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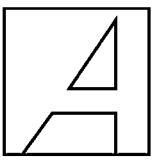

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GUIDE TO CONTRIBUTORS

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

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

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

All submissions for the NLJ are to be submitted to the Editor-in-Chief. Thus, no submissions will be accepted by the other editors or co-workers of the NLJ Trust.

No remuneration is paid for articles accepted by the NLJ Trust or its partners.

Authors assign the copyright of any submission to the NLJ, and thereby permit the NLJ Trust to publish it in the next or any subsequent edition.

If an author withdraws a submission after the NLJ Trust has incurred any costs associated with its publication, the author is liable for such costs.

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

Submissions for the January 2011 edition need to reach the editors by 15 September 2010. Contributions with a constitutional theme are encouraged for the next edition.

All submissions need to comply with the following requirements:

- Submissions are to be in English.
- Only original, unpublished articles and notes are usually accepted by the Editorial Board. If a contributor wishes to submit an article that has been published elsewhere, s/he should acknowledge such prior publication in the submission. The article should be accompanied by a letter stating that the author has copyright of the article.
- By submitting an article for publication, the author transfers copyright of the submission to the Namibia Law Journal Trust.
- For the “Articles” section, submissions should be between 4,000 and 10,000 words, including footnotes.
- The “Judgment Notes” section contains discussions of recent cases, not merely summaries of them. Submissions in this category should not exceed 10,000 words.

- The “Notes and Comments” section is for shorter notes, i.e. not longer than 4,000 words.
- The “Recent Cases” section contains summaries of no longer than 4,000 words.
- In the “Book Reviews” section, submissions on Namibian or southern African legal books should not exceed 3,000 words.

The NLJ style sheet can be obtained from the Editor-in-Chief at namibialawjournal@gmail.com or on the website www.namibialawjournal.org.

INTRODUCTION

Nico Horn*

It took a long time for Namibian legal practitioners and scholars to get a law journal off the ground. Over the past two years, sceptics often questioned the sustainability of a law journal for a country with limited resources and a small legal fraternity. With Issue 2 of Volume 2 of the *Namibia Law Journal* (NLJ), the NLJ Trust and the Editorial Board have reached an important goal: to be in business for two academic years.

Not only is this achievement a strong indication of sustainability, it is also a significant step towards accreditation. For some, accreditation does not matter. Unlike our southern neighbours, academics at the University of Namibia (UNAM) are not compensated for publishing contributions in accredited journals. However, accredited journals attract good articles. Furthermore, they contribute to a respected research and publication culture. With the strong emphasis on a peer review system, the NLJ is compelled to accept only exceptionally good material.

This edition carries the work of some familiar faces from UNAM (Sam Amoo, Francois-X Bangamwabo, Manfred O Hinz, Clever Mapaure, and Oliver Ruppel), but also an excellent article by a young legal practitioner, Karin Klazen, on the judgments of the Southern African Development Community (SADC) Tribunal. The Editorial Board is proud to publish articles of this nature. Despite the fact that the Tribunal has its seat in Windhoek, the legal fraternity and the Windhoek press did not devote much attention to its judgments. Helping to fill this gap, Ms Klazen helps us to understand that the Tribunal's judgments did not stop with the *Campbell* case: there are several other judgments with significant implications for trade in the SADC Region. A newcomer is human rights activist Norman Tjombe, with a review of a publication by former UNAM academic, Oliver Ruppel.

Lastly, it remains a concern for the Editorial Board that the contributors are still predominantly UNAM legal scholars and young researchers from other African countries. While we value their work, we need more practice-related articles from local practitioners. And for those young Namibian researchers who are frustrated with the comments of the peer reviewers and language editors, it is part of the process of growth. Even seasoned researchers must deal with the reviewer's red pen.

* Editor-in-Chief; Professor of Law, University of Namibia.

ARTICLES

The jurisprudence of the rights to trial within a reasonable time in Namibia and Zambia

Sam K Amoo*

Abstract

The demands of sovereignty place on states and governments, inter alia, the responsibility to protect and defend the integrity of the state, and maintain peace and security. Among the institutions and mechanisms employed by states is the criminal justice system that provides for the legal framework of the powers exercised by law enforcement agents and judicial officers. Penal laws and their enforcement, in particular, impinge on the rights of the individual, especially with regard to the rights of personal liberty, freedom of movement and privacy, etc. The concern about the potential abuse of the rights of the individual in the process of the enforcement of penal laws by the state security apparatus and law enforcement agents has resulted in legislative intervention at both international (in the form of international Covenants)and national levels aimed at protecting the rights of the individual. International Bills of Rights have impacted on municipal jurisdiction to the extent that most contemporary jurisdictions have incorporated the International Bill of Rights[1] and international treaty norms in their constitutions and domestic legal systems. The jurisdictions referred to in this article have written constitutions with Bills of Rights that trace their origins to international Conventions. Both jurisdictions have acceded to relevant international Conventions dealing with the rights of the individual to fair trial.

Introduction

The issue of alleged violation of the rights of individuals who are detained for a long time before trial has become phenomenal and has raised global concern. One need only think here of the interns in the infamous Guantanamo Bay detention facility. In the Zambian case *The People v John Chisimba*,[2] for example, the victim was arrested on a charge of alleged murder in 1994. In 1998, he was examined by a specialist psychiatrist and neurologist to determine whether he was fit to stand trial. It was concluded that he was, and

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1 The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

2 2TO/09/95.

a report was sent to the court in May 2004. Despite the report being received, the victim had not yet stood trial by June 2006, when the applicant applied for constitutional bail – which was granted. During the bail hearing, it emerged that the prosecution had misplaced the victim's file: hence, the delay in trial.

In Namibia, in what is commonly referred to as the *Caprivi Treason Trial*, the accused were arrested in August 1999 and charged with some 275 counts of, inter alia, high treason, murder, sedition, public violence and attempted murder, following an armed attack launched in the country's Caprivi Region. Bail applications were denied by the courts because of the nature of the offences. Amnesty International, in a 2003 report, refers to alleged violations of the accuseds' pre-trial rights, and concludes that these alleged violations may seriously undermine their right to a fair hearing in accordance with international standards articulated on the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (hereafter *Charter*).[3] Concerns have also been raised about the duration of the trial. The Government of the Republic of Namibia, in its Report to the United Nations (UN) Secretary General, has responded to these allegations,[4] explaining that one obvious reason for the prolonged duration of the trial is the complex nature of the case.

Review of the applicable international human rights treaties and Conventions[5]

The demands of sovereignty place on states and governments, inter alia, the responsibility to protect and defend the integrity of the state and to maintain peace and security. Among the institutions and mechanisms employed by states is the criminal justice system, which provides for the legal framework of the powers exercised by law enforcement agents and judicial officers. Penal laws and their enforcement, in particular, impinge on the rights of the individual – especially with regard to the rights of personal liberty, freedom of movement and privacy, etc. The concern about the potential abuse of the rights of the individual in the process of the enforcement of the penal laws by the state security apparatus and law enforcement agents has resulted in legislative intervention at both international (in the form of international Covenants) and national levels aimed at protecting the rights of the individual. Bills of Rights

3 Amnesty International. 2003. "Namibia: Justice delayed is justice denied: The Caprivi treason trial"; 4 August, 42/001/2003. Available at www.amnesty.org/en/library/info/AFR42/002/2003; last accessed 19 July 2010.

4 Reports submitted by The Government of the Republic of Namibia under Article 9 of the International Convention on the Elimination of Racial Discrimination CERD/C/NAM/12, 18 July 2007. Available at www2.ohchr.org/english/bodies/cerd/docs/.../CERD.C.NAM.12.doc; last accessed 19 July 2010.

5 See also Amoo, SK. 2008. "The bail jurisprudence of Ghana, Namibia, South Africa and Zambia". *Forum on Public Policy: A Journal of the Oxford Round Table,* Summer:1–29.

have impacted on municipal jurisdiction to the extent that most contemporary jurisdictions have incorporated the International Bill of Rights[6] and treaty norms in their constitutions and domestic legal systems. For example, with regard to the right to fair trial, both the Charter and the ICCPR have provisions protecting the rights of the individual to fair trial, and these provisions have been internalised in most countries' municipal laws. The provisions in the two instruments concerned are as follows:

- Article 7(d) of the Charter states that "every individual has the right to be tried within a reasonable time by an impartial court or tribunal", and
- Article 9(3) of the ICCPR states that "anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release".

As a general application of the basic principles of the Law of Treaties, in international law, the parties to international treaties are states and the UN. Therefore, such international standards and norms become binding on states parties either through the constitutional technique of legislative incorporation, or through automatic incorporation.[7] Such constitutions guarantee the civil and political rights of every citizen as well as the democratic values of human dignity, equality and freedom and, in the Bill of Rights provisions, such rights as the right to a fair hearing – including the right to be heard, to appeal, to be presumed innocent, to be defended by counsel of one's choice, and to have a trial within a reasonable time by an impartial court or tribunal – are both entrenched and justiciable.

International Covenants such as the ICCPR and its two Protocols provide not only for these rights, but also the mechanisms for redress and appropriate remedies that are available to a victim of a human rights violation. Because states parties to such Covenants are bound by these international instruments, any alleged violations of individual rights are governed by the provisions of not only the municipal laws of a particular jurisdiction, but also international law. The Human Rights Committee established under the ICCPR, for example, is mandated to monitor and supervise the implementation of the rights set out in that Covenant. At the continental level, treaty bodies such as the African Court on Human and Peoples' Rights (hereafter *Court*) and the African Commission on Human and Peoples' Rights[8] (hereafter *Commission*) are mandated to protect and defend the rights of the individual against violations by state agencies.

6 The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.

7 Leary, V. 1982. *International Labour Conventions and national law*. La Haye: Martinus Nijhoff Publishers.

8 The Protocol establishing the African Court on Human and Peoples' Rights entered into force on 25 January 2004.

However, it has to be added that, under international law, as a general rule there is no formal obligation on states to ratify a particular international Covenant or Protocol. Therefore, for example, the invocation of the jurisdiction of the Human Rights Committee mentioned above will require prior ratification of the Protocol establishing the Committee. The limitations of the binding effect of international Conventions and the lack of enforcement mechanisms by which to hold signatories accountable are recognised in the jurisprudence of international law. Furthermore, under international law, individuals seeking the jurisdiction of international tribunals have the locus standi only where the state has acceded to the jurisdiction of the international organisation concerned, and the individual has exhausted all available domestic remedies to enforce compliance with domestic and international law applicable under his/her home country's constitution.

This seeming inefficacy of the enforcement mechanisms under international law does not mean that states can indulge in violations of rights with impunity, however. In modern international relations, and especially in human rights jurisprudence, there are mechanisms and instruments of compliance such as sanctions and isolation of the recalcitrant and delinquent state that can be exerted by the international community, and international human rights watchdogs such as Amnesty International that can enforce compliance. Steiner and Alston describe the concept as follows:[9]

> Human rights violations occur within a state, rather than on the high seas or in outer space outside the jurisdiction of any one state. Ultimately, effective protection must come from within the state. The international human rights system does not typically place delinquent states in political bankruptcy and through some form of receivership take over the administration of a country in order to assure the enjoyment of human rights – although the measures implemented by the international community in Bosnia-Herzegovina after the 1995 Dayton Peace Agreement and especially in Kosovo represent steps in that direction. Rather the international system seeks to persuade or pressure states to fulfil their obligations through one or another method – either observing national law (constitutional or statutory) that is consistent with the international norms, or making the international norms themselves part of the national legal and political order.

