007); decision available at the European Court of Human Rights, http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=anheuser-busch%2C%20%7C%20Inc%20%7C%20portugal&sessionid; last accessed 5 January 2009.

35 See e.g. Chavez v Arte Publico Press, 204 F.3d 601, 605 n.6 (5th Cir. 2000): "Since patent and copyright are of a similar nature, and patent is a form of property [within the meaning of the Due Process Clause] … copyright would seem to be so too".

36 See Article 16 of the Namibian Constitution, which states the following: "(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens. (2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament".

In this regard, it should be remembered that –[37]

[t]he overriding purpose of the constitutional property clause is to strike a balance between the protection of existing property rights and the promotion of the public interest.

Resolving a conflict between the Namibian Act and fundamental rights

Assuming it is true that copyright, like other intellectual property rights, is not a fundamental human right, then a conflict can be said to exist between the Namibian Act and the fundamental rights and freedoms enshrined in the Namibian Constitution. On the basis of freedom of expression, it may be asserted that a specific use that is not reflected in the existing exceptions in the Namibian Act is constitutional and, therefore, not contrary to the Act. Accordingly, a challenge to the constitutionality of the Act will invite a Namibian Court to consider the limitation clause as contained and defined in Articles 21(2) and 22 of the Constitution. Indeed, Article 21(2) provides as follows:

(2) The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

Article 22 defines the process of the limitation by providing that –

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:

(a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;

(b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.

The question, therefore, will be whether the Copyright Act can be said to limit freedom of expression, the right to privacy, or the right to property.

An example of a broadly similar challenge can be found in *Fantasy Enterprises* where the applicants challenged the constitutionality of the Indecent and Obscene Photographic Matter Act, 1967 (No. 37 of 1967) on the ground that it imposes an unreasonable and unjustifiable restriction on the right to freedom

37 See the South African Constitutional Court in First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance, 2002 (4) SA 768 (CC), para. 50.

of speech and expression. In *Kauesa*, the Court held that limitations to the right to speech are required to be both reasonable and necessary. Furthermore, it was pointed out that the courts should be strict in interpreting limitations to rights so that individuals are not unnecessarily deprived of the enjoyment of their rights.

The South African Constitutional Court has demonstrated the manner in which a court could assess a challenge to the constitutionality of an intellectual property right in *Laugh It Off Promotions v South African Breweries*.[38] In the latter case, the Constitutional Court demonstrated that the use of freedom of expression could be a good way to constrain intellectually property rights that centred excessively on private interest; the case in point entailed the reach of the anti-dilution provisions of the South African Trade Marks Act, 1993 (No.194 of 1993). The respondent in the case, a trader of alcoholic and non-alcoholic beverages, had acquired trademarks relating to the brand of Carling Black Label from a South African firm. At the end of November 2001, the respondent came to know that the applicant had produced and was offering for sale to the public T-shirts that bore a print that was markedly similar in lettering, colour scheme and background to that of the respondent's trademarks. The only difference was in the wording: the words *Black Label* were replaced on on the T-shirt with *Black Labour*; the respondent's wording *Carling Beer* was substituted with *White Guilt*; and for *American Lusty Lively Beer* that was *Enjoyed by men around the world*, the applicant had printed *Africa's lusty lively exploitation since 1652* and *No regard given worldwide*. The calls by the respondent to the applicant to desist from using the trademarks elicited no response. Consequently, the respondent sought an interdict at the High Court, which was granted. The applicant appealed to the Supreme Court of Appeal and lost, hence the appeal to the Constitutional Court, where it was successful. The Constitutional Court held that the proper approach when freedom of expression, a constitutionally guaranteed human right, interfaced with legislative anti-dilution provisions – which, in this case, was section.32(4) of the Trade Marks Act – is to balance the interests of the owner of the trademarks against the claim of free expression, for the very purpose of determining what is unfair and materially harmful to the trademarks in these circumstances. Since the relevant South African anti-dilution provisions seek to oust certain expressive conduct, the Constitutional Court assumed that this could be a limitation of the freedom of expression reasonably and justifiably expected in an open and democratic society. Therefore, the Court required an interpretation of the anti-dilution provision that was most compatible with, and least destructive to, the right to free expression. Accordingly, the Court determined the appropriate interpretation to be that the owner of a trademark seeking the protection of anti-dilution provisions to oust an expressive conduct protected under the Constitution had to demonstrate likelihood of substantial economic harm or detriment to the trademark.

Because of *Laugh It Off*, it is certainly permissible to speculate as to whether freedom of expression and other human rights can be employed to constrain the private-interest-centred copyright protection. Clearly, our comparative survey of

38 2006 (1) SA 144 (CC).

some African copyright legislation in relation to the Namibian Act shows that there are many public interest concerns that may not be permissible under the Act, and that, if Namibian courts were to follow the prevalent interpretation of the Three-step Test then these public interests will not be promoted. Since the Three-step Test certainly restricts access to information and knowledge, there is a strong possibility that a claim for some of the exceptions discussed above would be successful. Of more importance, perhaps, is the attitude to an interpretation of exceptions to a right owner's exclusive rights. The values represented by fundamental rights ought to loom large in the background, instructing the judge to strictly interpret statutory provisions which seek to nullify constitutionally guaranteed rights. Accordingly, this attitude will surely broaden the exceptions in the Namibian Act – and, therefore, the public interest.

Another example of how freedom of expression can mediate the exercise of intellectual property rights is found in the decision of the English Court of Appeal in *Ashdown v Telegraph Newspapers*.[39] The Court of Appeal stated that the case raised the important question of whether the Human Rights Act, 1998 had impacted on the protection offered to owners of copyright by the Copyright Design Patent Act, 1988.[40] The facts of this case reveal that, in the course of a meeting between Prime Minister Tony Blair and the then leader of the Liberal Democrats, Lord Ashdown, the latter kept a confidential minute of their meeting. The minute reached the hands of the political editor of the *Sunday Telegraph*, which subsequently published it. Lord Ashdown commenced proceedings against the Telegraph Group claiming breach of confidence and copyright infringement. He sought an injunction and damages or, alternatively, an account of profits. In considering the merits of the defence of public interest, the Ashdown Court stated that there would be occasions when –[41]

… it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright in them.

In the Court's opinion, one way of accommodating the public interest was to indemnify the author for any loss caused to him, or alternatively account to him for any profit made as a result of copying his work. Apart from the fact that the Human Rights Act justified the defence of *public interest*, the Court also held that it had an impact in the *manner* in which the fair dealing provision was to be interpreted. *Ashdown* illustrates the principle that paying a fee or a price is consistent with the public interest.

Copyright as a fundamental human right

As hinted above, there is still considerable controversy as to whether copyright and other intellectual property rights are human rights or whether they are

39 2001 EWCA Civ 1142. Hereafter Ashdown.
40 Ibid.:para. 1.
41 Ibid.:para. 44.

different values.[42] Assuming that copyright is part of the right to intellectual property, or its constituent parts find expression in other human rights, it is important to consider how to resolve the clash between copyright as a human right, and other human rights. Constitutional theory usually requires the balancing of the human rights that are involved. An example of the balancing of human rights is found in the minority judgment of O'Regan J in *NM v Charlene Smith*,[43] in which the relationship between privacy and freedom of expression was explored. O'Regan recognised that the two rights might, at some point, pull in opposite directions.[44] In her opinion, –[45]

… [t]he appropriate balance between privacy and expression requires the legal rules which provide for redress for breaches of privacy to be developed in a manner that recognises both the importance of privacy and the importance of freedom of expression.

As correctly identified by O'Regan, it is correct to proceed in balancing rights by treating all rights as equal and deserving of protection.[46] If this is in the foreground, the way to proceed is to identify the different interests that are ventilated by each right, and find a balance by an interpretation which preserves the essential interests in each right. This is often not an easy exercise because, at the end of the day, neither of the rights remains what it was at the beginning of the balancing exercise. Some of the features of a right may be removed or altered, depending on the prevalent interest. What is important is that the rights do not come to the table with an implicit understanding that one right will trump the other. In a sense, this is what may happen in a limitation exercise. However, when rights are balanced, this need not and should not happen.

When a court employs a wrong methodology and engages in a limitation exercise when it should be balancing the rights in question, it arrives at a result that seems to privilege one of the rights at play. This is what seems to have happened in the South African case of *Petro Props (Pty) Ltd v Barlow and Another*,[47] which involved freedom of expression and 'property rights'. In this case, the applicant, who was building a fuel service station and a convenience store that would operate under the South African fuel giant's brand name, *Sasol*, applied and obtained all the necessary consents for that activity, pursuant to section 22 of the Environmental Conservation Act, 1989 (No. 73 of 1989) (ECA). The respondent and her association opposed the development because it was taking place in an

42 Helfer (2003:47); Chapman (2001).
43 Case CCT 69/05; judgment delivered on 4 April 2007.
44 See para. 144:"In understanding the scope of privacy, it is important to recognise that, at times, the right to privacy might suggest that certain facts should not be published while at the same time the right to freedom of expression might suggest those same facts should be able to be published".
45 Ibid.:para. 147.
46 Generally, see Alexy & Rivers (2002:Ch. 3).
47 2006 (5) SA 160(W).

ecologically sensitive area. Her opposition took the form of an ongoing public campaign against the development. The campaign was successful in that it brought Sasol to the point of withdrawing from the project. The applicant sought an interdict, basing its claim on the right to property under section 25 of the ECA. The applicant contended that it had been persistently and unlawfully harassed in seeking to construct a petrol station on its property, and that its right to property had to prevail over the respondent's freedom of expression under section 16 of the South African Constitution. Inter alia, the respondents contended that, since sections 35 and 36 of the ECA provided for administrative appeals and court reviews of administrative decisions, as the only avenues of remedy against those aggrieved by such decisions, the respondent was entitled to fall back on the Constitution to claim a right to freedom of expression outside those avenues.

The Court refused to grant the interdict. After stating that neither freedom of expression nor 'property rights' were absolute, the Court recognised that its task in the matter was to "determine the point of balance appropriate to the pertinent facts".[48] It then went on rely on the methodology of Moseneke J in *Laugh It Off*. In doing so, it characterised the interests in *Petro Props* as being the same as those in *Laugh It Off* in relation to "the interface between freedom of expression and commercial and proprietary interests".[49] What had earlier been referred to as "property rights" was now downscaled to "commercial and proprietary interests". There was no mention of constitutional property. Perhaps this was why the Court proceeded to what is really a limitation analysis:[50]

Applying the two-stage analysis … to the present case, it is necessary first to assess the degree to which the constitutional protection of expression extends to the protection of the respondent's campaign, and thereafter to evaluate the degree to which that protection falls [sic] to be diluted in the light of [the] applicant's rights and interests.

In this way, the Court's analysis at the beginning of the case had already privileged freedom of expression over property rights. If the Court was involved in a balancing exercise, it would proceed by discussing freedom of expression and then the right to property. It would then identify how the issues in this case implicated the two rights, and would then seek to strike a balance. Be that as it may, it is not surprising that the Court found that the interdict would reverse the outcome of debate in the public domain and that this would have a chilling effect on the readiness of groups like the respondents to engage in free speech and free expression. It also found that the manner of the respondent's campaign was designed to promote public participation, the gathering and exchange of information, discussion, and production of community-based mandates.

There was clearly a public interest in protecting the manner in which the respondents carried out their campaign, as they were engaged in constitutionally protected expression.

48 Ibid.:para. 51.
49 Ibid.:para. 51.
50 Ibid.:para. 52.

The Court thereafter evaluated the applicant's "commercial interest in the undisturbed completion of the project".[51] It recognised the substantial investment in excess of R8.5 million, and stated that this was a point of distinction from *Laugh It Off* since the loss of this sum represented a "substantial economic detriment" fact which, in the *Laugh It Off* paradigm, may have justified ousting protected constitutional expression. Of importance to the Court was that there was no direct relationship between the act of expression and the allegation of prospective harm, and that it was public opinion that might influence Sasol's opinion – and only if that was successful would it have financial consequences for the applicant. For this reason, the Court found that a successful campaign was not vexatious, *contra bonos mores* or actionable, and that the applicant had not proved that its rights outweighed that of the respondent.