Under international law, the international standards and norms contained in international treaties and Conventions become binding on states upon their accession to the said instruments and acceptance of the jurisdiction of the international organisation concerned. However, if the provisions of a treaty or other international instrument are considered to be self-executing, the individual may – if s/he has the standing to do so – invoke the provisions of a treaty before national courts in automatic incorporation in the absence of implementing legislation. Individuals have locus standi before the international organisation's

9 Steiner, HJ & P Alston. 2000. *International human rights in context*. New York: Oxford University Press, p 987.

institutions if all available domestic remedies have been exhausted. This international rule of exhaustion of local remedies before taking to international remedies is one of the basic rules in international law. The object of the rule is to offer the respondent state the first opportunity to correct the harm and redress it. Hence, a person whose rights have been violated should first make use of domestic remedies to right a wrong rather than immediately approach the relevant international committee, international court or other tribunal. However, if no domestic remedies are available or there is unreasonable delay on the part of the national courts in grating remedy, then a person is justified in having recourse to international remedies. The rule of local remedies should not constitute an unjust impediment to access to international remedies.

The International Covenant of Civil and Political Rights

As stated in the previous section, two of the international human rights treaties or Conventions and treaty bodies that, inter alia, protect and enforce the right of the individual to a trial within a reasonable time are the ICCPR, the Charter, the Human Rights Committee, the Commission and the Court.

As mentioned earlier, the ICCPR states in Article 9(3) that –

> [a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

This provision cannot be seen as standing on its own. Its efficacy and application will only be fully appreciated if it is discussed in a holistic context and in conjunction with the complementary provisions under Articles 1 and 2 of the Optional Protocol. These Articles read as follows:

> ***Article 1***
> A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.
>
> ***Article 2***
> Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

Comments on Article 1

Reference is made to the Human Rights Committee established under Article 28 of the ICCPR. The jurisdiction of the Committee, which is stated

under Article 40 of the Covenant, requires states parties to submit reports on measures taken to effect the undertakings of the Covenant and on the progress made in the enjoyment of rights declared by it. The reports are transmitted to the Committee for its perusal. The same Article instructs the Committee to transmit such general comments as it may consider appropriate to these states parties. The other aspect of the Committee's jurisdiction, which is particularly relevant to this case, is the jurisdiction provided for by Article 2 of the Optional Protocol (see "Comments on Article 2" below).

The Human Rights Committee is a treaty body whose jurisdiction may be described as quasi-judicial. With respect to individuals' human rights, the Committee has the jurisdiction to receive communications from individuals who claim to be victims of a violation by a state party to the Protocol of any of the rights set forth in the Covenant. After being notified of the communication, the state party is required to submit to the Committee any explanations or statements clarifying the matter. The Committee examines the communications, and then forwards its views to the individual and the state concerned. The Committee's views may include payment of compensation or the release of a prisoner. Notably, however, there is no provision setting forth the precise legal effect of the Committee's views, or what follow-up should take place if the Committee's views are ignored.

Comments on Article 2

Article 2 requires that, in addition to the effective protection of Covenant rights, states parties are obliged to ensure that individuals also have accessible and effective remedies to vindicate those rights. Furthermore, states parties are enjoined to establish appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The enjoyment of the rights recognised under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms, in particular, are required to give prompt effect to the general obligation to investigate allegations of violations thoroughly and effectively through independent and impartial bodies. A failure by a state party to investigate allegations of violations could, in and of itself, give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

Article 2 also requires that states parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals in this position, the obligation to provide an effective remedy – which is central to the efficacy of Article 2 – is not discharged. In addition to explicit reparation in specific instances of violations, the Covenant generally entails appropriate compensation. Reparation can involve restitution, rehabilitation, and measures

of satisfaction such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing the perpetrators of human rights violations to justice. Victims of violations of rights suffering from long periods of detention, such as the case of the accused in the *John Chisimba* case, are entitled to such reparation.

International human rights jurisprudence indicates that, in general, the purposes of the Covenant would be defeated without an obligation integral to Article 2 to take measures to prevent a recurrence of a violation of the Covenant. Accordingly, in cases under the Optional Protocol, the Commission has often included in its views the need for measures – beyond a victim-specific remedy – to be taken to avoid a recurrence of the type of violation in question. Such measures may require changes in the state party's laws or practices,[10] and are encouraged in jurisdictions that have the notoriety of violations of the right to fair trial and, in the context of this article, trial within a reasonable time.

The African Charter on Human and Peoples' Rights and its Protocol

The continental human rights regime under whose jurisdiction cases of alleged violations of the right to speedy or reasonable time may be redressed is the Charter and its Protocol. Under Article 7(d), the Charter states that every individual has the right to be tried within a reasonable time by an impartial court or tribunal. However, this provision does not operate in a vacuum: its application and enforceability are found in the jurisdiction of the Commission and the Protocol to the Charter on the Establishment of an African Court on Human and Peoples' Rights.

Article 30 of the Charter establishes the Commission, the primary function of which is the promotion and protection of human and peoples' rights in Africa. The modus operandi employed by the Commission includes submission of communications by both states parties and individuals – or what are referred to as *non-state communications*.

With regard to cases such as that of John Chisimba,[11] the most appropriate procedure will be the individual communications procedure. However, this procedure has certain limitations which may impact on the satisfactory redress of such matters and which must, therefore, be highlighted. As stated by Steiner and Alston,[12] the Charter does not expressly define an objective for the individual communications procedure. In the *Free Legal Assistance Group*

10 See Human Rights Committee. 2004. *General Comment No. 31 (80). The Nature of the General Legal Obligation Imposed on States Parties to the Covenant Adopted on 29 March 2004* (2187th Meeting).

11 *The People v John Chisimba*, 2TO/09/95, Zambia.

12 Steiner & Alston (2000:925–6).

case,[13] the Commission established that the objective of the communications procedure was "to initiate a positive dialogue, resulting in an amicable resolution between the complainant and the state concerned, which remedies the prejudice complained of". The attainment of this objective, the Commission continued, was dependent on "the good faith of the parties concerned, including willingness to participate in a dialogue". Thus, the Commission recognises that the bottom line of the communications procedure is the redress of violations complained of. To enable the Commission to reach this objective, it is prepared to seek an amicable settlement between the parties, which are obliged to fulfil two-pronged, subjective and objective criteria. Subjectively, the parties need to be satisfied with the result – a difficult standard to meet, given that the interests and aims of the victims and perpetrators of violations are often at odds. Objectively, both parties are called upon to act in good faith so as to bring about a resolution which "remedies the prejudice complained of".

Another limitation of the objectives established by the Commission for the communications procedure is that it is dependent on the volition and good faith of the state party – the respondent, in this case – and, thus, may not be entirely consistent with the obligation of the states parties under Article 1 of the Charter to recognise the rights, duties, and freedoms enshrined in it and to "undertake to adopt legislative and other measures to give effect to them". Where efforts to reach an amicable resolution fail, the Commission is forced to reach a decision on the merits of the case in question.[14] Article 56(5) also subjects the invocation of this procedure to the general law principle in international law on the exhaustion of domestic remedies. But, as pointed out by Steiner and Alston,[15] in practice, the Commission has been willing to allow wide margins of exception to this requirement, especially in situations in which massive violations of human rights are alleged.

Pityana[16] also points out that the Commission's decisions lack enforceability as they are not judicial. Also, too many of the Commission's decisions are routinely ignored by states. Thus, the Commission lacks not only the authority to enforce its own decisions, but also the resources to undertake follow-up activities and monitor compliance with its decisions. The matter could be placed before the Assembly of the AU, but the Assembly itself has not had any legislative framework to date by which it could demand compliance from member states.

13 *Free Legal Assistance Group & Others v Zaire*, African Commission on Human and Peoples' Rights Communication No. 25/89, 47/9, 56/91, 100/93 (1995).

14 See the 1994 Decision in the Mekongo Communication Against Cameroon; African Commission on Human and Peoples' Rights, Communication No. 59/91 (1995).

15 Steiner & Alston (2000:927).

16 Pityana, NB. 2004. "Reflections on the African Court on Human and Peoples' Rights". *African Human Rights Law Journal*, 4:121. Available at www.projects.essex.ac.uk/ehrr/V4N2/juma.pdf*; last accessed 19 July 2010.*

The African Court on Human and Peoples' Rights was established in 1998 by a Protocol which entered into force on 1 January 2004 upon its ratification by 15 member states. The Protocol under Article 2 asserts that the Court is obliged to complement the Commission's mandate to protect human and peoples' rights – its protective mandate. Given the limitations of the Commission as described earlier, this should be understood to mean that it will reinforce the Charter's objectives and make them more effective by ensuring that member states comply with their obligations. Under Article 3, the Court has jurisdiction over all cases and disputes submitted to it concerning the interpretation and *application* of the Charter, the Protocol, and other relevant human rights instruments ratified by the states concerned. In terms of locus standi, the Court may entitle relevant non-governmental organisations (NGOs) with observer status before the Commission as well as individuals to institute cases directly before it in accordance with Article 34(6) of the Protocol, which demands that the states parties are obliged to have made a declaration at the time of the ratification of the Protocol or any time thereafter, accepting the competence of the Court to receive cases under Article 5(3) of the Protocol. Hence, in the absence of any such declaration, individuals have to submit their complaints to the Commission first. The Protocol is silent on the question of the exhaustion of local remedies, but it may be presumed that the general principles of international law will apply to subject individuals that seek the jurisdiction of the Court to the satisfaction of the exhaustion of local remedies principle.

The judgment of the Court is binding on states parties to the Protocol.[17] These states parties undertake, in terms of Article 30, to comply with the judgment in any case where they are parties within the time stipulated by the Court, and to guarantee such judgment's execution. In other words, the states take primary responsibility for the execution of the Court's judgments. Should the affected parties fail to do so, other persuasive and coercive means are available to the African Union. The Court submits its reports to the regular session of the Assembly of the AU,[18] and the provision goes on to state that the report is required, in particular, to specify the cases in which a state has not complied with the Court's judgment.[19] This provision, in effect, transfers the secondary responsibility for ensuring compliance with the rulings of the Court to the collective of the Heads of State and Government. This could serve as a kind of peer review mechanism.[20] As a monitoring mechanism, the judgments of the Court are notified not only to the parties in dispute, but also to the Council of Ministers who monitors its execution on behalf of the Assembly.[21]

17 Article 30, Protocol to the Charter.
18 Article 31, Protocol to the Charter.
19 (ibid.).
20 Pityana (2004).
21 Article 29.2, Protocol to the Charter.

Application of international human rights Conventions and standards

As stated earlier, both the ICCPR and the Charter have provisions protecting the right of the individual to trial within a reasonable time. Treaty bodies have been established and empowered with the jurisdiction to enforce compliance of the obligations under such treaties. In Zambia, international instruments are not self-executing: they require legislative implementation to be effective. The position in Namibia is rather more complex. Namibia has adopted both the monist and dualist approaches with respect to implementation of international treaties. The executive concludes or accedes to international treaties, which then require ratification by the National Assembly. Ratification does not imply automatic integration of treaty obligations as part of the law of Namibia. The nature of the treaty obligations will determine whether Parliament will regard a particular international instrument self-executing or not after ratification. Both Namibia and Zambia have ratified the ICCPR[22] and are also parties to its First Optional Protocol, which provides for individual communications procedures. First and foremost, therefore, it must be emphasised that Zambia is bound by the treaty obligations under Article 2 of the ICCPR to make available to the victim the remedies stated earlier herein, if violation of the victim's right is successfully established. Secondly, in the event of the victim's dissatisfaction with the local legal system for the reasons stated earlier, the victim/applicant can avail him-/herself of the individual communications procedure under the jurisdiction of the Human Rights Committee. As stated earlier, the Committee has the jurisdiction to examine communications from individuals who claim to be victims of a violation of any of the rights proclaimed in the ICCPR, including the right to trial within a reasonable period.

At the regional level, both Namibia and Zambia are also parties to the Charter.[23] The Zambian Constitution has incorporated international human rights standards, and these include the right to fair trial, which is justiciable. Therefore, both Namibia and Zambia are bound by the treaty obligations under the Charter, just as much as they are bound by the treaty obligations of the ICCPR. The victim/applicant is entitled to invoke the jurisdiction of the Commission and avail him-/herself of the individual communications procedure.

These international instruments that provide for these rights, however, do not define what constitutes "within a reasonable time" or a "speedy" trial; therefore, reference will have to be made to other sources for the determination of what constitutes a "speedy" trial, for example. These sources will include relevant legislation and case law, but it should be explained that, in this article, there is

22 Namibia and Zambia acceded to the ICCPR on 10 April 1984.

23 Zambia signed the Charter on 17 January 1983, and ratified it on 10 January 1984. Namibia became a state party to the ICCPR on 28 February 1995.

more reliance on case law than legislative sources, simply for lack of access to the latter, if they are available.

Establishment of a violation of rights under international Conventions and treaty bodies

To establish a successful case of infringement and violation of rights will necessitate the adducing of sufficient evidence to satisfy the requirements of both substantive and procedural law in order to establish that the delay complained of exceeds what is reasonable. Furthermore, evidence will have to be adduced to quantify the damage/loss occasioned as a result of the violations with regard to the claim for compensation.

Substantive considerations

The determination of what constitutes "reasonable time" has been discussed in judicial decisions of certain jurisdictions, the most notable of which is perhaps the case of *R v Askov*,[24] where the issue involved alleged violations of constitutional rights. This case reviews relevant authorities, especially cases of the Supreme Courts of the United States (US) and Canada, and lays down standards for the establishment of a "speedy" trial or trial within a "reasonable time". These standards have been followed by superior and constitutional courts in a number of jurisdictions, including Zimbabwe[25] and Namibia.[26] The standards are extensively discussed in the cases mentioned later herein,[27] but a summary of the factors can be mentioned here in order to put them in context. *R v Askov* lays down four factors to determine "reasonable time", namely –

- the length of the delay
- the explanation for the delay (this includes evidence relating to the conduct of the Crown or the state, systemic or institutional delays, and the conduct of the accused)
- the waiver, and
- prejudice to the accused.

The Supreme Court of Canada held that the first factor was the triggering mechanism or threshold determination of the excessiveness of the delay and that, if that delay appeared prima facie excessive, the court was then obliged to consider the three remaining factors to determine whether the accused had been deprived of the Sixth Amendment. In the Zimbabwean case of *In Re Mlambo*,[28] in determining whether the rights of the accused to trial within

24 (1990) 2 SCR 1199; (1991) 49 CRR 1 (Supreme Court of Canada).
25 *In re Mlambo* (1992) 4 SA 144 or (1992) 2 SACR 245.
26 *S v Heidenrich* (NmHC) (1996) 2 BCLR 197 (1998) No. 229.
27 *In re Mlambo* (1992) 4 SA 144 or (1992) 2 SACR 245; *S v Heidenrich* (NmHC) (1996) 2 BCLR 197 (1998) No. 229.
28 *In re Mlambo* (1992) 4 SA 144 or (1992) 2 SACR 245.

a reasonable time had been violated, Gubbay CJ followed the factors laid down in the *Askov* case and stated that additional evidence would have to be established to determine violation of human rights. He stated the following:[29]

> I have no hesitation in holding that the time frame is designed to relate far more to the period prior to the commencement of the hearing or trial than to whatever period may elapse after the accused has tendered a plea. This meaning is wholly consonant with the rationale of s18(2) – that the charge from which the reasonable time enquiry begins, must correspond with the start of the impairment of the individual's interest in the liberty and security of his person. *The concept of "security" is not restricted to physical integrity, but includes stigmatisation, loss of privacy, anxiety, [and] disruption of family, social life and work.*
>
> I may say that this view accords with the interpretation given to the materially similar wording of Article 6 para 1 of the European Convention by the European Courts of Human Rights.

In *R v Askov*,[30] Lamer J, as he then was, expressed similar views and referred to these vexations, as described above by Gubbay CJ, as "all strictly individual rights". In the case under consideration, the Presiding Judge ruled that there had been inordinate delay as the accused had been in detention for more than 12 years. Therefore, there is incontrovertible evidence to satisfy the triggering mechanism that the delay was prima facie unreasonable or, in the words of Powell J in *Barker v Wingo*,[31] "presumptively prejudicial". However, in order to conclude that the effect of the lengthy delay is such that it denies the applicant the right to a fair hearing, in this case there is the need to balance the other factors mentioned in the *Askov* judgment.

Further evidence will also have to be adduced to prove that the inordinate delay led to the impairment of the accused's interests in the liberty and security of his person, and therefore constituted a violation of his rights. In light of the above, therefore, proof of violation will include evidence to establish, for example, stigmatisation, loss of privacy, anxiety, and disruption of family life, social life and work, occasioned as a result of the inordinate delay and long period of detention.

Procedural considerations

The burden of proof required will be the standard required in civil proceedings, which is on the balance of probabilities and with regard to the question of locus standi there must be evidence of the exhaustion of local remedies, which will include both judicial and extra judicial remedies, like in the case of Zambia, for example, placing the case before the Zambian Human Rights Commission

29 (ibid.).
30 (1990) 2 SCR 1199.
31 (1972) 407 US 514 at 530.

(ZHRC). The other requirement is proof that the prevailing conditions are such that it can be legitimately claimed that the victim will not receive justice under the local legal system, including reasons stated earlier. These procedural considerations will apply to applications to both the Human Rights Committee and the Commission.

With respect to petitions before the African Court on Human and Peoples' Rights, it is imperative that the petition be directed against a state party which has made a declaration under Article 43.6 of the Protocol which authorises direct access to the Commission for individuals and NGOs with observer status before it. To be admissible under Article 56.2 of the Charter, the petition is required to invoke the provisions of the Charter allegedly violated, in this case Article 7(d).

Remedies

The provisions of the ICCPR that deal specifically with remedies can be found under Article 2, the relevant provisions of which read as follows:

> ***Article 2***
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy; [and]
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

Therefore, the specific remedies are initially to be sought from the remedies provided under the municipal laws of a particular jurisdiction. As indicated earlier herein, however, the remedies include compensation and reparation. These may be ordered by the Human Rights Committee, and the state concerned is obliged to comply with the order.

The jurisprudence of the right to a fair trial under municipal law

The right to a hearing within a reasonable time

Article 18(1) of the Zambian Constitution that deals with protection of law provides as follows:

> If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

Article (12)(1)(b) of the Constitution of the Republic of Namibia has a similar provision and provides as follows:

> A trial referred to in Sub-Article (a) hereof shall take place within a reasonable time, failing which the accused shall be released.

The term *reasonable time* is not defined in the two Constitutions, but it may be interpreted to mean that a party upon whom it is incumbent duly fulfils his/her obligation notwithstanding protracted delay, so long as such delay is attributable to cause beyond his/her control, and s/he has neither acted negligently nor unreasonably. The term *reasonable time*, however, has been considered in a number of cases from different jurisdictions.

Perhaps the most comprehensive consideration of what amounts to a *speedy* trial and/or a fair hearing *within a reasonable time* is to be found in the judgment of Cory JJ of the Supreme Court of Canada in the case of *R v Askov*.[32] The case involved the interpretation of what constituted *unreasonable delay* in the context of Section 11(b) of the Canadian Charter of Rights and Freedoms, which provides that "any person charged with an offence has the right to be tried within a reasonable time".[33] The provisions of Section 11(b) of the Canadian Charter of Rights and Freedoms are couched in the same terms as the provisions of Articles 18(1) of the Zambian Constitution and 12(1)(b) of the Namibian Constitution stated above.

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32 *R v Askov* (1990) 2 SCR 1199.

33 In the *Askov* case, the appellants were charged with conspiracy to commit extortion in November 1983. A, H and M were also charged with several related offences and detained in custody for almost six months before being released on recognisances. G was released on a recognisance shortly after his arrest. All counsel agreed on a date early in July 1984 for the preliminary hearing, but it could not be completed until September. A trial was then set for the first available date, in October 1985. The case could not be heard during that session, and was put over for trial to September 1986, almost two years after the preliminary hearing. When the trial finally began, appellants moved to stay the proceedings on the ground that the trial had been unreasonably delayed. The trial judge found that the major part of the delay following the appellants' committal stemmed from institutional problems and granted the stay. The Court of Appeal found: (1) no misconduct on the part of the Crown; (2) no indication of any objection by the appellants to any of the adjournments; and (3) no evidence of any actual prejudice to the appellants. It accordingly set aside the stay and directed that the trial proceed. But the Supreme Court found that the delay was prima facie excessive – indeed, grossly excessive. The Court further found that the defence never caused the delay nor agreed to it; the delay had been caused by the prosecution. Taking all those factors into consideration, the Court concluded that the delay could not be justified and was, therefore, unreasonable.

In laying down the factors to be considered in determining what constituted *reasonable time*, the court reviewed the position of the law in both the US and Canada and discussed in detail the raison d'être of the right to fair trial within a reasonable time. He explained the position of the law as follows.

Judicial consideration of the principle of providing a trial within a reasonable time

In the US, the Sixth Amendment ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial". The US Supreme Court considered the issue in *Barker v Wingo*.[34] Barker, who was charged with murder, was brought to trial five years after the murder had been committed. The delay was caused by the necessity of trying an accomplice beforehand. This prerequisite trial was extremely complicated: the accomplice was tried no less than six times. During this ongoing process, Barker initially had agreed to continuances or adjournments. He only began to assert his right to a speedy trial three-and-a-half years after the charges had been laid.

The court held that a flexible approach should be taken to cases involving delay and that the multiple purposes or aims of the Sixth Amendment need to be appreciated. Powell J, giving the reasons for the court's findings, recognised the general concern that all persons accused with crimes should be treated according to fair and decent procedures. He particularly noted three individual interests which the right was designed to protect, namely to –

- prevent oppressive pre-trial incarceration
- minimise the anxiety and concern of the accused, and
- limit the possibility that the defence would be impaired or prejudiced.