The claim that there was no direct relationship between the campaign and the building of the property is somewhat surprising, given that the Court was provided with cogent evidence that the campaign had led to Sasol beginning to review its sponsorship of the programme.[52] Furthermore, the Court declared the campaign "successful",[53] and stated that public opinion opposed the building of the petrol station. These facts prove that there is a *direct* relationship between the campaign and the fear of prospective harm, and that, even if it were *indirect*, the right to property is implicated.

It is important to note that the Court did not refer to constitutional property as the applicant's interests. All it alluded to was the "commercial interest"[54] of the applicant. The result may have been different if the Court had found that the applicant's interest was not just a "commercial interest" but a constitutionally protected one.

Having evaluated the two rights, the court should have proceeded to strike a balance – given the key dispute which was to stop further campaigns, as damages were not sought. Refusing the interdict would allow the campaign to continue and, ultimately, lead to Sasol's withdrawal and consequent loss to the applicants. Perhaps the Court could have dwelt on the provisions of sections 35 and 36 of the ECA, which provided an avenue for appeals against approvals such as the one applicant had been granted. The Court could have struck a balance by ordering the respondents to cease their campaigns and seek a judicial review of the approval, pursuant to sections 35 and 36 of the ECA. In this way, the public interest issues that the respondent's had promoted would continue to be ventilated.

In fact, it can be asserted that sections 35 and 36 were the statutory proxies of the freedom of expression in the way that the Act is cast. It would have been a different thing if there had been no such avenues, or if those that existed

51 Ibid.:para. 62.
52 Ibid.:para. 39.
53 Ibid.:para. 59.
54 Ibid.:para. 62.

had been permanently foreclosed. There is no doubt that the *Petro Props* Court unduly trumped constitutional property by the use of the freedom of expression because it did not correctly characterise the applicant's right as a constitutional right.

Judicial innovation: Recognising exceptions as user rights

This section of the paper addresses a judicial innovation by the Canadian Supreme Court in *CCH v Law Society of Upper Canada* in the recognition of exceptions as user rights.[55] In *CCH*, the Appellant Law Society maintained and operated the Great Library at Osgoode Hall in Toronto – a reference and research library with one of the largest collections of legal materials in Canada. The Great Library also provides a request-based photocopy service for Law Society members, the judiciary and other authorised researchers. Under this 'custom photocopy service' legal materials are reproduced by Great Library staff and delivered in person, by mail or by facsimile transmission, to requesters. The Law Society also maintains self-service photocopiers in the Great Library for use by its patrons.

In 1993, the respondent publishers commenced copyright infringement actions against the Law Society, seeking a declaration of subsistence and ownership of copyright in specific works, and a declaration that the Law Society had infringed copyright when the Great Library had reproduced a copy of each of the works in question. The publishers also sought a permanent injunction prohibiting the Law Society from reproducing these works, as well as any other works that they published. The Law Society denied liability and counterclaimed that copyright was not infringed when a single copy of a reported decision, case summary, statute, regulation or a limited selection of text from a treatise was made by the Great Library staff, or one of its patrons on a self-service copier, for the purpose of research. Inter alia, the Supreme Court held that, under section 29 of the Canadian Copyright Act, fair dealing for the purpose of research or private study did not infringe copyright. As stated above, the CCH Court confirmed what, in their opinion, the fundamental attribute of *copyright* was. The Court approved its opinion in *Théberge v Galerie d'Art du Petit Champlain Inc*,[56] where this attribute is set out thus:[57]

The Copyright Act is usually presented as a balance between promoting the public interests in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator … The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights[,] but [also] in giving due weight to their limited nature ... Excessive control by holders of copyrights and other forms of intellectual property may unduly limit the ability of the public domain to incorporate and embellish creative innovation in the long-term interests of society as a whole, or create practical obstacles to proper utilization.

55 [2004] 1 SCR 339. Hereafter *CCH*.

56 2002 SCC 34, [2002] 2 SCR 467.

57 Ibid.:para. 30–32. See also *Society of Composers, Authors and Music Publishers of Canada v Canadian Association of Internet Providers*, 2004 SCC 45.

The CCH Court formulated the concept that exceptions and limitations were user rights. According to the Court, –[58]

[b]efore reviewing the scope of the fair dealing exception under the Copyright Act, it is important to clarify some general considerations about exceptions to copyright infringement. Procedurally, a defendant is required to prove that his or her dealing with a work has been fair; however[,] the fair dealing exception is perhaps more properly understood as an integral part of the Copyright Act than simply a defence. Any act falling within the fair dealing exception will not be an infringement of copyright. The fair dealing exception[,] like other exceptions in the Copyright Act, is a user's right. In order to maintain the proper balance between the rights of a copyright owner and user's interests, it must not be interpreted restrictively.

Options in constructing the public interest: The role of Namibian collecting societies in achieving a balance between public and private interests in the Namibian Copyright Act

There are many options in constructing the public interest in the Namibian Act. They range from a reform of the Act to a liberal interpretation of the exceptions in it. One type of reform that deserves special consideration involves the enhancement of the operations of collecting societies in Namibia. *Collecting societies* are organisations of right owners acting to promote and protect right owners' interests. Typically, these societies licence the work of their members to the public, lifting the administrative load from individual owners who may otherwise be burdened with tasks such as negotiating with each member of the public wishing to use their work.[59]

Section 56(3)(b) of the Namibian Act authorises the Minister of Information and Broadcasting to authorise collecting societies that meet certain requirements that include their constitution adequately providing for –

… the collection on behalf of, and accounting and distribution to, its members of royalties or other remuneration accruing by reason of the use of works or performances affecting rights pertaining thereto ...

Presently there are two such societies: the Namibian Society of Composers and Authors of Music (NASCAM), and the Namibian Reproductive Rights Organisation (NAMRO). Because reprography is concerned with photocopying, NAMRO is likely to play a significant role in the Namibian educational sector, since the right to reproduction is the exclusive right of the author most implicated. Section 56(6) and (7) of the Act restrict negotiations to licence works to collecting societies and to individual right owners who have joined a

58 Note 56, para. 48. The significance of the user right has been recognised and celebrated in a surfeit of academic commentary. Here is a sample: Gervais (2004:131); Ong (2004:150); Scassa (2004:89); Tawfik (2005:6).
59 See Ficsor (2002).

collecting society. Typically, collecting societies negotiate an individual licence on the basis of individual work, or a collective licence to cover all the works in a repertoire. It is important to note, therefore, that the price of licences that collecting societies negotiate with users of the work is relatively high because of the weak bargaining position of the latter. It is important to add that, very often, users of copyrighted works are unable to factor in the exceptions to copyright as a basis for negotiating a lesser licence value. Accordingly, it is useful for users of copyrighted works to note the existence of Copyright Tribunals established by section 35 of the Act, because arguments about the public interest in Namibian copyright law will be entertained by these Tribunals.

Concluding remarks

The framing of the public interest in copyright issues as fundamental human rights and freedoms has brought new dimensions to the quest for the public interest in copyright – akin to the realisation that intellectual property rights are human rights. There is no doubt that the nature and extent of interaction between the various human rights will continue to unravel for a while. Part of this process is the awareness that the Three-step Test is fatal to the public interest. To overcome this obstacle, national legislatures and judiciaries need to be conscious of the constitutional obligations imposed on the state for her citizens.

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NOTES AND COMMENTS

More administrative justice in Namibia? A comment on the initiative to reform administrative law by statutory enactment

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Many countries – those with civil law and those with common law jurisdiction alike – have a codified system of administrative law or, at least, statutes which regulate aspects of administrative law. South Africa and its Promotion of Administrative Justice Act[1] is one example of the latter category.[2] A recent initiative of the Namibian Ministry of Justice and its Law Reform and Development Commission opened the debate on the question of whether or not Namibia should follow the approach adopted by other countries, namely to introduce a statutory framework for the promotion of administrative justice. The initiative was the result of joint efforts by the latter Ministry and the German Konrad Adenauer Foundation's Rule of Law Programme for Sub-Saharan Africa,[3] and led to an international conference entitled "Promoting Administrative Justice in Namibia", held in Windhoek from 18 to 21 August 2008.[4] The PAJN Conference was attended by international experts in administrative law from Germany, South Africa and Zimbabwe. Namibia was represented by government officials, judges, legal practitioners, and staff members of the University of Namibia's Faculty of Law. The practically unanimous opinion expressed by the Conference was that Namibia should indeed pursue the possibility of introducing an administrative law statute, while at the same time taking note of the country's socio-economic conditions.[5]

The following observations are not meant to be a conference report;[6] rather, they are comments on issues that might be considered in the expected administrative law reform project.[7]

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1 Act No. 3 of 2000, as amended.

2 Sec 33(3) of the Constitution of South Africa requires the promotion of administrative justice by an Act of Parliament.

3 The Programme has its seat in Nairobi, Kenya, and is currently under the direction of Prof. C Roschmann; cf. www.kas.de, last accessed 5 August 2008.

4 In the following, I will refer to this as the *PAJN Conference*.

5 Cf. here Mapaure (2008).

6 They refer to my teaching of administrative law at various universities for many years; the work of many years as an advocate specialising in administrative cases and representing clients against German administrative bodies; and my paper entitled "Administrative justice and modern constitutionalism: Preliminary observations", presented at the PAJN Conference. The comments also acknowledge the conference report by Mapaure (2008).

7 The establishment of such a project was recommended by the PAJN Conference.

They will –

- look at the constitutional foundation of administrative justice

- submit some remarks on administrative practice in situations of transition, which will help in our understanding the conditions under which administrative justice operates in Namibia, and

- draw some conclusions for the way forward.

The constitutional foundation of administrative justice

The Constitution of the Republic of Namibia deals with administrative justice in two of its Articles. The first is Article 18, which requires that administrative bodies –

… shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation … .

The second is Article 5, which contains the fundamental obligation enshrined in modern constitutionalism. According to this obligation, the three organs of the state – including the executive, therefore – are obliged to *respect and uphold the fundamental rights and freedoms* spelled out in Chapter 3 of the Constitution.

It is interesting to note that most contributions to administrative law in Namibia[8] (and South Africa, for that matter) concentrate on the elaboration of what is administratively *fair* and/or *reasonable* as required under Article 18 of the Constitution. In the development of the concepts of *fairness* and *reasonableness,* the usual and principal guide is the reference to *natural justice* as an umbrella term for what the courts have decided in administrative cases.[9] What Article 5 means for administrative justice, and how Article 5 and Article 18 relate to each other, has so far not attracted argument.

According to Levy, AJ, in the Frank case,[10] Article 18 of the Constitution *does not repeal common law; in fact, it embraces it.* Indeed, Article 18 expresses the

8 This applies in particular to the various contributions to the PAJN conference; see e.g. the opening remarks by JDG Maritz, JA; J Walters, Ombudsman; and U Nujoma, Deputy Minister of Justice. Otherwise, apart from Parker's (1991) groundbreaking article, not much has been written on administrative law in Namibia.

9 It would be interesting to determine which Constitutions (common-law-based or otherwise) have provisions such as Article 18, but also to elaborate on the notion of *natural justice,* which appears to be the generalisation of what courts practice. From what Parker (1991), for example, eloquently and convincingly submits, the concept of *natural justice* is a construct to cover fair treatment norms developed by the courts, and not what the linguistic closeness of *natural justice* to *natural law* may provoke, namely to believe that it is a jurisprudential (legal-philosophical) concept that would allow the systematic and theoretically consistent comprehension of administrative justice.