However, Powell J went on to observe that, unlike other constitutional rights which only had an individual interest, the right to a speedy trial involved the added dimension of a societal interest. He found that a delay could result in increased financial cost to society, and could have a negative effect upon the credibility of the justice system. Furthermore, it was noted that a delay could work to the advantage of the accused. For example, the fostering of a delay could become a defence tactic designed to take advantage of failing memories or missing witnesses, or could permit the accused to manipulate the system in order to bargain for a lesser sentence. Specifically, he stated that the right to a speedy trial was –[35]

> … a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate. As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial.

34 407 US 514 (1972).

35 (ibid.:521).

In order to balance the individual right and the communal aspect of the Sixth Amendment, the US Supreme Court adopted an approach of ad hoc balancing "in which the conduct of both the prosecution and the defendant are weighed".[36] The balancing is undertaken by reference to four factors identified by Powell J as the test for infringement of the right to a "speedy" trial. They are as follows:

- The length of the delay
- The reason for the delay
- The accused's assertion of the right, and
- Prejudice to the accused.

The first factor is the triggering mechanism or threshold determination of the excessiveness of the delay. If that delay appears prima facie excessive, the court then has to consider the three remaining factors to determine whether the accused has been deprived of the Sixth Amendment right.

After his definition and exposition of the factors to be taken into consideration on an application for a stay of proceedings, Powell J proceeded to explain that, before that step was undertaken, it was necessary to determine what might be distilled from the cases as to the purpose or aim of Section 11(b).

Purpose of Section 11(b)

Powell J explained that Section 11(b) explicitly focused upon the individual interest of liberty and security of the person. Like other specific guarantees provided by Section 11, this paragraph is primarily concerned with an aspect of fundamental justice guaranteed by Section 7 of the Charter. He stated the following in this regard:

> There could be no greater frustration imaginable for innocent persons charged with an offence than to be denied the opportunity of demonstrating their innocence for an unconscionable time as a result of unreasonable delays in their trial. The time awaiting trial must be exquisite agony for accused persons and their immediate family. It is a fundamental precept of our criminal law that every individual is presumed to be innocent until proven guilty. It follows that on the same fundamental level of importance, all accused persons, each one of whom is presumed to be innocent, should be given the opportunity to defend themselves against the charges they face and to have their name cleared and reputation re-established at the earliest possible time.

Furthermore, he added that community interest had a dual dimension:

> First, there is a collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law. Second, those individuals on trial must be treated fairly and justly. Speedy trials strengthen both those aspects of the community interest. A trial held within a reasonable time must

36 (ibid.:530).

benefit the individual accused as the prejudice which results from criminal proceedings is bound to be minimized. If the accused is in custody, the custodial time awaiting trial will be kept to a minimum. If the accused is at liberty on bail and subject to conditions, then the curtailments on the liberty of the accused will be kept to a minimum. From the point of view of the community interest, in those cases where the accused is detained in custody awaiting trial, society will benefit by the quick resolution of the case either by reintegrating into society the accused found to be innocent or if found guilty by dealing with the accused according to the law. If the accused is released on bail and subsequently found guilty, the frustration felt by the community on seeing an unpunished wrongdoer in their midst for an extended period of time will be relieved.

There are as well important practical benefits which flow from a quick resolution of the charges. There can be no doubt that memories fade with time. Witnesses are likely to be more reliable testifying to events in the immediate past as opposed to events that transpired many months or even years before the trial. Not only is there an erosion of the witnesses' memory with the passage of time, but there is bound to be an erosion of the witnesses themselves. Witnesses are people; they are moved out of the country by their employer; or for reasons related to family or work they move from the east coast to the west coast; they become sick and unable to testify in court; they are involved in debilitating accidents; they die and their testimony is forever lost. Witnesses too are concerned that their evidence be taken as quickly as possible. Testifying is often thought to be an ordeal. It is something that weighs on the minds of witnesses and is a source of worry and frustration for them until they have given their testimony.

It can never be forgotten that the victims may be devastated by criminal acts. They have a special interest and good reason to expect that criminal trials take place within a reasonable time. From a wider point of view, it is fair to say that all crime disturbs the community and that serious crime alarms the community. All members of the community are thus entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The very reasonable concern and alarm of the community which naturally arises from acts of crime cannot be assuaged until the trial has taken place. The trial not only resolves the guilt or innocence of the individual, but acts as a reassurance to the community that serious crimes are investigated and that those implicated are brought to trial and dealt with according to the law.

The failure of the justice system to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually to a feeling of contempt for court procedures. When a trial takes place without unreasonable delay, with all witnesses available and memories fresh, it is far more certain that the guilty parties who committed the crimes will be convicted and punished and those that did not, will be acquitted and vindicated. It is no exaggeration to say that a fair and balanced criminal justice system simply cannot exist without the support of the community. Continued community support for our system will not endure in the face of lengthy and unreasonable delays.

Factors to take into account in determining whether or not there has been an infringement of the right to a speedy trial

As stated earlier, four factors have generally been recognised as constituting the test to determine the infringement of the right to speedy trial. It might be useful to expatiate on the requirements and applications of each of these factors.

The length of the delay

Prima facie evidence of an unreasonably prolonged delay will necessitate an enquiry into possible infringement of the individual's right to a speedy or trial within a reasonable time. In certain jurisdictions such as the US, this factor constitutes the triggering mechanism or threshold determination of the excessiveness of the delay. In other jurisdictions, this factor is to be balanced along with the others. However, very lengthy delays may be such that they cannot be justified for any reason.

Explanation for the delay

This category may be subdivided and discussed under two areas, namely *systemic delay* and *conduct of the accused*.

(a) The conduct of the Crown or state

Generally speaking, this category comprises all of the potential factors causing delay which flow from the nature of the case and the conduct of the Crown or state, including officers of the Crown or state, as well as the inherent time requirements of the case. Delays attributable to the actions of the Crown or state or its officers will weigh in favour of the accused. Thus, adjournments initiated by the Crown or state, the unavailability of judges, and the misplacement of files by the prosecution are all examples where the action or the lack thereof by the Crown or state officers may weigh against the Crown or state in the assessment of the reasonableness of the delay.

Under this heading, the complexity of the case should be taken into account. Complex cases such as the Caprivi Treason Trial, which require a longer time to prepare, greater expenditure of resources by officers of the state, and the longer use of institutional facilities, will justify delays longer than those that would be acceptable in simple cases.

(b) Systemic or institutional delays

Delays occasioned by inadequate resources or systemic/institutional limitations should also weigh against the state. Various variables will determine this factor and need to be determined objectively. The state bears the onus of justifying inadequate resources resulting in systemic delays, for it is the responsibility

of the state to bring the accused to trial. The courts have always insisted that the lack of institutional resources cannot be employed to justify a continuing unreasonable postponement of trials. In *Mills v The Queen*, Lamer J noted as follows in this regard:[37]

> In an ideal world there would be no delays in bringing an accused to trial and there would be no difficulties in securing fully adequate funding, personnel and facilities for the administration of criminal justice. As we do not live in such a world, some allowance must be made for limited institutional resources.

However, he added that the lack of institutional facilities can never be used as a basis for rendering the right to trial within a reasonable time meaningless. In the same case, he added the following:[38]

> It is imperative, however, that in recognising the need for such a criterion we do not simply legitimate current and future delays resulting from inadequate institutional resources. For the criterion of institutional resources, more than any other, threatens to become a source of justification for prolonged and unacceptable delay. There must, therefore, be some limit to which inadequate resources can be used to excuse delay and impair the interests of the individual.

(c) The conduct of the accused (or delay attributable to the accused)

As stated earlier, it is the responsibility of the state to bring the accused to trial within a reasonable time. The courts in the *Askov*[39] and *Mills*[40] cases explained that it followed from this responsibility and the right to trial within a reasonable time that any enquiry into the conduct of the accused should in no way absolve the state from its responsibility to bring the accused to trial. Nonetheless, there is a societal interest in preventing an accused from using the guarantee as a means of escaping trial. It should be emphasised that an enquiry into the actions of the accused should be restricted to discovering those situations where the accused's acts either directly caused the delay, or the acts of the accused are shown to be a deliberate and calculated tactic employed to delay the trial. These direct acts on the part of the accused, such as seeking an adjournment to retain new counsel, of course need to be distinguished from situations where the delay was caused by factors beyond the accused's control, or a situation where the accused did nothing to prevent a delay caused by the state and the burden of proving that the direct acts of the accused caused the delay falls upon the state.

The court added that, since the protection of the right of the individual is the primary aim of Section 11(b), the burden of proving that the direct acts of the

37 1986 1 SCR 863 at 935.

38 (ibid.).

39 *R v Askov* (1990) 2 SCR 1199; and *Mills v The Queen* 1986 1 SCR 863 at 935.

40 *Mills v The Queen* 1986 1 SCR 863 at 935.

accused caused the delay has to fall on the Crown, and that this would be true except in those cases where the effects of the accused's action are so clear and readily apparent that the intent of the accused to cause a delay is the inference that has to be drawn from the record of his/her actions.

Waiver

The accused may be deemed to have waived his/her rights to a trial within a reasonable time by consenting to or concurring in a delay, and this needs to be taken into account. However, for a waiver to be valid it has to be informed, unequivocal, and freely given. The accused also needs to have full knowledge of the rights involved, and the effects the waiver will have on those rights.

The failure of an accused to assert the right does not give the state licence to proceed with an unfair trial. Failure to assert the right would be insufficient in itself to impugn the motives of the accused. Rather, there needs to be something in the conduct of the accused that is sufficient to give rise to an inference that the accused has understood that s/he had a right to trial within a reasonable time, understood its nature, and has waived the right provided by the constitution in question. Although no particular magical incantation of words is required to waive a right, the waiver should nevertheless be expressed in some manner. Silence or lack of objection cannot constitute a lawful waiver. The matter was put in these words by Dickson J, as he then was, in *Park v The Queen*:[41]

> No particular words or formula need be uttered by defence counsel to express the waiver and admission. All that is necessary is that the trial judge be satisfied that counsel understands the matter and has made an informed decision to waive … Although no particular form of words is necessary the waiver must be express. Silence or mere lack of objection does not constitute a lawful waiver.

The burden of showing that a waiver should be inferred falls upon the state.

An example of a waiver or concurrence that could be inferred as such is the consent by counsel for the accused to a fixed date for trial.

Prejudice to the Accused

There is a general and, in the case of very long delays, an often virtually irrebuttable presumption of prejudice to the accused resulting from the passage of time. Where the Crown or state can demonstrate that there was no prejudice to the accused flowing from a delay, then such proof may serve to excuse the delay. It is also open to the accused to call evidence to demonstrate actual prejudice to strengthen his/her position that s/he has been prejudiced as a result of the delay.

41 (1981) 2 SCR 64 at 73–74.