10 *Frank & Another v Chairperson of the Immigration Selection Board,* 1999 NR 257, at p 265.

interest of the Constitution-makers to secure legal certainty and stability in the post-independence legal order by providing for the continuation of the legal dispensation that prevailed before the Constitution's enactment. Nonetheless, the same interest is also articulated in Article 140 of the Constitution for all laws in force immediately before the date of independence, and in Article 66 for the respective common and customary law. In other words, even if Article 18 did not exist, the common-law-grounded administrative law of Namibia would not be different from what it is today with reference to Article 18.[11]

Although one will certainly accept that Article 18 entails more than the mere constitutional confirmation of inherited administrative common law, since it also offers space for the further development of this law in the spirit of the Constitution,[12] Article 5 reaches beyond Article 18. The yardstick of Article 18, which is used to measure the constitutional validity of administrative law, is rather general and primarily procedural.[13] The yardsticks of Article 5 are very precise, namely the specific fundamental rights and freedoms. Article 5 requires substantial compliance with the comprehensive catalogue of human rights by confronting administrative actions with the law authorising such actions.

In fact, the prominent place and the comprehensive orientation of Article 5 ought to be the eventual point of reference when it comes to the constitutional foundation of administrative law. The focus on Article 5 will not only contribute to dogmatic clarity, but will also reflect that, for the citizen, his/her first concern with respect to administrative actions is not necessarily procedural, but related to the fact that administrative actions have a bearing on his/her rights. Article 5 is the platform from which to assess the degree to which inherited administrative law complies with the Constitution, and upon which to build in the reform of administrative law.

Article 5 of the Constitution leads into Chapter 3, which specifies the fundamental rights and freedoms applicable in Namibia. Although the language of this Article differs from that of the Articles that follow it, the fact that Article 5 is an integral part of Chapter 3 necessitates an interpretation that takes note of the Article's placement. The placement of Article 5 introduces what is to follow in Article 21(1) and Article 22, namely that the fundamental rights and freedoms are at the very centre of the Constitution's gravity. In other words, whatever the state does is subject to these rights; and whatever the administration does is subject to these rights. Thus, the very law that regulates the administration is subject to these rights.

11 Cf. Baxter (1984:475ff, 535ff), who analyses the Roman-Dutch-law basis of the doctrine of *reasonableness* and, later, the doctrine of *fairness* (natural justice).

12 Cf. Parker (2008), Glinz (2008), Nakuta (2008).

13 What the text says is more valid for the *fairness* than for the *reasonableness* requirements. However, it is noteworthy that we may also reach the point of arguing for reasonableness when debating the possible limits of constitutional rights and freedoms as effected by measures of the state. Cf. Article 21(2) of the Constitution and, for the interpretation of *reasonableness* in view of the given relevant right or freedom, see *Kauesa v Minister of Home Affairs and Others*, 1995 NR 175 (NmSC) and the leading Canadian case, *R v Oakes* (1986) 1 SCR 103.

This has challenging consequences for the reshaping of administrative law, including the question of whether or not there is a need to involve the legislator. Even if one accepts that the current body of administrative law contributes effectively to justice in cases where courts are requested to attend to administrative law, and also that the inherited law holds potential to be strengthened in the spirit of the Constitution,[14] the question that the law reformer needs to ask will nevertheless be whether or not the system, as it is, can be improved: does it operate and respond adequately in constitutional terms to the needs of the constitutional subjects, the citizens themselves?

Administrative practice in situations of transition

The history of the administration and administrative law as it developed from the days of British colonialism in South Africa (or German colonialism in Namibia, for that matter), through the period of apartheid and thereafter would be the appropriate place to look for answers to whether or not administrative law needed reform. However, no relevant research has been done on this issue.[15] In view of this, I will illustrate the dimension of the desired research by recalling some findings that inform us about respective developments in Europe.

The eminent German writer on administrative law, Ernst Forsthoff, in his classic text on administrative law[16] explains how difficult it was to emancipate administrative law from authority-obedient structures before constitutions with comprehensive human rights were enacted. Although the administration had been rule-based from the middle of the 19th century,[17] the restructuring of administrative law to a law that had the fundamental rights and freedoms of citizens at its core could only materialise after further constitutional changes. These changes were eventually prompted by the implementation of modern constitutionalism, which subjects all organs of state to the order of a Constitution, including subjection to fundamental rights and freedoms! How difficult such a process can be is shown by the example of Germany, where it took 11 years after the adoption of the post-Nazi German fundamental law (*Grundgesetz*) to produce the Administrative Courts Act of 1960.[18] This Act was the first

14 As submitted by Parker (2008).

15 The pre-independence blueprint for Namibia by the United Nations Institute for Namibia (1988) does not consider administrative law, nor does the monograph that was written in preparation for such blueprint (UNIN with Sichilongo 1981). Wiechers (1985) and Carpenter (1995:1043ff) also do not reflect on the historical or jurisprudential place of administrative law in the legal order of South Africa. An exception worthy of further analysis is that by Baxter (1984), who has an introductory chapter entitled "Administrative law and the administrative state in historical and comparative perspective". Cf. also the introduction to Hoexter (2007).

16 Forsthoff (1961).

17 Ibid.:2f.

18 *Verwaltungsgerichtsordnung* (Administrative Courts Act) of 21 January 1960 (as amended) – not to mention the *Verwaltungsverfahrengesetz* (Administrative Procedural Act) of 21 September 1998 (as amended), enacted 38 years later.

comprehensive approach towards generating a legal system that translated the complex nature of modern administration into

a code governing the state– citizen relationship. Modern administration not only intervenes in civic affairs to maintain order, but is also responsible for distributive justice through the various welfare schemes that emerged as part of modern states.[19]

In this sense, it would certainly be enlightening to consider how –

- the concept of *administrative justice* took shape in South Africa after the end of British rule
- the concept was distorted in what became known as *Bantu administration* in South Africa and its special appearance in Namibia
- elements of administrative justice survived in South Africa and Namibia, despite the primary task of the apartheid administration being not to provide justice, but to defend the state against the so-called total onslaught, and
- the partial survival of administrative justice culminated in cases where courts in South Africa and Namibia could at least maintain certain principles of fairness.[20]

If research in these fields had been available when the Namibian Constitution was debated, the form of Article 18 might have been different. However, interpreting the principles of administrative justice by reading Articles 18 and 5 of the Constitution together, allows for the promotion of sound administrative practice in line with the objectives of the fundamental rights and freedoms. In other words, the jurisprudence offered by (Roman–Dutch) common law may be evaluated differently when read in light of Article 5 and the fundamental rights and freedoms.[21]

Conclusions for the way forward

How will law reform find an appropriate answer to the many questions posed at the conference on promoting administrative justice in Namibia? Although the conference provided a relatively comprehensive picture of administrative justice in the country, further research is required on the state of affairs in terms of the constitutional basis of such justice,[22] its operation through courts and tribunals,[23] and its shortcomings.[24] This will strengthen the foundation on which

19 These will also require addressing in Namibia at some stage.
20 As Horn (2008:69ff) presents in his analysis of the pre-independence position of the judiciary in Namibia.
21 It would be interesting, for example, to work through the cases assembled in Parker's article (1991:88ff) – on "shall act fairly" (ibid.:92ff) and "shall act … reasonably" (ibid.:96ff) – in order to determine whether the principles derived from these cases would stand the test of constitutionality.
22 As to the right of access to information – an important aspect of the overarching right to administrative justice – I refer to Ueitele (2008), Elliot (2008) and Tjombe (2008).
23 Cf. De Kock (2008) and Shapwa (2008).
24 Cf. Tjombe (2008) and Odendaal (2008).

the Namibian bill to promote administrative justice can be developed, and will convince the various stakeholders – including politicians and those in charge of finances alike – of its usefulness, as administrative law reform will certainly not be without financial consequences.

Research would need to investigate –

- the nature of administrative actions
- the perceptions of administrators in respect of their performance of administrative duties
- the perceptions of citizens as regards the administration's behaviour
- cases where citizens would have liked to see a judicial review of administrative decisions
- cases where citizens decided not to appeal to the courts because of logistical or financial problems
- the number of administrative cases decided since independence
- the existence and contents of written or oral administrative reasoning, and
- the way the administration handles citizens' dissatisfaction with administrative decisions.

Comparative legal research would also be needed to see how other countries deal with administrative justice, and what avenues they offer to assist citizens in obtaining it. Such comparative work would enable one to assess whether or not the South African response, in particular, to the need to strengthen administrative justice is a model for Namibia.[25]

Although there is anecdotal evidence, derived from newspaper reports and day-to-day observation, to assume that the results of the suggested research would support the proposal of a statutory regulation of administrative law, the proposal would stand on much firmer ground if research were conducted in the manner outlined above. This is said against the background of former Minister of Justice NE Tjriange's attempts to initiate a project to codify criminal law. Members of the judiciary were not in favour of codification. They held that there was nothing wrong with the criminal law in place. The *socio-political* argument, namely that a codified system of criminal law would help to bring the law closer to the people than the current system does – the latter being centred on the legal profession, was not appreciated by those who opposed the Minister's project. Their opposition eventually won the day because the socio-political argument in favour of codification was not sufficiently substantiated by facts from the field.

25 The PAJN Conference offers a number of relevant papers, e.g. Chiloane (2008) and Wessels (2008) from South Africa; Machaka (2008) and Feltoe (2008) from Zimbabwe; Chibwana (2008) from Malawi, and Roschmann (2008) from Germany. Discussions with experts suggested that, apart from Germany, other civil law countries that could be studied include Australia, Canada and India.

Thus, only facts related to the practice of administration will convince legal stakeholders to consider legislative acts in the area of administrative law. Only insights into the practice of administration will empower law reformers to consider what legal instruments are appropriate for incorporation into the Act. Only the records of reality will allow one to determine whether or not it would make sense, for example, to leave it to the High Court to hear administrative cases or to use the example of German administrative law and provide for in-house, quasi-judicial bodies that review administrative actions before they go to court.[26] Only a consideration of the nature of administrative cases will assist in deciding whether or not it would be appropriate to have an inquisitorial system in administrative procedural law.

However, law reform has to have in mind what Friedrich Karl von Savigny (1779–1861), one of the founders of the influential historical school of jurisprudence, stated in his *Of the vocation of our age for legislation and jurisprudence*.[27] In it he opposed the codification of the Roman law applicable in Germany at the time into what is now the German Civil Code. Von Savigny believed that a *hasty legal codification* was to be avoided, since an essential prerequisite for any codification was the comprehensive *appreciation of the spirit of the particular community*.[28]

How far-reaching is the appreciation of the statutory promotion of administrative justice in Namibia?

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26 As provided for in section 68ff of the Act. Quasi-judicial reviews of this nature are cheap, fast and effective. At the same time, they contribute to in-house administrative law capacity-building.

27 Von Savigny (1975).

28 Ibid.

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RECENT CASES

Section 16 of the Supreme Court Act

Raymond Heathcote*

Section 16 of the Supreme Court Act, 1990[1] reads as follows:

> Review jurisdiction of Supreme Court
>
> (1) In addition to any jurisdiction conferred upon it by this Act, the Supreme Court shall, subject to the provisions of this section and section 20, have the jurisdiction to review the proceedings of the High Court or any lower Court, or any administrative tribunal or authority established or instituted by or under any law.
>
> (2) The jurisdiction referred to in subsection (1) may be exercised by the Supreme Court mero moto whenever it comes to the notice of the Supreme Court or any judge of that Court that an irregularity has occurred in any proceedings referred to in that subsection, notwithstanding that such proceedings are not subject to an appeal or other proceedings before the Supreme Court: Provided that nothing in this section contained shall be construed as conferring upon any person any right to institute any such review proceedings in the Supreme Court as a Court of first instance.
>
> (3) The Chief Justice or any other judge of the Supreme Court designated for that purpose by the Chief Justice, may give such directions as may appear to him or her to be just and expedient in any particular case where the Supreme Court exercises its jurisdiction in terms of this section, and provision may, subject to any such direction, be made in the rules of Court for any procedures to be followed in such cases.
>
> (4) The provisions of this section shall not be construed as in any way limiting the powers of the High Court as existing at the commencement of this Act or as depriving that Court of any review jurisdiction which could lawfully be exercised by it at such commencement.

Recently, the provisions of section 16 have come under scrutiny by the Supreme Court of Namibia in two judgments; *Schroeder and Another v Solomon and 48 Others*,[2] and *Christian v Metropolitan Life Namibia Retirement Annuity Fund and 2 Others*.[3]

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1 Act No. 15 of 1990.