The issue of what constitutes a fair hearing within a reasonable time was also considered in the Zimbabwean case of *In Re Mlambo*.[42] The applicant was arrested in 1986 and charged with theft. He appeared in court and was released on bail after two weeks in custody. He subsequently appeared in court on 12 occasions until August 1987, when his legal representative complained about the lengthy delay in bringing the matter to trial and made strong representations that a date for trial be set. Thereupon the prosecutor promptly withdrew the charges and the applicant was advised that he could be charged at a later stage. In August 1990, the applicant was summonsed to appear in court on substantially the same charges. On several occasions, his legal representative wrote to the clerk of the court requesting copies of various documents which the state intended to produce at the trial. When the date of trial arrived and the copies of documents had not been furnished, the applicant's legal representative sought a postponement of the trial, which was granted. At the resumed hearing, the applicant's counsel asked the court to stay the proceedings on the grounds that the applicant's rights under Section 18(2) in the Declaration of Rights in the Constitution of Zimbabwe had been infringed by the delay in bringing the matter to trial. The prosecution made no attempt to explain the delay and the magistrate dismissed the application. On the following day, the matter resumed before another magistrate, who agreed to refer the matter to the Supreme Court in terms of Section 24(2) of the Constitution.

The Supreme Court held that a reasonable time was necessary for the state to be ready for a trial, which period varied from case to case. It further held that the distinction between what was or was not a reasonable period not could not be drawn too sharply.

Gubbay CJ, delivering the judgment of the full Bench of the Supreme Court, endorsed the approach of the European Court of Human Rights in *Eckle v Germany (Federal Republic)*[43] and *Foti v Italy*.[44] He restated the factors as follows:[45]

> The factors to be considered in a determination of whether an accused person has been afforded a fair hearing within a reasonable time: In *Fikilini v Attorney-General* 1990 (1) ZLR 105 (SC) at 112G this Court approved of the factors identified by Justice Powell in his landmark judgment in *Barker v Wingo*[46] as amongst those to be taken into account in assessing whether an accused has been deprived of his constitutional right to a speedy trial. He stated them at 530-2, as follows:

42 *In re Mlambo* (1992) 4 SA 144 or (1992) 2 SACR 245.

43 (1985) 5 EHRR 1.

44 (1983) 5 EHRR 313.

45 See also *United States v Van Neumann* 474 US 242 (1986) at 247. These factors received the imprimatur of the Privy Counsel in *Bell v Director of Public Prosecutions of Jamaica and Another* [1985] 2 All ER 585.

46 407 US 514 (1972).

The length of the delay is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.

Closely related to length of delay is the reason the Government assigns to justify the delay. Here, too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the Government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the Government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.

We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasise that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.

A fourth factor is prejudice to the defendant. Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pre-trial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

The onus

As stated earlier in the case of *Fikilini v Attorney-General*,[47] it is for the applicant to persuade the court that the delay complained of exceeds what is reasonable. The degree of persuasion required of him/her is to show that the delay is prima facie unreasonable, or, in the words of Powell J in *Barker v Wingo*,[48] "presumptively prejudicial". It is that which triggers the enquiry into the other factors that go into the balance. It is the threshold at which the court may look to the state for an explanation. It is, of course, neither possible nor desirable to identify precisely the length of delay which will trigger the enquiry. Each case is to be viewed in the light of its own particular circumstances in order to determine whether the delay is prima facie unreasonable.

Assessment of reasonableness

In the Zambian case of *John Chisimba*,[49] for example, the overall length of the delay is 12 years, which is more than adequate to trigger an enquiry: it is "presumptively prejudicial". It is submitted in the premise, therefore, that the disposition of this case will ultimately turn on the proof of the other factors such as –

- explanation for the delay, particularly systemic or institutional delay and delays attributable to the accused
- waiver, and
- prejudice to the accused.

Considering the length of the delay and the explanation thereof – that the prosecution had misplaced the victim's file, one is obliged to conclude that the state's conduct indicates a sustained unconcern to proceed as quickly as possible against the accused. It is submitted that the explanation for the delay is as totally unacceptable as it is reprehensible. That the entire delay was attributable to the actions of the state weighs heavily in favour of the accused. Therefore, unless some strong basis can counter this factor – the length of delay, which becomes clear from an examination of other factors – it will not prove possible to tolerate it.

Next to be set in the scale is the frequency and force of the objection to the delay. Here, evidence is to be deduced to establish that there was nothing in the conduct of the victim or his/her defence counsel that can be viewed as a waiver of the applicant's constitutional guarantee. It needs to be proved that concerted efforts were made by the victim or his/her counsel to object to the delay. With regard to the fourth factor, evidence also needs to be elicited from the applicant that the delay had caused him/her actual prejudice. This may relate to unavailability of witnesses and other evidence that collectively

47 1990 (1) ZLR 105 (SC) at 117 D–E.
48 *Barker v Wingo* (1972) 407 US 514 at 530.
49 *The People v John Chisimba*, 2TO/09/95, Zambia.

impairs the ability to present an adequate defence to establish the trial prejudice. It also needs to be borne in mind that a very long delay such as this inherently gives rise to a strong presumption of prejudice to an accused. In the *Heidenrich* case in Namibia, this was how Hannah J put it:[50]

> The right, therefore, recognises that, with the passage of time, subjection to a criminal charge gives rise to restrictions on liberty, inconveniences, social stigma and pressures detrimental to the mental and physical health of the individual. It is a truism that the time awaiting trial must be agonising for accused persons and their immediate family. I believe that there can be no greater frustration for an innocent charged with an offence than to be denied the opportunity of demonstrating his lack of guilt for an unconscionable time as a result of delay in bringing him to trial.

The right also recognises that an unreasonable delay may well impair the ability of the individual to present a full and fair defence to the charge.

Where the state can demonstrate that there was no prejudice flowing from the delay, then such proof may serve to excuse it.

Balancing all the factors leads one irresistibly to submit that the effect of this extraordinarily lengthy delay is such as to deny the applicant/victim the right to a fair hearing of his/her case. Justice so delayed is an affront to the individual, to the community, and to the very administration of justice. The charge against John Chisamba is murder and, therefore, far from trivial; and there can be no doubt that it would be in the best interests of society to proceed with the trial of those who are charged with the commission of serious crimes. Yet, that trial can only be undertaken if the guarantee under Section 18(1) of the Zambian Constitution has not been infringed. In this case it has been grievously infringed. In the premise, it is unconceivable how a hearing can be allowed to take place. Any conclusion to the contrary would render meaningless a right enshrined in the Constitution as the Supreme Law of the land.

The appropriate remedy

As stated earlier, both the Constitutions of Namibia and Zambia protect and guarantee the right of the accused to a fair trial within a reasonable time. A cause of action for alleged violations of the right will necessitate an application for a declaration of the violations. The order for the remedies will have to be made to the courts in both countries that have jurisdiction over constitutional matters, namely the High Court and the Supreme Court.

In criminal law jurisprudence, there are two schools of thought on the appropriate remedy to be ordered in cases of violation of the right to fair trial, whether an order for a stay of prosecution (an order to abort the trial) or an

50 *S v Heidenrich* (NmHC) 1996 (2) BCLR 197 (NmH): 1998 NR 229 at 235 A–C.

order for a speedy trial. In *R v Askov*,[51] the court granted a stay of proceedings. In the *Mlambo* case,[52] the court granted a permanent stay of proceedings, but added that an order that the charge be dismissed would be tantamount to a pronouncement of innocence. In the Namibian case of *S v Heidenrich*,[53] Hannah J stated the following in this regard:

> [O]nce the main of the sub-article 12(1)(b) of the Constitution of Namibia, which provides that the accused shall be released in the event of the violation of right, has been identified as being not only to minimise the possibility of lengthy pre-trial incarceration and to curtail restrictions placed on an accused who is on bail but also to reduce the inconvenience, social stigma and other pressures which he is likely to suffer and to advance the prospect of fair hearing, then it seems to me that "release" must mean release from further prosecution for the offence with which he is charged. It is only by giving the term this wider meaning that the full purpose of the sub-article is met. Release from custody or from onerous conditions of bail meets part of the purpose of the sub-article.

In another Namibian case, namely *S v Uahanga and Others*,[54] the accused had originally been charged in March 1995. Thereafter the matter had been postponed several times. By the time the matter was to be heard in October 1995, the state requested a further postponement. When the matter was postponed in July that year, it had been recorded that October was to be the final postponement. On the day in October when the matter was to be heard, witnesses were available, but there seemed to be a problem with the availability of prosecutors. It appeared that at least two prosecutors were not involved in trials, but the state alleged that it could not proceed. The magistrate acquitted the accused, invoking Article 12 of the Namibian Constitution, which provides for the right to speedy trial. On appeal, the High Court held that the accused were entitled to a speedy trial in terms of Article 12 of the Namibian Constitution. The delay had not been unduly long, but the High Court held that the explanations for the continual postponements had been unsatisfactory. The High Court found that the conduct of the prosecution had been slovenly and that the accused had been correctly acquitted by the lower court.

However, in *Van As and Another v Prosecutor-General*,[55] a three-member High Court bench in interpreting *release* in Article 12(1)(b) of the Namibian Constitution – which provides to the effect that, where a criminal trial has not taken place within a reasonable time, the accused may be released – the Ccurt held that "release" in Article 12(1)(b) could not be equated with *acquit*, and that it merely meant that an accused would be released. The High Court also held that this did not preclude the prosecution from rearresting the accused at a later stage and reviving the proceedings. The court added, however, that

51 *R v Askov* (1990) 2 SCR 1199.
52 *In re Mlambo* (1992) 4 SA 144 or (1992) 2 SACR 245.
53 *S v Heidenrich* (NmHC) (1996) 2 BCLR 197 (1998) No. 229.
54 1998 NR 160.
55 2000 NR 271.

this interpretation did not lose sight of the fact that the prosecution should not be allowed to benefit from its ineptitude. The court accordingly held that Article 12(1)(b) did not provide for a permanent stay of criminal proceedings.

The Supreme Court's interpretation of "release" in Article 12(1)(b) in the case of *Margaret Malama-Kean v The Magistrate of the District of Oshakati NO and the Prosecutor General NO)*[56] is the latest and most comprehensive formulation of the nature and forms of release as contemplated by the framers of the Namibian Constitution. The court confirmed the premise that those that those competent criminal courts with the necessary jurisdiction should, in an appropriate case of unreasonable delay, have the power and responsibility to order a permanent stay of prosecution as at least one of its discretionary powers. The Supreme Court further indicated that a permanent stay of prosecution was not the only order contemplated as constituting the discretionary powers of the criminal courts, and that a particular form an order for release from the trial took would depend not only on the degree of prejudice caused by the failure of the trial to take place within a reasonable time, but also that court's jurisdiction in considering the issue and making the order. O'Linn AJA, delivering the Supreme Court judgment, described the various forms of release as follows:

> The question however still remains what is the full significance of an order – "shall be released from the trial".
>
> It is clear that the remedy provided in art. 12(1)(b) – "shall be released" [–] is couched in mandatory and peremptory terms. Nevertheless it does not seem to me that only one form of release from the trial would meet the peremptory requirement. The following forms of release from the trial, will in my view all be legitimate forms meeting the peremptory requirement:
>
> (i) A release from the trial prior to plea on the merits, which does not have the effect of a permanent stay of the prosecution and is broadly tantamount to a withdrawal of the charges by the State before the accused had pleaded.
>
> This form of release will encompass:
>
> (a) Unconditional release from detention if the accused is still in detention when the order is made for his/her release;
> (b) Release from the conditions of bail if the accused had already been released on bail prior to making the order;
> (c) Release from any obligation to stand trial on a specified charge on a specified date and time if the accused had previously been summoned or warned to stand trial on a specified charge, date and time.
>
> (ii) An acquittal after plea on merits.
> (iii) A permanent stay of prosecution, either before or subsequent to a plea on the merits.