2 SCR 1/2007.

3 SCR 3/2007.

The facts of the *Schroeder* case were as follows. Schroeder and his daughter instituted action in the High Court against the respondents for payment of N$2.2 million and N$10.2 million, respectively. A group of the respondents brought an interlocutory application in terms of Rule 23(2) of the High Court Rules to strike out certain alleged vexatious and irrelevant matters contained in the applicants' particulars of claim. The application was set down for 8 March 2007 on an ordinary motion Court day.[4] But a day before the matter was to be heard, the applicants (the plaintiffs in the High Court action) applied for a postponement until 16 May 2007 in order to obtain the services of a legal practitioner of their choice. The Court granted this relief.

While the above proceedings were pending, the applicants lodged two further applications in the High Court (in relation to some of the respondents/defendants only), seeking relief, inter alia, for an order that the majority of the respondents had not entered a lawful defence and that the respondents should stop harassing the second applicant. On 13 March 2007, both applications were struck from the roll because the applicants' papers were not indexed.

Having suffered two setbacks in a period of less than two months, the applicants then lodged an application in the Supreme Court for review, claiming the following relief:

- Firstly, and curiously, after having asked for – and, indeed, received – postponement, they claimed that the order postponing the matter on 9 March 2007 should be reviewed and set aside.
- Secondly, they sought an order in terms of which the High Court order striking their application from the roll on 13 March 2007 should be reviewed and set aside, and
- This was followed by an array of additional relief sought, including that further respondents should be joined (by the Supreme Court) in the pending High Court action, and that it be declared that "the defence of the respondents/defendants has been fatally compromised and pre-empted", and that "the combined summons be determined in the absence of the respondents/defendants".

Maritz, JA, with whom Shivute, CJ and Strydom, AJA agreed, determined the scope and ambit of section 16 with reference to the contents and context of the section, and ascertained the three principal features of that section to be –

(a) that the Court has jurisdiction to review the proceedings of all other Courts, administrative tribunals and authorities "established or instituted by or under any law" ("public authorities");

(b) it may of its own accord exercise this review jurisdiction whenever an irregularity in those proceedings comes to its notice or to the notice of anyone of its Judges irrespective of whether the proceedings in

4 The practice in the High Court is that, if a matter which is set down on the unopposed roll becomes opposed, the matter will be postponed to a date as determined by the presiding judge.

> question are subject to an appeal or are otherwise before the Court; and (c) that the section does not give any person the right to institute review proceedings in this Court as one of first instance.

The Court further confirmed, in essence, that section 16 was only permissive, i.e. the Supreme Court could review any decision of the High Court, provided that an "irregularity in the proceedings" had occurred. Nevertheless, such jurisdiction powers would only be exercised mero moto by the Supreme Court. Thus, section 16 does not give any litigant an "as of right" entitlement for such a review application to be heard. At best, a litigant can bring an alleged irregularity to the Court's attention. But, once that has been done, the matter will only proceed if the Court in fact exercises its section 16 review jurisdiction.

At first blush, it may be argued that an anomaly exists here: why provide for such a jurisdictional power, but fail to provide for a procedure to lodge an application to Court? As Maritz, JA then carefully explained, however, a decision of the Court to invoke its section 16 review jurisdiction was a –

> … threshold requirement for the admissibility of any application under the section to review and set aside or correct the impugned proceedings. …
>
> It would place an unbearable burden on the limited resources of the Court and severely compromise its ability to dispense justice in an equal, just and fair manner if everyone dissatisfied with the fairness or reasonableness of judicial, quasi-judicial and administrative judgments or decisions by Courts, administrative tribunals and other public authorities on account of alleged irregularities could at will institute review proceedings in this Court – in the process bypassing all existing judicial structures often better suited to deal with those matters in the first instance.

Despite these policy considerations, the Court also made it clear that, "with the Supreme Court constitutionally positioned at the apex of the judiciary", it would not concern itself with form, but would have regard only to substance. Thus, despite the applicants' conduct (i.e. the way in which their review application was launched) clearly having been impermissible, the Court –

> … nevertheless considered the substance thereof at the time it was received and, as further affidavits and heads of argument were filed later in the proceedings, continuously reassessed whether or not it should invoke its review jurisdiction.

In exercising its discretion whether or not to invoke its section 16 review powers, the Court will have regard to a number of factors, and its jurisdiction will only be invoked –

> … when it is required in the interests of justice. Whether it is so required or not, must be decided on the facts and the circumstances of each case. Considerations such as whether or not –
>
> (a) the irregularities are also reviewable by other competent Courts or may be corrected in other available proceedings;

(b) the irregularities relate to completed, uncompleted, interlocutory or ancillary proceedings;

(c) considerations of urgency attach to the adjudication thereof;

(d) the issues are important;

(e) a public interest is at stake;

(f) only an individual or a class of persons or a section of the community has been affected by the irregularity and the like.

Although section 16(4) of the Supreme Court Act stipulates that the Chief Justice (or another judge of the Supreme Court designated by him for that purpose) may "give such directions as may appear to him or her to be just and expedient in any particular case", and for that purpose may direct that Rule 9 of the Court's Rules be followed, that will only be done once and "where the Supreme Court exercises its jurisdiction" in terms of section 16.

But the Court also realised that its judgment might, in future, not be known to all lay litigants: they might continue to serve review applications on other litigants as if the Supreme Court were compelled to exercise its review jurisdiction in terms of section 16 once a litigant had launched such an application. The respondents in such application, like the respondents in the *Schroeder* case, might fear that a default judgment would be granted against them if they did not file notices of intention to oppose and answering affidavits. Recognising this intolerable situation, the Court drew on its powers in terms of section 37(2) of the Act and determined that all future applications which purported to be review applications in terms of section 16 had to be processed by the Registrar as if they were merely applications which sought the Court's decision whether or not it would exercise its section 16 review jurisdiction.

It is submitted that the practical effect of the Court's determination here is that, in future, where a respondent is served with an application in terms of which an applicant claims that the Supreme Court is obliged to invoke its section 16 jurisdiction, the process can be ignored until such time as the Chief Justice has indicated that the Court will indeed invoke its section 16 review jurisdiction and consider the application. Once that has been done, the process as directed by the Chief Justice should be followed.

Having set out the ambit and scope of section 16, as well as future procedure to be applied if a litigant wanted the Supreme Court to invoke its section 16 review jurisdiction, the Court held that none of the orders made by the High Court (as discussed above) constituted an "irregularity in the proceedings". Accordingly, the Supreme Court declined to invoke its section 16 jurisdiction mero moto, and the matter was struck from the roll with costs.

In the *Christian* judgment, Maritz JA, with whom Strydom, AJA and Chomba, AJA concurred, again dealt with the provisions of section 16. Christian and his

wife lodged an urgent application in the High Court, claiming final relief in terms of which the respondents had to be ordered to submit a dispute between the parties to arbitration. Lacking compliance with Rule 6(12) of the High Court Rules, the matter was struck from the roll with costs. More importantly, the High Court also made an order that the applicant could not proceed with the same application in the ordinary course unless the costs had been paid.

Again, the applicant launched what purported to be an "Application for review" in the Supreme Court for the setting aside of the High Court's order.

Maritz, JA described this review application as one with "an uncanny resemblance" to the *Schroeder* application. Nevertheless, and true to the principle that substance should take preference over form, the Court held that –

> … notwithstanding the apparent inadmissibility of the review application and the significant irregularities in its form, it [the application] nevertheless disclosed alleged irregularities in the proceedings of the High Court which this Court had to take note of.

Whilst dealing with the substance of the review application in terms of section 16 of the Supreme Court Act, Maritz, JA confirmed a number of important legal principles, as follows:

- The review jurisdiction of the Supreme Court in terms of section 16 is unique and extraordinary. Its precise scope will be determined with circumspection on a case-by-case basis, and the criteria taken into consideration and mentioned in the *Christian* judgment are likely to be "expanded on in future".
- For an applicant to be successful with such a review application, the "onus rests upon the applicant for review to satisfy the Court that good ground exists to review the conduct complained of", and
- What constitutes "good grounds" depends on the facts and circumstances of the case and the nature of the proceedings under consideration. In particular, the applicant –

> … must establish that the review relates to an irregularity in the proceedings. This much is clear from Bushebi's case.[5] The irregularity need not be apparent from the proceedings but may be established by evidence aliunde the record. Precisely what would constitute a reviewable irregularity will depend on the facts and circumstances of each case and the body of laws applicable to the adjudication thereof, the most fundamental of which is the Constitution and, in the context of the review of judicial proceedings, the fair trial provisions guaranteed under Art. 12 thereof. The grounds of review must either expressly or by necessary implication identify the irregularities relied on in each instance. The application must also establish that the irregularity in the proceedings

5 S v Bushebi, 1998 NR 239 (SC).

> complained of resulted or is likely to result in an injustice or other form of prejudice being suffered.

With the above criteria in mind, the Court then dealt with the numerous complaints made by the applicant, which, according to him, constituted reviewable irregularities in the proceedings. All but one of those complaints were found to be without substance. But, as pointed out above, the High Court also made an order that the applicant should pay the costs of the High Court proceedings before the matter could proceed in the ordinary course. It is submitted that such an order was wrong on the merits of the case as well, although that would not have constituted an irregularity in the proceedings. Nonetheless, the High Court made this cost order without hearing the applicant on this aspect. The Supreme Court held that the High Court's –

> … failure to allow the applicant an opportunity to address it on the respondent's application for such an extraordinary order of costs constitutes an irregularity in the proceedings. The prejudice to the applicant in the effect of the order is apparent: Being indigent, it effectively bars him from obtaining redress in the main application.

The costs order was set aside.

The *Schroeder* and *Christian* judgments have done much to bring about certainty in respect of the procedural aspects when a litigant wants the Court to invoke its section 16 review jurisdiction. The judgments have also clarified and expanded the substantive law in relation to the exact meaning of the concept *irregularity in the proceedings*. But the Court has also made it clear that the last word has not been spoken.

Minister of Home Affairs v Van der Berg, Case No. 19/2004, Supreme Court of Namibia, delivered 12 December 2008

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CORAM: Shivute, CJ, O'Linn, AJA, et Chomba, AJA

The foundation of this appeal is a criminal case that started in 1994. The respondent, Accused No. 2 in the criminal trial, was charged in the Magistrate's Court with a contravention of section 28(a) (possession of rough or uncut diamonds) and section 28(b) dealing in rough or uncut diamonds) of the Diamond Industry Protection Proclamation No. 17 of 1939[1]. He was discharged at the end of the State's case. The Magistrate also made an order that a vehicle belonging to the respondent, which was part of the alleged diamond deal and impounded by the police, be returned to the respondent.

The vehicle was not returned. The State appealed against the judgment. The appeal[2] succeeded, and Justice O'Linn ordered that the trial magistrate's decision be set aside, including his order that the vehicle in question be returned to Accused No. 2. The case was referred back to the Magistrate's Court to reconvene from the point at which the State had closed its case.

The State recalled some witnesses and Van der Berg closed his case without leading evidence. He was then convicted on the main count of wrongful and unlawful dealing in rough or uncut diamonds. However, on appeal on 17 June 1996, the conviction was set aside and replaced with a conviction of attempted wrongful and unlawful dealing in rough or uncut diamonds.

However, in the light of the discharge in the Magistrate's Court and the order to return the vehicle, Van der Berg instituted a civil action in which he stated that the motor vehicle had been damaged beyond economical repair while in police custody. The Minister of Home Affairs did not defend the application and, on 19 August 1994, the plaintiff obtained judgment in default. When Van der Berg issued a warrant of execution, the Minister lodged an application for rescission of the default judgment. When the application was set down for hearing, the State appeal against the Magistrate's Court judgment was still pending. The parties agreed that the hearing be adjourned sine die in anticipation of the appeal hearing, and the Court ruled accordingly.

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1 Hereafter Proclamation 17.

2 See *S v Van der Berg,* 1995 NR 23 (HC).

Despite several letters by Van der Berg's legal practitioners to the Government Attorney, and a promise by the Government Attorney that they would look into the matter of the vehicle's statement, nothing happened after Judge O'Linn's appeal judgement, after the second Magistrate's Court judgment, or after the appeal by Van der Berg.

On 6 July 2000, Van der Berg again approached the Court, requesting it to order the respondent – the Minister – to comply with the judgment issued against him on 19 August 1994. The Minister responded with an application requesting the Court to reinstate the application for rescission of judgment of 20 September 1994, condone the Minister's failure to timeously set down the application for rescission, and to rescind the judgment entered against the Minister on 26 August 1994, or, in the alternative, dismissing the plaintiff's (i.e. Van der Berg's) cause of action.

The High Court per Justice Hoff granted judgment in favour of Van der Berg. In response, the Minister appealed to the Supreme Court. Justice Chomba, writing the majority judgment in a 2–1 split decision, summarised the issues of the case as follows:

Whether the defendant had offered a plausible explanation for his failure to prosecute the rescission application which he lodged on 20 September 1994

Whether the application he subsequently lodged for reinstatement of the said rescission application was bona fide, and not merely intended to delay the plaintiff's claim, and

Whether he had disclosed a bona fide defence to the said claim.

Looking at the first issue, the Court pointed out that *at the time of the reinstatement application, the defendant had been over five years out of time*. The Minister's explanation for the failure to file a notice to defend the action started by Van der Berg in 1994 was given as having to deal with administrative issues in the Office of the Government Attorney. More important, however, were the reasons for not restoring the rescission application to the active roll after the appeal had been decided.

The appellant (the Minister) believed that when Van der Berg had been convicted of an attempt to deal in rough or uncut diamonds in contravention of section 28(b) of Proclamation 17, the vehicle was automatically forfeited to the State. This was also seen by the Court as the basis for determining whether the Minister had a bona fide defence.

The section in the Proclamation that the Minister relied on, namely section 34 ter, reads as follows:

(N)otwithstanding anything to the contrary in any other law contained, any

money or property which a person has paid or delivered to a member or agent of the Namibian Police in terms of agreement for the delivery or acquisition of diamonds, shall upon conviction of that person of an offence under this Proclamation in connection with such agreement, be forfeited to the State.

The Court found that there was indeed a possibility that the Minister's interpretation of the section was correct, and commented as follows:

By parity of reasoning, if in [sic] present case the State's interpretation of section 34 ter of Proclamation 17 of 1939 were to be found at the trial of the plaintiff's action to be correct, then the default judgment might well be found to be a non sequitur and therefore to be a judgment that did not promote justice between the parties.

While the Court did not disagree with the court a quo that the State had acted negligently in the process, relying on *De Witts Auto Body (Pty) Ltd v Fedgen Insurance Co. Ltd*[3] and *Lewies v Sampoio*,[4] the Court stated that negligence alone could not *per se lead to the dismissal of an application for rescission*.

The Court also pointed out that, if the appeal succeeded, it would make no sense to condone the committal. Relying on two South African cases,[5] and pointing to the fact that the Minister at the time of default judgment, Hon. J Ekandjo, was no longer the Minister of Home Affairs, the Court said the following:

The order has lost meaning firstly because the appeal should be allowed and secondly because it would be ludicrous to enforce it in the changed situation.

Consequently, the appeal succeeded and the Court made the following orders:

1. The appeal is allowed.

2. The orders of the Court *a quo* are set aside and I substitute therefor the following orders:

(a) The application for reinstatement of the application for rescission is allowed;

(b) the application for rescission of the default judgment is allowed and consequently;

(c) the default judgment is set aside;

(d) the order relating to committal is set aside;

3 1994 (4) SA 705 (ECD).
4 2000 NR 186 (SC).
5 *Mjeni v Minister of Health and Welfare*, Eastern Cape 2000(4) SA 446, and *York Timbers Ltd v Minister of Water Affairs and Forestry and Another*, 2003(4) SA 477 (TPD).

(e) the defendant is directed that within 10 days from the date hereof he must file a notice to defend the plaintiff's action; and

(f) the plaintiff's action, inclusive of the interpretation of section 34 *ter* of Proclamation 17 of 1939, should be set down for hearing before a different constituted Bench and as a matter of priority.

African Personnel Services v Government of Namibia and Others, decided on 1 December 2008. Case No. A4/2008

Nico Horn* and Kaijata Kangueehi**

Coram: Parker, J, Ndauendapo, J, and Swanepoel, AJ

African Personnel Services (APS) brought an application to the High Court challenging the constitutionality of section 128 of the Labour Act, 2007.[1] Section 128 outlawed labour hire practices in Namibia. APS was of the view that the section infringed on its right to carry on a trade, which is enshrined in Article 21 of the Namibian Constitution. Article 21 provides as follows:

(1) All persons shall have the right to:

(j) … carry on any … trade or business.

Section 128 of the Labour Act provides the following:

Prohibition of labour hire

128. (1) No person may, for reward, employ any person with a view to making that person available to a third party to perform work for the third party.

(2) Subsection (1) does not apply in the case of a person who offers services consisting of matching offers of and applications for employment without that person becoming a party to the employment relationships that may arise therefrom.

(3) Any person who contravenes or fails to comply with this section commits an offence and is liable on conviction to a fine not exceeding N$80,000 or to imprisonment for a period not exceeding five years or to both such fine and imprisonment.

(4) In so far as this section interferes with the fundamental freedoms in Article 21(1)(j) of the Namibian Constitution, it is enacted upon the authority of Sub-article 2 of that Article in that it is required in the interest of decency and morality.

The Court laid the foundation for its judgment by pointing out that Article 21 was not an absolute right:

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1 Act No. 11 of 2007.

As I understand Article 21(1)(j), not every "trade or business" is entitled to the protection of Article 21, e.g. a business that is for a criminal enterprise. Thus, a person who is in the business of, for instance, stock theft, the keeping of a brothel, trafficking in women or children, and slavery cannot be heard to claim a right under Article 21(1)(j) of the Constitution on the basis that the business or trade yielded a profit or income. That much Mr Smuts is in agreement with. The reason – and this is very important for our present purposes, as I shall demonstrate in due course – is not only because such activity is criminal; it is also because it has no basis in law. In my view, if the business or trade has no basis in law, it is not lawful; and as Maritz, J (as he then was) correctly stated, in *Hendricks and Others v Attorney-General, Namibia and Others* 2002 NR 353 at 357H, "It is, in my view, implied by that article (i.e. Article 21(1)(j)) that the protected right relates to a profession, trade, occupation or business that is lawful."

Quoting Maritz, J (as he then was) in the *Hendricks* case, the Court pointed out that only a lawful profession, trade, occupation or business were protected under Article 21(1)(j) of the Constitution. Moreover, *lawful*, the Court explained, was be understood in its wider sense, namely –

… the activity involved in the business or trade is lawful when it is not a crime or when it has legal basis in Namibian law.

The Court then proposed the following definition for *labour hire*:[2]

Labour hire is a form of indirect employment relationship in which the employer (the agency) supplies its employees to work at a workplace controlled by a third party (the client) in return for a fee from the client.

After an extensive discussion of what constituted a *labour contract* in Namibian law, the Court concluded that a third party – in this case, the labour hire company – could not be party to such a contract. *Employment contract*, in Namibia, was defined under the Roman law of locatio conductio operarum, i.e. "the letting and hiring of personal service in return for a monetary return".

The only other form of hiring or letting labour under Roman law was slavery, where the slave was the possession of its owner. A slave could be the object of a location condition rei, and as such be hired out and be locatio conductio operas (faciendi) – the independent contractor.

Consequently, the common law knows only one labour contract: that of the rendering of personal service by the locator operarum (servant) to conductor operarum (master). This, the Court stated, was not changed by statutory law. Labour hire creates an unacceptable interposition of a third party (the labour hire agency's client) in the employer–employee relationship, which has no basis in law.

2 Power (2002:64).

The Court also pointed out that labour hire not only had no basis in law, it also violated the fundamental principle of the International Labour Organisation (ILO), of which Namibia is a member, namely that labour is not a commodity.

Justice Parker made two strong statements on the practice to express his resentment:

In my opinion it is letting or hiring of persons as if they were chattels; … it also smacks of the hiring of a slave by his slave-master to another person …

Consequently, the Court did not find it necessary to balance the right to labour protected in Article 21 with the disadvantages of labour hire to the workforce. Once labour hire was found to be against the law and alien to the Namibian common law, the debate was over.

The full bench held that –

the Article 21 right was a derogable one and could be limited, provided the limitation was reasonable, necessary in a democratic society, and in the interests of Namibia

the contract of employment had only two parties: the employer and the employee

there was no room for interposing a third party (the client) in a contract of employment

the common law did not know labour hire practices

labour hire was akin to slavery and, therefore, illegal, and

since labour hire was illegal, APS could not claim such a right and, therefore, did not have a right protectable under Namibian law.

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NEW LEGISLATION

Tousy Namiseb*

Pre-independent Namibia was characterised by institutionalised discrimination, which was based on race, gender and some other forms. With the operation of the system of parliamentary sovereignty, the law was used as a very powerful tool to enforce and entrench such discrimination. At independence, however, Namibia adopted a Constitution which promised to eradicate all forms of discrimination. This is evidenced by Article 10, which states as follows:[1]

> (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.

The democratic Constitution sets certain standards which need to be actualised in practice. Specific legislative interventions are essential to make the variety of undertakings in the Constitution a practical reality.

This analysis aims to examine the extent of the legislative intervention as it relates to the empowerment of women and the eradication of gender-based discrimination.

We have seen some significant developments in the arena of law reform since independence. However, we need to analyse the impact of legislative interventions. The legislative developments under scrutiny have affected the position of women in the labour sector, in the family, in customary law, and in criminal law. These need to be considered in turn.

In terms of labour laws, significant reforms were brought about by the Labour Act,[2] which prohibits discrimination based on sex, marital status, and family responsibility, amongst other things. The Act recognises biological realities and makes specific provision for maternity leave, where appropriate. The Labour Act of 2007[3] strengthens these developments in favour of women's empowerment.

The Affirmative Action (Employment) Act[4] has also been significant in empowering women in employment. The Act aims to create a more representative national workforce in relation to, among other things, the number of women employed by specific employers. These provisions are enforced through affirmative action plans and regular reporting to the Office of the Employment Equity Commissioner.

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* Chief of Law Reform, Secretaty to the Law Reform and Development Commisssion

1 Constitution of the Republic of Namibia.

2 Act No. 6 of 1992.

3 Act No. 11 of 2007.

4 Act No. 29 of 1998.

Family law has also been reformed, and some additional reforms remain in the pipeline. The Married Persons Equality Act[5] introduced some significant reforms as well. Married women[6] had previously been subject to the marital power of their husbands. They were placed in a position akin to that of minors and could not perform certain juristic acts without their husbands' assistance or permission. Under the Married Persons Equality Act, spouses are now given equal powers to deal with joint estates. The Act also makes important provisions with regard to the head of the household. Prior to the existence of the Act, husbands were automatically regarded as the heads of their households; under the new Act, the parties to a marriage or other union are given the right to choose who represents the head of the household. Nonetheless, in practical terms, husbands may continue to be regarded as heads of households due to cultural, religious and other practices, although wives fulfil this role from a socio-economic perspective.

It is also important to mention that the Income Tax Act[7] was amended to remove all discrimination against married women.

Customary law reforms have not been so significant. Due to the complexity of matters pertaining to personal law, reform in the sphere of customary law has been very slow. Nonetheless, coupled with pressure from the High Court judgment in *Berendt v Stuurman*,[8] some law reform has occurred, e.g. in the form of the Estates and Succession Amendment Act.[9] The aim of the latter amendment was to do away with discrimination relating to the process of reporting and administering deceased estates. The Amendment Act upholds customary laws, however, which in some cases discriminate against women.

In respect of criminal law, legal reform has been aimed particularly at fighting gender-based violence in Namibian society. The Combating of Rape Act[10] was introduced to redefine the offence of rape and to fight it effectively. Among the important developments in this context is that marriage as such is not a defence to rape. The Act further provides for stiff minimum sentences for rape, which aims to effectively deter the commission of sexual offences.