56 Case No. SA 04/2002. Unreported judgment of the Supreme Court of Namibia; available at www.superiorcourts.org.na; last accessed 21 July 2010.

In the South African case of *McCarthy v Additional Magistrate, Johannesburg*,[57] the court decided that a party asserting an unreasonable delay in prosecution was required to show more than average systemic delay, and that an indefinite stay of prosecution would seldom be granted in the absence of extraordinary circumstances.

Conclusion

Both Namibia and Zambia are sovereign states with Supreme Courts as their final courts of appeal; therefore, foreign authorities are not binding, only persuasive. But the authorities referred to above are not from the courts of only one jurisdiction: these authorities all confirm that a stay of proceedings is an appropriate remedy to be ordered when the right to fair trial has been violated. Considering the length of the delay in the Zambian case, for example, coupled with the non-availability of the case records, it is inconceivable that the state would wish to continue with the proceedings. Constitutional bail has already been granted by the trial court and, therefore, further detention of the victim in a case of this nature will amount to the court disobeying its own orders, and would be an affront to the Zambian criminal justice system. Appropriate remedies provided for by the Criminal Procedure Code of Zambia need to be investigated and ascertained, and should be brought in line with a more just system, such as those that apply in the municipal laws of South Africa and Namibia, which have specific legislative provisions relating to remedies to be granted in cases of violation of the right to fair trial.

Victims of violations of the right to speedy trial are also entitled to invoke the civil jurisdiction of the superior courts to apply for a declaration of the violation of their rights and due compensation. But, in practice, in order to succeed in the claim for compensation, sufficient evidence must be adduced to establish quantifiable loss. Evidence such as job loss, loss of conjugal and matrimonial rights, and deprivation of family life will be relevant and necessary.

Namibia and Zambia are both signatories to the ICCPR and the Charter. Furthermore, Zambia, for example, has internalised the norms and standards of the International Bill of Rights in her domestic laws, and more specifically, in the Constitution of Zambia, Article 18(1) of which protects the right to fair trial within a reasonable time. It is submitted, therefore, that the Zambian law enforcement agents are bound not only by the treaty obligations of the above-mentioned international instruments, but also by the provisions of their own Constitution, the Supreme Law of the land, to give effect to those international standards and norms.

Applying the principles of law dealing with the right to fair trial within a reasonable time to the *Chisimba* case, for example, will lead to the conclusion

57 2000 (2) SACR 542 (SCA).

that there was obviously an unreasonable delay by the state and, hence, the triggering threshold requirement is satisfied. If enough evidence is adduced to establish trial prejudice, then a clear case of the infringement of the rights of the victim exists. In the premise, therefore, the victim is entitled to approach the Constitutional Court of Zambia for redress. The remedies of stay of proceedings and release should be available to the victim.

In terms of applying to the treaty bodies whose protocols Zambia has ratified, the victim prima facie has jurisdiction before such bodies, but with the proviso that the exhaustion of domestic remedies requirement has to be complied with – except, of course, where no domestic remedies are available, or there is unreasonable delay on the part of the Zambian courts in granting remedy.

Decoding the right to equality: A scrutiny of judiciary perspicacity over 20 years of Namibia's existence

Clever Mapaure*

Introduction

The principle of equality is a deep-seated ingredient of the legal system of any truly democratic society. It is also an internationally well-known fact that a corollary is sandwiched between equality and non-discrimination.

Over the past two decades of Namibia's existence, Article 10 of the Namibian Constitution – which provides for the right to equality – has been one of the busiest provisions, with many cases going to court to seek its application in order to obtain redress for injustices suffered. In these cases, Namibian courts have amply demonstrated the description of *equality* as a "treacherously simple concept";[1] indeed, it is a complex set of political, socio-economic and legal norms which need to be decoded with great astuteness.

Namibian courts' approaches to the concept of *equality* over the past two decades have not differed from the approaches employed by other judiciaries across the world. In addition, Namibia has been plugged into the miscellany and complexity of modern relations and some cultural and historical factors that inform disadvantage and bigotry as opposed to egalitarianism. It also goes without saying that Namibia's history of inequality, juxtaposed with international standards as regards human rights, underlines the language of Article 10 of the Constitution and has subsequently informed judiciary wisdom in the interpretation and application of the right to equality.

This paper does not intend to take stock of all the cases that have dealt with the right to equality in Namibia since Independence in 1990; rather, it sets out to critically comment on specific areas of interest and cases which form the locus classicus of various approaches the courts have taken over the past two decades. These areas include the way the right to equality has been

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1 Holtmaat, R. 2004. "The concept of discrimination". Unpublished Academy of European Law Conference paper, p 2. Available at http://www.era.int/web/en/resources/5_1095_2953_file_en.4193.pdf; last accessed 8 February 2010.

interpreted, the way it has been implemented or applied by the courts, and the areas it has brought change to or affected in some other way.

The paper starts with a general and philosophical background on the concept of *equality*. It then considers two major tests the courts have followed to determine non-discrimination. Each approach is critically commented on, and international jurisprudence is employed to elaborate on them. The paper then concludes with an analysis of the application of the right to equality in the area of access to justice, by way of decoding the wisdom of the courts in the application of Article 10.

The concept of *equality* in perspective

The great Austrian economist Friedrich Hayek declared that "the great aim in the struggle for liberty has been equality before the law".[2] The expression *equality before the law* at once means that all laws must apply to everyone, including those who enact and/or sanction them, and that the law so enacted or sanctioned cannot be used to apprehend or isolate a group of individuals for discrimination. Clearly, this concept of *equality* was integral to the struggle for liberty in Namibia, which suffered under the 'divide and rule' policy of the South African apartheid regime.

Formal and substantive equality: Decoding the dual interpretation

Holtmaat has described *equality* as a "treacherously simple concept".[3] Yet, there are as many definitions of *equality* as the number of people who have tried to define it. Coupled with this assortment of definitions is a concoction of opinions which exist regarding what the state should do to fully ensure that this concept is realised as a fundamental human right of the citizenry. Under the apartheid regime, equality was taken as a mere scheme of values; but now, under the new constitutional dispensation, judicial astuteness has shown that the concept of *equality* is indeed a perfidiously 'simple' concept.

Against the background of Namibia's jurisdiction and others like it, the concept of *equality before the law* is a philosophically complex one. Namibian courts have taken a dual approach to the right associated with equality: they see equality as both formal and substantive. The idea of *formal* equality can be traced back to Aristotle and his dictum that *equality* meant "things that are alike should be treated alike".[4] This is the most widespread and indulgent

2 Hayek, FA. 1972. *The constitution of liberty*. Chicago: Henry Regnery Company, p 85.

3 Holtmaat (2004:2).

4 Aristotle. 1980. *3 Ethica Nicomachea (Nicomachean Ethics).* Translated by W Ross; edited by JL Ackrill and JO Urmson. Oxford: Oxford University Press, pp 112–117, 1131a–1131b.

view on equality today. A formalistic approach to equality was evidenced in the *Beukes* case,[5] for example, wherein the High Court stated the following: [6]

> [T]he constitutional notions of fairness and equality[7] demand that the courts must ultimately treat all litigants equally when they adjudicate the substance thereof.

Therefore, in the High Court's view, the court should ignore the individual characteristics of litigants. Therefore, in Namibia, as is the case elsewhere, *formal equality* is the notion of *equal treatment*: it does not take into account the fact that equal application of the rules to unequal groups or individuals can have unequal results. This formal approach to equality, as the high Court illuminates, supports the view that a person's individual or physical characteristics should be seen as irrelevant in determining whether they have the right to some social benefit or gain.

From a theoretical point of view this is certainly a good principle to uphold since, ideally, every person should be treated in the same way, but it is a simplistic point of view that does not adequately take into account real-world situations. Thus, although *formal equality* is about treating all people in the same way, it can lead to inequality for groups that have been disadvantaged by a system that fails to take different needs into account. South African commentators have said that formal equality promotes individual justice as the foundation for a moral and ethical claim to virtue, and is reliant upon the proposition that fairness – which is the moral virtue – requires consistent or equal treatment. [8]

On the other hand, it is incontrovertible that individuals have different talents, abilities and interests. Hence, they are different socially, economically, intellectually, etc. Important to note as well is that human beings are born different and exercise their choices differently. Those who wrote the Universal Declaration of Human Rights and those who adopted its principles and incorporated same into the Constitution may, from a certain perspective, therefore, be 'very wrong'. To be poles apart or minimally different does not imply pre-eminence or lowliness: it merely means not being the same.

It is patent that there are laws in Namibia which discriminate between and sometimes against people, and such laws are regarded as constitutional. Firstly, it should be noted that Namibian legislation that attempts to make people equal will necessarily have to treat people unequally because, as was held by the Namibian High Court in *Uffindell t/a Aloe Hunting Safaris v Government of Namibia and Others*,[9] mere differentiation is permissible for persons not

5 *Beukes & Another v Botha & Others*, unreported case No. (P) I 111/2004).

6 At paragraph 3.

7 Compare Articles 10 and 12(1)(a) of the Constitution.

8 See e.g. Murray, W. 2007. "Equality and social rights: An exploration in light of the South African Constitution". *Public Law*, 2:751.

9 Unreported case number (P) A. 141/2000 (20 April 2009)

similarly situated – and this is what the law does the world over.[10] In the first decade of independence, the Namibian Supreme Court drew the distinction in the *Müller* case,[11] i.e. that *equality* was not to mean "absolute equality" but "equality between persons equally placed". The same interpretation was adopted by the same court in the second decade of independence in the *Mwilima* case.[12]

Thus, *equality before the law* may mean equality for those equally placed – this is *substantive* equality. Substantive equality would thus entail that making unequal things equal is in itself a form of inequality, and amounts to discrimination.[13] In the *Mwilima* case, substantive equality enabled the court to treat the case differently from other cases involving applications for legal aid. This option was open to the court because of the magnitude, complexity and gravity of the *Mwilima* case, which made it "exceptional and unique".[14] The court cautioned that it was absurd for the authorities to deal with such a case in the same manner as they would deal with ordinary criminal cases before it. This is because the so-called ordinary criminal cases, even though serious, only involved one or a few accused and one or a few charges; thus, they had to be handled differently. Therefore, the jurisprudence of the *Müller* case permeated the legal discourse of the second decade of Namibia's independence.

Unlike formal equality, which dictates behaviour through applying rules and procedures consistently, substantive equality as reinforced by Namibian laws seeks to sew the thread of social redistribution into the interpretation and application of the right to equality in the country. The same approach informed Namibia's Affirmative Action Policy, which is based on the United States of America's notion of *reverse discrimination*[15] and the European concept of

10 That is if there is intelligible differentia proved through the application of the rational connection test. The Rational connection test will be discussed in more detail below.

11 *Müller v President of the Republic of Namibia & Another*, 1999 NR 190 (SC).

12 *Government of the Republic of Namibia & Others v Mwilima & Others*, SA 29/01.

13 *Müller v President of the Republic of Namibia & Another*, 1999 NR 190 (SC); *Mwellie v Ministry of Works, Transport and Communications*, NmHc, 9.3.95, not reported, p 17. See also *State v Vries*, 1996 (2) SACR 639 NmHc, at 668(b)–670(a); Ramcharan, BG. 1981. "The rights of minorities". In Hewkin, L (Ed.). *The International Bill of Rights: The Covenant of Civil and Political Rights*. New York: Columbia University Press, 252.

14 *Mwilima* case, original judgment, at 67.

15 In the US, the term *reverse discrimination* was used in discussions of racial or gender quotas for collegiate admission to government-run educational institutions. Such policies have since been held to be unconstitutional in the US, while non-quota-based methods – which may include race as a factor, including some affirmative action programmes (race as a factor, ethnic minorities, and persons with physical, mental, or learning disabilities) – can be legal.

positive discrimination – and there is nothing under international law that would prevent the application of this approach.

Affirmative action is a controversial approach to limiting peoples' rights the world over. Indeed, an entire book can be written on this topic alone. However, the purpose of most affirmative action programmes throughout the world, including the one adopted by Namibia, is to promote and encourage persons who have been discriminated against in the past. This can, of course, apply to any racial group, gender or class of persons, e.g. people living with disabilities, who have been prejudiced as a result of unfair policies, practices, attitudes and obstructions in the past. This is the philosophy which informs the acceptability of reverse discrimination. In light of the above, therefore, whether the court should approach the concept of *equality* from a formal perspective or a substantive one is a question of fact.

The concept of *substantive equality* in Namibia further manifests itself through a spectrum of policies and legal mechanisms in various jurisdictions. *Reverse discrimination*,[16] *positive discrimination*[17] and *affirmative action*[18] are just a few which have been put forward to represent this concept. *Affirmative action* or *positive discriminatory action* in Namibia can be succinctly discerned from *positive collective action*, and has been defined in the following terms:[19]

> Positive action means offering targeted assistance to people, so that they can take full and equal advantage of particular opportunities. Positive discrimination means explicitly treating people more favourably on the grounds of race, sex, religion or belief, etc. by, for example, appointing someone to a job just because they are male or just because they are female, irrespective of merit.

This underlines the philosophy of Article 23 of the Constitution, which is a derogation from Article 10 and other Articles on equal treatment. The cited text explains that the interpretation of Article 10 also has to be done in the light of Article 23. Article 23(2) provides an exception to the rule contained in Article 10, by maintaining that nothing contained in Article 10 is permitted to prevent Parliament from enacting legislation that provides directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices.

In Namibia, it seems that the development, defence, and contestation of preferential affirmative action have proceeded along two paths. One has been legal and administrative by way of the courts, the legislature, and the executive

16 This term is generally used in the US, alongside the term *affirmative action*.

17 This term is generally used in Europe, particularly in the United Kingdom.

18 This is found in Article 23 of the Constitution and was most probably adopted from the US.

19 Department for Communities and Local Government. 2007. *Discrimination Law review. A framework for fairness: Proposals for a single Equality Bill for Great Britain. A consultation paper*. London: Voice UK, Respond & The Ann Craft Trust, p 61.

arms of government, which have made and applied rules requiring affirmative action under the Affirmative Action (Employment) Act.[20] The other has been the path of public debate, where the practice of preferential treatment has spawned a lot of media attention. Often enough, the two paths have failed to make adequate contact, with public quarrels not always very securely anchored in any existing legal basis or practice.[21]

From overseas, particularly in the US, where rich jurisprudence has been developed, the first case to challenge reverse discrimination there was *Regents of the University of Califonia v Bakke*.[22] In *Parents Involved in Community Schools v Seattle School District*,[23] Chief Justice John Roberts wrote that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race". However, reverse discrimination aims to remedy entrenched social inequalities whereby minority groups are unable to access the same privileges as the majority. Though it is unpopular to admit, racism still exists in the US, and minority groups are still frequently denied loans, housing, employment and opportunities for capital gain and class mobility that are more widely available to the majority.[24] Reverse discrimination seeks to redress these long-standing inequalities and open up some of the opportunities that have been denied to minority groups throughout centuries of racism.

Unless the disparity that currently exists is consciously and systematically obliterated, it can easily be overlooked and will, as a result, continue to define Namibian society for a long time to come. Namibian courts are conscious about this, as illustrated in the *Mwilima* case, where the Supreme Court stated the following:

> This [the inclusion of Article 95 in the Constitution] was done against the background and awareness of the founding fathers who drafted the Constitution that, given the high ideals expressed by the Constitution of equality, dignity and non-discrimination, inequalities which exist in this regard should also be addressed as they also affect those who were once disadvantaged by discriminatory laws and practices. However given Namibia's resources in manpower and finances it would be, and still is, impossible to provide free legal aid for each and every person who is indigent and in need of such assistance. This fact is recognized in that the State limited itself to certain defined cases and in regard to available resources. It is further clear that Article 95(h) is not limited to criminal cases only or civil cases only but is intended to include the whole spectrum of instances where the need for legal aid may exist.

20 No. 29 of 1998.

21 Regarding similar developmental patterns in the US, see Fullinwider, R. 2009. "Affirmative Action". In Zalta, Edward N (Ed.). *The Stanford Encyclopedia of Philosophy* (Winter 2009 Edition). Available at http://plato.stanford.edu/archives/win2009/entries/affirmative-action/; last accessed 7 February 2010.

22 438 US 265 (1978).

23 No. 1 [551 US 701 (2007)].

24 Lipsitz, G. 2006. *The possessive investment in whiteness*. Philadelphia: Temple University Press.

In South Africa, specifically in the case of *Brink v Kitshoff NO 1*,[25] the Constitutional Court remarked that, as in other national constitutions, section 8 of the South African Constitution – which is the equivalent of Article 10 in the Namibian Constitution – is the product of apartheid history. Perhaps more than any of the other provisions in Chapter 3, the interpretation of Article 10 should be based on the specific language of that Article as well as Namibia's own constitutional context. This invites the reinforcement of substantive equality, as we have seen above. This approach is understandable, since Namibia's history is of particular relevance to the concept of *equality*.

How to test unequal treatment: Two approaches in two decades

The basic analytical structure and interpretation to be applied to Article 10 to determine whether differential treatment is constitutional, i.e. allowed or not, has been set out in two major cases, namely the *Mwellie* case[26] and *Müller* cases.[27] These cases have heralded an important paradigm in looking at issues relating to the realisation of the right to equality in Namibia. Hence, they form the foundation of Namibian law as far as the interpretation of Article 10 is concerned. The cases borrow from international jurisprudence and expose judicial astuteness over the past two decades of Namibia's existence.

An early reminder

Just before Namibia was born, in the *Chikane* case,[28] the Appellate Division held that "a reasonable classification is one which has a rational relation to the object sought to be achieved by the statute". The court concluded from its comparative study that –[29]

> … the right to equality before the law was not absolute and that the legislature was entitled to adopt in legislation reasonable classifications that were rationally connected to the object of the Statute.

It went further to quote US cases that say if there is no objective and reasonable justification, or, put another way, if no justifiable purpose is pursued or if the unequal treatment is in no reasonable proportion to the intended purpose, then the challenged action or statute fails constitutional muster. Thus, to some extent, the legislature is entitled to limit rights or create classifications.

25 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC).
26 *Mwellie v Ministry of Works, Transport and Communication & Another*, 1995 (a) BCCR 1118 (NmH).
27 1999 NR 190 (SC).
28 *Cabinet for the Territory of South West Africa v Chikane*, 1989 (1) SA 349.
29 At page 363.

The court, therefore, applied the Rational Connection Test in interpreting the right to equality. This occurred before the Namibian Constitution came into force. This early jurisprudence, which has since become valid in Namibia and internationally, was adopted from the concept of *equality before the law* as applied in the US, India, Germany and other countries, where reasonable classifications that are rationally connected to the object of the impugned statute are permissible. The South African Ciskei Appellate Division stated that "whatever the position, each Constitution must be interpreted upon its own provisions and the values set out therein or to be gathered from it".[30]

This statement conforms with the rule of constitutional interpretation observed in the *Cultura 2000* case,[31] namely that –[32]

> … the Constitution must be broadly, liberally and purposively interpreted so as to avoid the austerity of tabulated legalism, [i.e. to avoid a strict adherence to literalism (or the literal rule)] and so as to enable it to continue to play a creative and dynamic role in the expression and achievements of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.

At the close of the second decade of Namibia's existence, specifically in the *Aloe Hunting Safaris* case,[33] the High Court adopted this approach. It stating that, if there was differentiation, and if such differentiation was without any justification, this does not detract from the aggrieved person's right to equal treatment under the law. In other words, where there was a rational connection between the differentiation and the reason for it, such differentiation was intelligible and the right to equality was not violated. In the *Aloe Hunting Safaris* case, Maritz J emphasised that, for differentiation to be constitutionally impermissible under Article 10(1), it has to amount to discrimination in the pejorative sense by being "unfair" or "unreasonable" in the circumstances. The court said that –[34]

> [i]t [differentiation] is not measured by a mathematical formula to establish whether there had been identity of treatment, but is assessed with reference to a legal model based on the values of reasonableness and fairness: It requires that the differentiation must both be intelligible and rationally connected to the legitimate governmental objective advanced for its validation.

30 See the explanations in *Chairman, Ciskei Council of State v Qokose* 1994 (2) BCLR 1.

31 *Government of the Republic of Namibia v Cultura 2000*, 1993 NR 328 (at 340B/C–C/D).

32 This important principle was echoed both in *S v Acheson* 1991 NR 1 (at 10A–B) and *S v Van Wyk* 1993 NR 426 (at 456E–F).

33 *Uffindell t/a Aloe Hunting Safaris v Government of Namibia and Others*. Unreported case number (P) A. 141/2000 (20 April 2009).

34 Cf. *Müller v President of the Republic of Namibia*, at 200A–B; *Harksen v Lane NO & Others*, 1998 (1) SA 300 (CC), at paras 45 and 54; *Van der Merwe v Road Accident Fund* (Women's Legal Centre Trust as Amicus Curiae), 2006 (4) SA 230 (CC), at para. 25.

According to the High Court, as decided in the second decade of Namibia's independence, the burden to prove that the differentiation is not intelligible or rationally connected to a legitimate governmental objective is borne by the person who challenges the constitutionality thereof.

Is it unfair? Please don't discriminate!

General exposition and comment

In the *Mwellie* case, the Supreme Court of Namibia held that cases concerning equality before the law are to be restricted to classifications which involve the subjects set out in Article 10(2) of the Constitution, namely sex, race, colour, ethnic group, religion, creed, or social or economic status.[35] Furthermore, Cassidy[36] contends that a differentiation based on one of the enumerated grounds in Article 10(2) will only violate that sub-Article if it constitutes "unfair discrimination", which is determined primarily by considering the effects of the discrimination on the victim(s).

In the *Müller* case,[37] the applicant challenged section 9(1) of the Aliens Act,[38] which lays out the procedures and formalities that a man has to comply with if he wants to use his wife's surname. In terms of the section, a woman is not obliged to comply with any formalities, but may elect to use her husband's surname. The applicant argued that section 9(1) was unconstitutional and should be invalidated as it contravened Article 10(2) of the Constitution. The question before the court was whether this differential treatment in allowing a woman to assume her spouse's surname on marriage without formalities while not permitting a husband to do the same amounted to an infringement of any constitutional guarantee, and, in particular, that contained in Article 10.