The Combating of Domestic Violence Act[11] has supplemented the provisions of the Combating of Rape Act. The Combating of Domestic Violence Act redefines *violence* and covers sexual violence, harassment, intimidation, economic

5 Act No. 1 of 1996.

6 This relates to women married under civil rather than customary law.

7 The Income Tax Act, 1981 (No. 24 of 1981) was amended by Act No. 12 of 1991 and Act No. 25 of 1992, and deals with distinctions between men and women, particularly as regards being married or single.

8 *Magrietha Berendt & Aron Berendt v Claudius Stuurman and Others,* No. A105/2003, High Court of Namibia; heard on 16 May 2003, delivered on 14 July 2003.

9 Act No. 15 of 2005.

10 Act No. 8 of 2000.

11 Act No. 4 of 2003.

violence, and psychological violence. An important aspect of the latter Act is contained in the protection orders that can be issued by a Magistrate's Court. This is a less costly way of attaining protection for a victim of domestic violence. If such provision had not been made, the victim would have to institute costly civil proceedings in order to obtain a restraining order against the offending party.

Some of the latest statutes need a special mention due to the impact that they have on ordinary people's lives. Reference has already been made to the Labour Act. The labour sector is extremely important for an emerging nation like Namibia, as it impacts on the lives of and relationships between ordinary citizens. It also describes how the State can interfere with and regulate such relationships.

Soon after independence, the Labour Act, 1992[12] was promulgated. This Act provided for the tripartite relationship between the State, the employer and the employee. An important aspect dealt with by the 1992 Labour Act was to make the adjudication in labour matters accessible to ordinary people. Thus, specialised courts were set up to deal with labour matters. District Labour Courts were established at the level of Magistrates' Courts. District Labour Courts were presided over by chairpersons who were normally appointed from the ranks of magistrates. The Labour Court was also established as an Appeal Court in labour matters. The Labour Court was presided over by a president, who was appointed from the ranks of High Court judges.

Litigants in the District Labour Courts were not limited to be represented by legal practitioners, and could choose to be represented by non-lawyers like trade union representatives and labour consultants. However, practical problems soon developed with finalising matters, since the District Labour Courts put an additional strain on the already overburdened Magistrates' Courts. The Labour Act, 2007[13] was promulgated to, among other things, deal with the problems relating to the expeditious finalisation of labour matters.

The system operating with the District Labour Courts has since been abolished and replaced by a new system of conciliation, mediation and arbitration. Chapter 8 of the 2007 Labour Act deals exclusively with the prevention and resolution of disputes. Sections 81 to 83 specifically set out the procedures to be followed for the conciliation of disputes. Arbitration of disputes is provided for in sections 84 to 90. It can be argued that arbitration of labour disputes substitutes the role that used to be played by the District Labour Courts in terms of the Labour Court of 1992 (?the 1992 Labour Act?). The 2007 Labour Act provides that the arbitrator can make awards in a dispute that can be enforced in terms of section 90 of that Act.

The Labour Court that was established under the 1992 Labour Act continues to exist as a division of the High Court, and is presided over by a High Court judge.

12 Act No. 6 of 1992.
13 Act No. 11 of 2007.

The Labour Court is vested with the jurisdiction to determine appeals emanating from arbitration awards, decisions of the Labour Commissioner, and compliance orders issued by labour inspectors. The Labour Court also has review jurisdiction and can review arbitration awards and decisions of the Minister or Permanent Secretary of Labour and Social Welfare, the Labour Commissioner, or any other body or official acting in terms of the 2007 Labour Act.

Issues relating to labour hire companies became controversial and were seriously contested. Section 128 of the 2007 Labour Act prohibits and criminalises labour hire agencies. Fines not exceeding N$80,000 or imprisonment of up to five years or both are provided as sanctions for contravening this prohibition. The matter was contested in the High Court, and the Supreme Court has yet to rule on the matter. Thus, it will not be appropriate to deal with this matter here at length.

It is worth mentioning that some key statutes passed by Parliament have not yet been put into operation. Only a few of these will be mentioned here. The Prevention of Organised Crime Act, 2004[14] is a good example. This statute is aimed at combating organised crime, money laundering and criminal gang activities. A possible reason for this Act not being operational as yet is the fact that certain systems have not been put in place.

The Criminal Procedure Act, 2004[15] has also been promulgated, but has not been put into operation. It is crucial to note that statutes need to operate as a unit; if supporting statutes are not in place, then a specific statute cannot be made operational. For example, it would be impractical to put the Prevention of Organised Crime Act into operation if the new Criminal Procedure Act had not yet become operational.

In conclusion, it is apparent that there has been a serious commitment for law reform relating to issues of gender equality. However, some areas have not seen progress, as law reform has been very slow. Areas relating to proprietary regimes for marriages and intestate succession, amongst other things, need to be dealt with urgently. Namibia has also reached a point where the effects of statutes such as the Combating of Rape Act, the Combating of Domestic Violence Act and the Married Persons Equality Act can be reviewed in an effort to establish whether or not the desired results are being achieved.

14 Act No. 29 of 2004.
15 Act No. 25 of 2004.

BOOK REVIEWS

Human rights and the rule of law in Namibia
N Horn & A Bösl (Eds), Macmillan Namibia, Windhoek, 2008, 299 pp

Joseph Diescho*

The publication, Human rights and the rule of law in Namibia, is the first of its kind since the country's political independence and national sovereignty in 1990. The book is a collection of the state of human rights and the rule of law in Namibia over the last 18 years of self-rule in a constitutional state. The publication is important because it situates the concept of the rule of law in Namibia insofar as the paradigm of democratic and constitutional governance in Namibia is concerned, and chronicles in a thematic way how Namibia is going about building and/or improving on these important pillars of constitutional democracy.

The list of essays forms a whole gamut of interventions – from African customary jurisprudence, the separation of powers in a democracy, and ecology, to research and documentation. The book is an important composite of the state of a human rights culture in Namibia on the one hand, and the internalisation of the rule of law on the other. The essayists in the book offer instructive insights into the reality pertaining to the evolution of human rights and the rule of law culture as these two important concepts move in tandem to grow democracy and create conditions for sustainable economic development. The importance of having all the essays on human rights and the rule of law in one 'easy-to-lift' book in a country like Namibia – where more questions than answers exist regarding whether or not Namibia is truly a democracy – cannot be overemphasised.

The challenges facing the young Namibian nation in particular and Africa in general in the realm of human rights and the rule of law are immense. The carefully selected essays in this book constitute a deliberate attempt by the authors and editors to offer an informed response to the myriad of challenges that accompany a democratic project of nation-building.

There are 11 chapters in the book. The first contribution makes the case that Namibia has sufficient mechanisms for the rule of law, as laid out in the Constitution. The second contribution discerns that the spirit of constitutional democracy in Namibia started before the attainment of political independence, when the courts were given more leeway to interpret the laws in favour of justice.

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The third chapter offers a fresh perspective of a new constitutional governance system that Namibia ought to look at in terms of the place and role of African traditional jurisprudence: being not mutually exclusive but complementary to the rule of law and social justice jurisprudence,

The fourth chapter illuminates the weaknesses of the ongoing struggle for more rights for those who are still left out – the minorities, the poor, and the most vulnerable in society. The fifth is an alert on how far behind Namibia is in advancing third-generation – or ecological – rights, as required by international standards. The sixth is an exposition of the mandate of the Office of the Ombudsman in the furtherance of human rights in the country. Chapter 7 discusses the importance and role of research and documentation for the sake of democracy. The eighth takes a look at how international treaties such as United Nations protocols are respected by Namibia's courts and structures of local government. Chapter 8 highlights the link between Namibia's Constitution and existing international obligations insofar as civil and political rights are concerned. The tenth chapter gives an understanding of how far Namibia is in observing international accords and protocols. The last chapter is a reflection by the current Chief Justice of Namibia on the general state of the rule of law in sub-Saharan Africa.

In essence, the book seeks to inform and educate the reader by providing some answers to many vexing questions, albeit rhetorical, as Namibia lurches forward in its progress along the path of human rights: against the background of the struggle and a system that denied human rights to the majority of the people on the one hand, and, on the other, the rule of law, which forms the bedrock of the Constitution of the Republic of Namibia – or any written constitution for that matter. The answers offered by the book's theorists cannot be considered conclusive or final canons on Namibia's jurisprudence. Rather, they are part of work in progress. More salient is the spirit in invariably all the contributions, in their attempt to name the jurisprudential issues of today and tomorrow, and chronicle the experience in the last 18 years. The essays in many ways pose pertinent questions rather than offer conclusive perspectives. They pave the way for future thinking and research, as the real truth – as the proverb goes – only comes with the wisdom of hindsight.

All the essays are commentaries on human rights and the rule of law in the context of Namibia's constitutional democracy. Each of the authors approaches his/her spheres of focus and competence from a particular angle to help the reader understand the challenges and contradictions of a constitutional democracy: be it the separation of powers, the evolving constitutional jurisprudence in the country, comparative African legal practices, the so-called generations of rights, the mandate of constitutional human rights requirements, research and documentation, protocols with which rights are generally exercised and enjoyed, the impact of international regimes on Namibia's practice of human rights, or the ongoing evolution of jurisprudential consciousness in southern Africa and the post-Cold-War world.

The strength of the book lies firstly in its bold stand to take on human rights and the rule of law in the context of Namibian's 18 years of independence. Eighteen is the voting age in Namibia and, symbolically, the appearance of the book signals the coming of age for Namibian legal scholars to claim their position in the dialogue on the matters of rights and liberties in the country, as they theorise and offer perspectives on a whole range of issues pertaining to constitutionalism and the legal framework of political and other rights. For any student or researcher, the starting point has been provided by this timely publication.

Secondly, readers begin to discuss the trends in different inputs of the country's constitutional ethos – and the ethos in Namibia is unlike that in any other country with a similar socio-political background. The authors acknowledge that Namibians have accomplished a great deal in a short space of time insofar as human rights and the rule of law are concerned. Namibians have enjoyed considerable human rights in a manner not often appreciated. The separation of powers is there to the extent that the Constitution allows and prescribes; citizens have enjoyed and continue to enjoy their rights with limited interference by government organs; freedom of speech and assembly remain protected; and the independence of the judiciary remains upheld thus far – even when, at times, political leaders would prefer otherwise.

Thirdly, scholars have begun to develop a culture and style of writing about Namibia's jurisprudence. Very little has existed in the country to date in terms of systematic and thematic scholarly by Namibians and/or Namibianists. For students and researchers of constitutionalism, law and jurisprudence in post-independence Africa, this is an enormously important step in the direction of intellectual disputation, research and documentation, and will in turn assist with information management – an aspect of knowledge production and repository that has been widely neglected in Africa's historiography. Thus, this book becomes one of the first real reference materials in this respect and is likely to remain as such for a long time to come.

Lastly, the coalition exposes the strengths and weaknesses of existing legal scholarship in the country as a foundation upon which to build future discourses. For example, the reflections by the Chief Justice of the country undergird what future judicial commentators and juridical opinion-makers will offer.

The shortcomings of the book are principally to be ascribed to the political consciousness of the authors themselves insofar as they appear too cautious and, thus, reluctant to take controversial positions relative to and critical of the current political regime in the country. There is an almost unstated gentility on the part of the authors to tread softly, for better or worse, so as not to invite the wrath of an already overly sensitive government. It is this sensitivity that causes the essays to appear sterile and too distant from the current contradictions within the body politic of the country.

For instance, the separation of powers between the legislature, the executive and the judiciary is not sufficiently problematised in a way that would unravel the dilemmas of having a constitutional system wherein members of the executive constitute more than half of the legislature – indeed, so much so that both the legislature as well as the executive become ineffective as their true functions in the pursuit of good governance are conflated and confused. Neither the legislature nor the executive know how to do their work well, and there are no lines of oversight and accountability apparent from either. In this sense, constitutional democracy is greatly hamstrung. One would have expected the constitutional scholars to challenge the efficiency of this non-separation of powers and offer an informed and comparative theoretical and forward-looking approach to improve upon it.

A second major shortcoming is that the scholars prevent themselves from delivering an attack on the current glorification of politics in Namibia's jurisprudence. Put differently, the lack of delineation on the part of the political elite – and, therefore, of the entire political system – between the ruling party, the government and the state in Namibia remains a major difficulty in advancing constitutional justice.

A third issue is that human rights and the rule of law seem to be described in sterile liberation struggle idioms, and not enough attention is given to the post-independence violation of rights and the paradoxes that beset the African ruling elite's notions and/or appreciation of the rule of law in the countries they forever claim to have liberated and now govern. In Namibia, there is a sense in which certain categories of people are seen to be above the law. This state of affairs is not probed in the book, a failure which is typical of African scholarship in respect of dealing with the human conditions and realities of power in a constitutional democracy.

It would appear that the authors are too self-restrained in the execution of their task as theorists with a sense of progressive activism to assist the Namibian nation in managing their constitutional development in such a way that a system of a governance regimen is strengthened on the pillars of a strong human-rights and rule-of-law culture. Such a culture would, in turn, enhance social justice – the very foundation of democracy, peace and stability.

Biodiversity and the ancestors: Challenges to customary and environmental law MO Hinz & OC Ruppel (Eds), Namibian Scientific Society, Windhoek, 2008, 282 pp

Thomas Falk*

The publication Biodiversity and the ancestors assesses the role of customary law in biodiversity management. The main objectives of the editors is to heighten awareness among academics, policymakers and the interested public of the fact that customary law fulfils important coordinating functions with regard to natural resource management in Namibia. This seems to be especially important if one considers the past impact of global, regional and national policies on the effectiveness of customary law. This impact is assessed in the first section of the book in particular, where issues like the link between cultural and biological diversity; the global, regional, national and local values of biodiversity; the protection of intellectual property rights; and the coordination of customary and statutory law are discussed. The analysis considers multiple dimensions of the topic, which is possible due to the profound expert knowledge of the editors. Manfred O Hinz is a Professor at the Faculty of Law at both the University of Namibia (UNAM) and the University of Bremen. For more than 20 years he has worked in the field of customary law and has authored and edited numerous publications. Worthy of particular mention is the book Without chiefs there would be no game: Customary law and nature conservation. Oliver Ruppel is a lecturer at UNAM's Faculty of Law. He is an expert in the field of public law, with special emphasis on the interrelationship between international trade, human rights, and the protection of the environment. Both editors demonstrate a strong affiliation to questions dealing with issues of cultural philosophy. This affiliation is well reflected throughout the publication.

The analysis of global, regional and national policies puts the local problems discussed in the section that follows in a broader context. Eleven case studies form the main part of the book. They were carried out within the framework of the Biodiversity Monitoring Transect Analysis (BIOTA) Southern Africa Project. Authors of the case studies are senior students at UNAM's Faculty of Law. The general methodology of equipping university students with a theoretical legal

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concept and sending them to their home communities in order to assess and discuss the role of customary law in biodiversity management was an interesting approach.

In addition, giving the students the opportunity to publish their results strongly contributes to capacity-building in Namibia, and encourages them to continue with an academic career. In this way, the book contributes to the development of tertiary education in a country which still lacks sufficient lecturers.

As an integrating framework, all studies test four hypotheses:

1. Traditional communities possess the social capital of norms suitable for the protection of biodiversity.
2. Traditional communities recognise the values of biodiversity.
3. The awareness of biodiversity's values entails the potential to establish customary norms, and
4. Customary law has advantages compared with statutory law regarding the protection of biodiversity.

The results clearly show that customary law and traditional authorities matter when it comes to the management of a wide range of natural resources in different communities all over Namibia. Community members are aware of social norms which aim to ensure the sustainable use of pastures, trees, medical plants, fish and land in general. Traditional norms control access to resources; limit the amount of resource extraction; regulate the technologies of resource use; and prescribe clear consequences for non-compliant behaviour. The norms are based on the traditional knowledge of the local value of resources. In many cases, they are the only effective institutions regulating resource use.

However, in most instances, the case studies also show that customary laws do not prevent unsustainable utilisation, resulting in high pressure on natural resources. How is it possible that, despite the applicable customary law regulations in place, resources are not managed in a sustainable manner? The case study authors identify a number of key problems responsible for this situation. One reason is that neither the customary nor the statutory legal system manages to fully consider national, regional or global biodiversity values. It is simply unrealistic to expect that traditional communities have the necessary overview over biodiversity values beyond the local level, and the capacity to develop mechanisms to internalise externalities such as option values for pharmaceutical uses, aesthetic values, or carbon sequestration.

Another challenge is the cultural transformation Namibian society has undergone, resulting in a reduced appreciation of traditional knowledge. Conflicts with competing value systems such as religious ones are common. This goes hand in hand with the limited capability of customary law systems to adapt quickly to new developments such as the commercialisation of resource use.

Insufficient enforcement is mentioned repeatedly, which underlines the problem of how customary law is embedded in the country's legal system. In some cases, statutory law enables community norms to function effectively, but in others it hampers them. For example, customary law is recognised by the Namibian Constitution. However, the executive authorities often do not have the capacity or knowledge to deal with the enforcement of traditional rules. There are obvious attempts by government to incorporate customary law into statutory law. Indeed, various government reforms even go so far as to interfere with the powers of communities and traditional authorities, sometimes enabling traditional institutional knowledge, but sometimes creating confusion about property rights and responsibilities. The case studies describe the customs of different ethnic groups and impressively demonstrate the challenge the Namibian government faces in linking culturally heterogeneous value systems to a non-discriminative standardised legal system. Decentralised approaches such as the establishment of conservancies and community forests attempt to address this challenge.

Additional crucial factors often diminishing the effectiveness of customary law are conflicts within and between communities, as well as corruption among traditional authorities. The abuse of power is as common in the traditional authority system as in any other system of governance. Even more complex is the question of how to deal with broadly accepted community norms that conflict with fundamental human rights.

The studies give a comprehensive overview of the complexity of the issue. They present a differentiated picture, balancing the advantages and disadvantages of traditional communities' rules and norms with regard to natural resource management. Referring to the fourth hypothesis, the empirical work shows that customary law is not generally superior to statutory law. It is this multifarious situation which creates such difficulty for lawmakers in their attempts to locate traditional governance appropriately in the overall societal and state system.

In the concluding discussion, the editors re-link the local situation to global and national discourses. They assess how national laws incorporate traditional knowledge as well as the philosophies of international conventions and policies. Both a naïve centralised and a decentralised governance approach are criticised. Nonetheless, a structured, in-depth analysis of the root causes for existing customary law often being ineffective is only partially given. The reader is no doubt sufficiently inspired by the book to connect and interlink different policy and governance levels. However, the authors leave it up to the reader to reach his or her own conclusions as regards how existing global and regional policies encourage communities to apply indigenous institutional knowledge to the protection of biodiversity and, in this way, to provide values beyond the local and national dimension.

Biodiversity and the ancestors impressively links the specific human and social capital of local indigenous knowledge to challenges we face on a global level. It

fulfils its objective to make students, academics and policymakers aware of the complex role customary law plays in biodiversity management. This differentiated analysis is an important basis for the authors' strong call for improved inter- and transdisciplinary research.

The independence of the judiciary in Namibia N Horn & A Bösl (Eds), Macmillan Education Namibia, Windhoek, 2008, 325 pp

Yvonne Dausab*

Eighteen years after independence, and given our constitutional dispensation, the Namibian legal academic writing scene has been starved of publications that critically examine and narrate on topics that relate to the rule of law within a constitutional set-up. Although there have been some writings on the Constitution and some human rights aspects and its jurisprudence, the absence of sufficient writings and research material for the legal scholar in Namibia on topical issues such as the one under review has become critical.

The independence of the judiciary in Namibia, in its current scope and content, starts to address and in a way fills this academic void. The editors' first attempt at this is to pull together strong and even independent views on a topic as potentially controversial as the one chosen. A first glance at the topic makes one think the authors are out to question the independence of the judiciary. However, a proper reading of the book instead reveals a general attempt to examine the extent to which the independence of the judiciary has been upheld through the various institutions within the legal grouping. The various authors aptly, and with absolute substance, cover aspects on the place of history, politics, prosecution, the legal profession, the Ombudsman, the bench in its various formations (Lower, Traditional, High and Supreme Courts), education, and the place of the international systems of protection and promotion vis-à-vis the independence of the judiciary. It is evident that this book is a fine attempt to take stock of what the current normative framework presents to ensure the independence of the judiciary.

The seven broad thematic topics under which each subtopic is then assembled help create a golden thread of the key issues that the book seeks to address. The themes cover the following:

- The paradigm of an independent judiciary
- The independence of the judiciary in pre-independent Namibia
- The structure of the Namibian judicial system
- The independence of the prosecutorial authority
- The independence of the lower courts
- The independence of the superior courts, and
- Beyond the Namibian judiciary.

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The book seems to have tried to cover every conceivable angle relating to the topic, and has done well in doing so. For example, the editors repeat, at least theoretically, certain concepts that remain true for all seven themes, namely –

- judicial independence
- integrity
- impartiality
- liberty
- the constitutionality of executive, legislative and judicial actions
- the effect of judicial independence on the protection and promotion of human rights
- the rules of natural justice
- the separation of powers
- checks and balances
- judges and judgments, and
- jurisprudence and the rule of law.

The various authors successfully anchor their submissions and findings around these concepts.

The editors are to be applauded for their efforts, given the academic and legal expertise and knowledge base the authors possess. What they have not tried to do is to create the impression that the various chapters are necessarily linked by a flow of thought.

The book kicks off with a reasonably well set-out historical perspective and some conceptual thoughts on the challenges that a constitutional democracy faces when the legal framework requires accountability in respect of governance issues. Although Namibia has advanced quite substantially in this respect, it appears that Africa still needs to step up and clearly define the relationship among the three branches of state.

As though in reverse, the book then moves backward quite extensively and, with reference to key jurisprudence, shows the reader the negative effects that the notion and practice of parliamentary sovereignty and the almost careless use of political power has on citizens' rights. It is the showcase of judicial activism and the bravery of the Supreme Court of South West Africa (SWA) in the types of decisions it took in the face of an oppressive apartheid regime that makes this portion of the book a must-read for any scholar. The book is also very useful for South African/colonial history. Because of the interwoven nature of the legal systems of Namibia and South Africa, there is quite a substantive reference to South African jurisprudence and its legislative framework. In comparing the prosecutorial authorities of the two countries, the author in question, almost irritatingly, repeats some historical data in too much detail. Nonetheless, the comparisons and contrasts are notable, and highlight the commonalities and differences between the two authorities in each country.

Whilst an understanding of the notional aspects of the topic under review is probably primary, an understanding of the court structure and its role in the maintenance and promotion of the independence of the judiciary brings a structural framework to the debate. The content is an extensive overview of the powers of jurisdiction, territory, review and appeal at various stages of the judicial hierarchy. Again, this kind of substantive content is useful for students in particular, but also legal practitioners that may require some theoretical understanding of the structure of the courts.

In some instances, the authors did not entirely do justice to the topics. They would go off on a tangent and only a small portion of the relevant part would simmer through in what they were writing about. This was particularly evident in the section on the role of the executive in safeguarding the independence of the judiciary, where the author only begins to address the real question – whether or not the executive considers itself the facilitator of the independence of the judiciary – right at the end. In fact, the author makes the point that this role for the executive will certainly diffuse the apparent tension between the two branches of government. The uniqueness of the Prosecutor-General's office is also not made clear. Perhaps it should rather have referred to the independent nature of the office, as the content – although well written and quite easy to follow – would support such a topic.

Because of the supranational nature of our coexistence with other nations, the comparative section on the right to an independent and impartial tribunal is valuable. It is relatively extensively researched and its opinions are well-considered. It is here that, for the first time in the book, reference is made to justice not only being done but being seen to be done. This is a classic misnomer, as most international and regional bodies of protection and promotion of human rights are usually quite ineffective in the enforcement stage and, therefore, fall short not only in terms of doing justice, but also in being seen to be doing it.

It is also clear that the independence of the judiciary is predicated on certain conditions being met in order to flourish; throughout the book, the role of judges as individuals and as a collective is shown to be imperative. This comes out more clearly in the previously mentioned section. But it is common cause that judges' remuneration, security of tenure, and method of appointment, to name but a few of their conditions of service, are considered determinants of judicial independence and impartiality. In fact, one of the authors quite compellingly makes the argument that, while the appointment of acting judges solves the staff shortages within the High and Supreme Courts, such appointments are potential avenues for compromising judicial independence. On the other hand, the author on traditional courts is evidently conversant with traditional practices of the various groups in Namibia, and does well in advising on an appropriate way to incorporate the Community Courts Act, 2003 (No. 10 of 2003) within the civil system, without compromising its rightful place in the traditional system. The author refers to embracing the traditional administration of justice

in order to locate the place of traditional courts, their role, and their judicial independence within a constitutional dispensation. The author's conviction that these institutions and their practices deserve to take up their rightful place makes his contribution useful for scholarly comparisons with the practice of magistrates' courts.

Under the theme "Beyond the Namibian judiciary", the authors on the role of the Ombudsman, the legal profession, and legal education and academic freedom deal with a relatively nascent topic in terms of academic writing. Given these circumstances, they have made some relatively new arguments on what should obtain. In respect of each subtopic, i.e. the Ombudsman, is challenged to engage in a more proactive response mechanism to fulfil his/her mandate, particularly with regard to the environment. The University of Namibia and the Justice Training Centre (JTC) are called to task to prepare students more effectively in terms of the practical aspects of their professions. On legal education, the author makes some useful suggestions, one of which is to offer more practical subjects in the undergraduate curriculum; restructure the JTC programme; and improve the training for judicial officers. Legal practitioners are challenged to take up their role in society. This practical approach to the problem, offering practical recommendations, makes this book not only a tool for research and reference, but also an operations manual.

An almost perfect interplay of intellectual display is evident throughout the book. This is because most of the authors used the same or similar sources – the most primary of which were the constitutional provisions that relate to the independence of the judiciary. There are also commonalities in the jurisprudence used to reflect the decision-making powers and patterns of courts. The history and common political reference points of our past also add to this interplay. The negative aspect of this display is the lack of sufficient depth and breadth in the reference materials on the topics concerned. As a result, a substantial amount of repetition and cross-referencing occurs in the text, almost amounting to a lack of ingenuity and intellectual prowess. On a positive note, however, the book is a fine show of intellectual interpretation and diversity of opinion, which is a source of great scholarship.

One of the authors asks whether the good we see on paper is the reflection of what transpires in the courtroom. He does this quite persuasively by using empirical data to substantiate his case that the independence of the judiciary is not only about the existence of a good normative framework: its effective implementation plays a very critical role. There is obviously not enough evidence to discredit the Namibian systems of safeguards; however, the author provides enough proof to raise our concern, if we desire that our legal systems and enforcement mechanisms in theory and practice are based on constitutional underpinnings that answer to the expectations of protecting the citizen's harbour.

The only place where there is a glaring assertion that the independence of the judiciary is threatened and probably even compromised to some degree is within the set-up of the magistracy and the Magistrates' Commission. The author goes out on a limb, using case law to demonstrate his assertion. This is particularly worrying, as magistrates are constitutionally regarded as part of the judiciary. Yet, at an administrative and even operational level, they are considered government employees. Therefore, the author argues, they face a potential and real risk of having their independence compromised. One hopes a book bringing this issue to the foreground will be used to raise these issues squarely within the relevant arenas.

In the end, the book makes two central points. The first of these entails the fact that the Namibian judicial system, in terms of legal safeguards, has a relatively extensive and implementable legal framework that ensures the independence of the judiciary. In fact, in this regard, Namibia has made significant strides. The second principal point made is that, despite an impressive record of safeguards, Namibians must guard against complacency. Empirical evidence is used to show that, in some quarters, this independence has already been compromised – either overtly or covertly. Therefore, a real threat exists that the independence of the judiciary is likely to be compromised if we take our constitutional democracy and the rule of law for granted. In sum, the editors and the authors must be applauded for a job well done.

Women and custom in Namibia: Cultural practice versus gender equality? OC Ruppel (Ed.), Macmillan Education, Windhoek, 2008, 228 pp

Chuma Himonga*

This book brings together a set of papers on issues relating to women's rights and gender equality in Namibia against the background of the country's constitutional principles and the human rights protected by various regional and international instruments.

In general terms, the book highlights women's lack of access to resources, their unequal treatment compared with men, and the impact on gender equality of gender stereotyping, patriarchy and traditional attitudes. In some of these dominating themes, the book identifies the principal barriers to the achievement of gender equality in a society in which cultural practices and customary law govern the lives of the majority of Africans, especially those living in rural areas. Specific aspects of customary law that are inconsistent with the principle of gender equality are identified, and recommendations on how to deal with their negative effects on women are discussed within an interdisciplinary framework and from different legal and socio-economic perspectives.

A number of chapters identify a yawning gap between women's rights on paper and the actual enjoyment of these rights by women in practice, due largely to the lack of effective enforcement of the paper rights. Among the obstructive factors in this respect are illiteracy and poverty among the communities affected, and the inability or unwillingness of the national government to provide adequate resources and infrastructure to enable citizens to mobilise the law to their benefit. Thus, while law is an instrument of power that women can use to effect real changes to their lives,[1] several papers admit that the achievement of gender equality and the protection of women's rights in practice in Namibia continue to be a real challenge.

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1 See Crotty (1996:331): "No matter what type of law is involved or how closely it reflects a nation's culture, law can serve as a first step in transforming social realities and fostering equal rights. It can validate injuries and, in some cases, deter or redress them. It can help redistribute power and increase the number of voices that are heard. Legal rights are means for women to achieve equality, not ends in themselves. If women are to be equal, therefore, all laws are important. And in the interplay between law and culture, changing the law has the potential to change cultural practices".

Compounding the problem of translating women's paper rights into real benefits for women is the coexistence in Namibia – as elsewhere in Africa – of different official and non-official normative systems. This form of legal pluralism turns the legal scene into a complex maze, to the disadvantage of the illiterate and those who are unable to afford legal representation to protect their rights. In recognition of these problems, the book recommends both legal and non-legal measures, as well as the use of research methodologies that facilitate the investigation of women's legal status under customary law, and the identification of appropriate measures for dealing with offensive customary practices within the prevailing normative pluralities.

It may also be interesting to note that all the contributions acknowledge the importance of customary law to the people of Namibia, especially rural communities, and the need to ascertain and reform those aspects of customary law that require alignment with constitutional principles and human rights – rather than abolishing the entire system of customary law.

It is now necessary to highlight major points in the individual contributions.

The paper entitled "Promoting women's rights and gender equality in Namibia" by Anton Bösl argues that, notwithstanding the constitutional guarantees of gender equality and non-discrimination and the government's commitment to the protection of women's human rights, the achievement of equal participation of women and men in politics, the economy and in society at large remains a major hurdle. This is largely due to the Namibian Consitution's recognition of customary law, which in turn limits women's control of resources, including property, and their access to loans. The paper also highlights the interventions of civil society and foreign donor agencies in promoting women's political rights and their socio-economic status.

The paper by Veronica de Klerk entitled "Women's Action for Development: 15 years of experience with customary practice in rural Namibia" expands on civil society's intervention in the fight for women's rights, in addition to identifying specific cultural practices that hamper women's development and contribute to their inferior status. The gap between constitutional rights that benefit women and the reality in practice is also evident in this chapter.

In their paper, entitled "Women and custom in Namibia: A research overview", Lotta Ambunda and Stephanie de Klerk present a synopsis of their research into women and custom in Namibia. The paper sets out the constitutional and human rights provisions relevant to the protection of women's rights in the country, as well as some legislative measures taken since Namibia's independence to implement gender equality in customary law in the areas of traditional leadership and communal land ownership. A significant part of the paper is also devoted to specific customary practices that undermine gender equality, and the authors address the lack of implementation of women's rights, especially in personal matters and in matters of access to land.

In the paper, "Polygyny among the Ovambadja: A female perspective", its author, Prisca Anyolo, highlights the difficulties experienced by women due to the non-recognition of customary marriages. She advocates the full recognition of customary marriages as a way of protecting the rights of women in such unions.

The paper by Manfred Hinz entitled "Strengthening women's rights: The need to address the gap between customary and statutory law in Namibia" identifies pockets of statutory provisions that regulate the application of customary law and promote the protection of women in the areas of traditional leadership and communal land. The gaps relate to the absence of legislation –

- giving full recognition to customary marriages
- reforming the customary law of inheritance, and
- regulating the operation of traditional courts.

Legislative changes in these areas are considered to be long overdue in the light of the constitutional principle requiring the state to –[2]

> … actively promote and maintain the welfare of the people … and to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society.

The paper by Tousy Namiseb, namely "Women and law reform in Namibia – Recent developments", discusses the following research projects initiated by the Law Reform and Development Commission that have a bearing on the rights of women: succession and estates, divorce, customary law marriages, domestic violence, and cohabitation. The author concludes by emphasising the importance of legislative reforms in dealing with the status of women in Namibia.

The contribution by Kato van Niekerk entitled "Some judicial reflections on women and custom in Namibia" uses anecdotes of cases decided by the High Court to provide a judge's perspective of issues affecting the status of women under customary law, as well as of the difficulties that courts are faced with when applying customary law, such as the problem of ascertaining the rules of customary law relevant to a given case.

The paper by Oliver Ruppel, Kingo Mchombu and Itah Kandjii-Murangi, entitled "Surveying the implications of violence against women: A perspective from academia", presents interesting findings on violence against women – including the prevalence of such violence, the location of the violence in Namibia's social structure, and the forms such violence takes – from a survey of the views of university students.

Drawing from research experience in southern Africa, Julie Stewart's paper on "Intersecting grounds of (dis)advantage: The socio-economic position of

2 Ruppel (2008:105).

women subject to customary law – a Southern African perspective" discusses critical methodological issues and assumptions concerning the analysis and understanding of gender in relation to the status of women under customary law. Furthermore, it identifies appropriate measures to address the gender inequalities and other disadvantages women suffer at the intersections of customary law, custom, practice, religion, and socio-economic conditions.

The last paper, namely "Women and custom: The legal setting" by Wilmary Visser and Katharina Ruppel-Schlichting, gives a broad overview of the constitutional provisions and legislation as well as the regional and international human rights instruments relevant to the issue of conflicts between cultural practices and gender equality. Most of these legal provisions are also discussed by Ambunda and De Klerk in their paper.

In conclusion, in my view, the book makes an important contribution to the understanding of the impact of customary law on the rights of women in Namibia. Therefore, I echo Bösl's opinion that the publication –[3]

> … will be a tool not only for researchers, students, academics, lawyers and stakeholders in the field of women's rights and customary practices, but also for the public at large. At the same time, this important publication serves as a guide for all those men and women who wish to contribute to the enhancement of women's rights in Namibia or who wish to empower themselves by breaking the fetters in their thinking.

As many of the issues discussed in the book are similar to those identified in other African countries,[4] the publication also contributes to comparative African studies on the legal status of women.

In my view, the book would have made a greater scholarly contribution to discourses on the rights of women under customary law by including a critical discussion of the following three issues:

- Whether and how changing patterns of customary law affect the rights of Namibian women living in different social and economic conditions
- The increasingly recognised living/official customary law dimension of the protection of African women's rights,[5] and
- The implications of legislative reforms aimed at replacing customary law with the received English or Roman–Dutch common law for the survival of customary law as part of African legal systems, on the one hand, and the status of women in these systems, on the other.[6]

3 Ibid.:20.

4 See e.g. Banda (2005:86-206); Himonga (2005:82).

5 See e.g. *Bhe and Others v the Magistrate, Khayelitsha*, 2005 (1) SA 580 (CC); *Mabena v Letsoala*, 1998 (2) SA 1068 (T).

6 For a discussion of the South African approach in this regard, see Pieterse (2000:35); Himonga & Manjoo (2006:329).

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