The court stated that all the grounds mentioned in Article 10(2) were historically singled out for discriminatory practices exclusively based on stereotypical application of presumed group or personal characteristics. Therefore, where a differentiation amounted to discrimination based on one of those grounds, the court held that a finding of unconstitutionality had to follow. The court also stated that, in interpreting Article 10(2), the courts were required to apply the Unfair Discrimination Test, which entails asking the following sequential questions:[39]

35 See the *Mwellie* case at 1136H–I per Strydom JP (as he then was).

36 Cassidy, EK. 2000. "Article 10 of the Namibian Constitution: A look at the first ten years of the interpretation of the rights to equality and non-discrimination and predictions of the future". In Hinz, MO, SK Amoo & D van Wyk (Eds). The *Constitution at work*: *10 years of Namibian nationhood*. Pretoria: University of South Africa, p 169.

37 *Müller v President of the Republic of Namibia*, at 200A–B.

38 No. 1 of 1937.

39 At 665A–C.

- Whether there exists a differentiation between people or categories of people
- Whether such differentiation is based on one of the enumerated grounds set out in the sub-article
- Whether such differentiation amounts to discrimination against such people or categories or people, and
- Once it is determined that the differentiation amounts to discrimination, it is unconstitutional unless it is covered by the provisions of Article 23 of the Constitution.

In short, one can say that if the legislation treats people differently on one of the enumerated grounds referred to in Article 10(2) and this difference in treatment is discriminatory, then the legislation will constitute a violation of Article 10(2) unless it is embraced as a way of achieving the affirmative action imperatives of Article 23.

Moreover, Strydom CJ pointed out in the *Müller* case that –[40]

> … inherent in the meaning of the word "discriminate" is an element of unjust or unfair treatment and that although the Namibian Constitution does not refer to unfair discrimination, within its context, that is the meaning that should be given to it.

Therefore, the explained entails that the words "discrimination against" in Article 10(2) were intended to refer to the pejorative rather than the benign meaning of the word *discriminate*. This assumption is said to arise from the fact that the grounds mentioned in Article 10(2) are all grounds on which discrimination in the past was practised and which benefited some groups of individuals at the expense of others. Therefore, in regard to Article 10 (2), it is fair to comment that the drafters were aware of the history of the Namibian people and realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. Reverse discrimination is, thus, allowed in Namibia.[41] The Supreme Court had alluded to this four years after Independence, in the *Kauesa* case,[42] where it held that Article 10(2) prohibits various types of discrimination and that it is designed to protect all persons against discrimination by any persons or entities as well as by the state.

South African courts have cautioned that –[43]

> … courts must not only look at the disadvantaged group but also the nature of the power causing the discrimination and the interests which have been effected.

40 At 665F–G.

41 See also *Brink v Kitshoff NO*, 1996 (6) BCLR 775.

42 *Kauesa v Ministry of Home Affairs*, 1994 NR 102.

43 Per Goldstone J in *President of the Republic of South Africa & Another v Hugo* 1997 (6) BCLR 708, at paragraph 43.

The same stance was taken by Strydom CJ in the *Müller* case, where he noted that the Unfair Discrimination Test focused primarily on the 'victim' of the discrimination and the impact on him or her. Strydom held the following:[44]

> [I]n determining the effect of such impact, consideration should be given to relevant factors such as (1) the person's position in society, (2) whether he or she was disadvantaged by racial discrimination in the past, (3) whether the discrimination is based on a specified ground or not, (4) the power and purpose sought to be achieved by discrimination, and (5) whether the discrimination affected the person's dignity.

Strydom CJ noted that the effect of the differentiation on the interests and rights of the appellant had to be seen against the background that the Aliens Act gave effect to a tradition of long standing in the Namibian community, namely that the wife normally assumes the surname of her husband. The purpose of the section, he said, was not to impair the dignity of males individually or as a group or to disadvantage them, but to establish legal security and certainty, where Parliament had to regulate the change of a person's identity for various purposes, including those for security, insurance, licences, and marriage. The application was dismissed as the Act was said to have been enacted in the interests of the state and the public at large.

However, Strydom CJ emphasised that the guidelines laid down as well as any other factors that might be relevant to a particular situation were useful in the determination of discrimination in Article 10(2), but that not every differentiation based on the enumerated grounds would be unconstitutional. However, how can one detect the unconstitutionality of a specific differentiation based on the enumerated grounds? Some writers have opined that sub-Articles (1) and (2) of Article 10 should be read together and not in isolation in order for a person to bring about an equality claim to prove discrimination in terms of Article 10(2), because although discrimination is an important source of inequality, it is not the only one.[45]

This shows an interpretation which is inclined towards substantive equality in that the approach in the *Müller* case goes beyond the notion of *equal treatment* and takes into account the differences in the needs that exist between groups and individuals. Thus, *substantive equality* is concerned with achieving equitable outcomes. It is fair to say, therefore, that Article 10(1) establishes a substantive right to equality, offering protection against inequality in all its manifestations. It not only provides a broader form of protection against discrimination, but also offers protection against arbitrary treatment because it prevents the state from drawing irrational distinctions between people in conferring benefits or in applying punishment. In the *Müller* case, the court

44 At 202 F–H.

45 The Association of Law Societies of SA & The Law Society of Namibia. 2007. *The practice of constitutional law: Human rights, and practical workings of the organs of the State and public bodies*. Windhoek: Justice Training Centre, p 48.

also applied a purposive approach to the interpretation of Article 10. The advantage of the purposive approach to the equality provision is that it helps us identify those differences which require differential treatment in order to achieve actual, substantive equality.[46]

At the close of the first decade of independence, Article 10 was also applied in the Namibian courts to determine the legality of lesbian relationships. In the *Frank* case,[47] Levy AJ concluded that a lesbian relationship was a "universal relationship" that should be treated on an equal basis with marriages sanctioned by statute law in terms of Article 10. A year later, at the start of the second decade, in *Myburgh v Commercial Bank of Namibia*,[48] Strydom CJ followed the guidelines laid down in the *Müller* case[49] in determining unfair discrimination. He held that women could claim to have been part of a formerly disadvantaged group, and also that the disabilities brought about by common law rules relating to women in a marriage in community of property, which renders a wife subject to the marital powers of her husband, were discriminatory and offended against Article 10(2) of the Constitution for they discriminated on the ground of sex.

At the end of the second decade of independence, in the *Uffindell* case,[50] the applicants challenged an administrative decision. They submitted that the decision had been taken in violation of their fundamental right to equality, to fair administrative justice, and to freely practise a profession or occupation and carry on a business. In applying the Rational Connection Test, the court said the following:[51]

> I agree with the distinction drawn by counsel, but it is only one of consequence if a rational connection is shown to exist between the challenged administrative action and the constitutional rights and legal interests of the applicant allegedly affected by it which, in a constitutional setting, must be sufficiently direct and substantial to confer upon the applicant the legal right to challenge it under Article 25(2) of the Constitution as an "aggrieved person".

In the context of this case, it should be noted that, before constitutional entrenchment of the right to equality, the South West African and South African courts had held that –[52]

46 See *Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517, at paragraphs 16 and 22.

47 *Frank & Another v Chairperson of the Immigration Selection Board*, 1999 NR 257 (at 318J–319A).

48 2000 NR 255 (at 266D).

49 At 666.

50 *Arthur Frederick Uffindell t/a Aloe Hunting Safaris v Government of Namibia & 4 Others*, unreported case No. (P) A 141/2000.

51 At paragraph 11.

52 (ibid.), referring to *Lister v Incorporated Law Society*, *Natal*, 1969 (1) 431 (N), at 434, and *Sekretaris van Binnelandse Inkomste v Lourens Erasmus (Edms) Bpk*, 1966 (4) SA 434 (A), at 443.

> … a law should not be construed to achieve apparently purposeless, illogical and unfair discrimination or differentiation between persons who might fall within its ambit.

Referring to the "rational connection", "reasonable classification" and "intelligible differentia" criteria developed in local and international law around the principle of constitutionally entrenched equality,[53] in the *Uffindell* case, the court held that the second respondent's decision to sell a concession to the fourth respondent by private treaty differentiated between the latter and other professional hunters without there being a rational connection to a legitimate governmental purpose for the differentiation. The court accepted the argument that "not all forms of differentiation violate the constitutional demand for equality",[54] and are permissible if persons are not similarly situated.[55]

The philosophy and internationality of the test

The above cases have shown that the purpose of the prohibition of unfair discrimination is to achieve a society in which all human beings would be accorded equal dignity and respect regardless of their membership of any particular group, and that "to insist upon identical treatment in all circumstances prior to the achievement of that goal would frustrate the endeavour to reach it".[56] Therefore, *unfair discrimination* should be interpreted within the historical context in which the prohibition was formulated. This was alluded to in the early years of Namibia's independence in the *Cultura 2000* case,[57] where it was held that a purposive interpretation was best suited to constitutional provisions for it required that a substantive meaning be given to each sub-Article.

The *Müller* and *Mwellie* cases decided in the last two decades illustrate the centrality of the anti-subjugation principle to equality and non-discrimination in Namibia. However, this is judiciary wisdom; what about social realism? The social reality shows that pervasive societal discrimination continued in various fields of public life, such as employment, education, health care and housing, resulting in charges and countercharges of racism and the marginalisation of certain minority groups. Practically speaking, however, the achievement of equality will not be easy. This was noted by the South African Constitutional

53 Discussed in *Harksen v Lane NO & Others*, 1998 (1) SA 300 (CC); Sieghart, P. 1984. *The international law of human rights*. Oxford: Oxford University Press, p 262.

54 With reference to *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC), at paragraphs [17] and [23]–[25]; *Harksen v Lane NO & Others,* at paragraphs [45]–[46], and *Jooste v Score Supermarkets Trading (Pty) Ltd*, 1999 (2) SA 1 (CC).

55 Citing *Mwellie v Ministry of Works, Transport and Communication & Another*, 1995 (9) BCLR 1118 (NmH) in support.

56 *President of the Republic of South Africa v Hugo*, 1997 (4) SA 1, at paragraph 41.

57 *Government of the Republic of Namibia v Cultura 2000*, 1993 NR 328 (at 340B/C–C/D).

Court in the *Hugo* case,[58] where Goldstone J held as follows:

> [A]t the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that the goal of the constitution should not be forgotten or overlooked.

Article 10(2) supplements (1) by providing mechanisms whereby specific denials of equality arising from discrimination may be challenged. Therefore if a person seeks to rely on Article 10(1), s/he still has to prove an element of arbitrariness or irrational differentiation before the person or institution relying on the validity of the legislation can be called upon to justify it in terms of Article 22 or 23.

In the US, the Unfair Discrimination Test compares the treatment of the rejecting class as a whole with the treatment provided to other classes. Thus, in respect of US courts at least, the questions of within-class treatment are irrelevant to this analysis. US courts seem to combine the Unfair Discrimination Test and the Rational Connection Test. In 2000, in *Re Chacon*,[59] the United States Court of Appeals for the Fifth Circuit explained that "[d]ifferences in treatment are not discriminatory if they rationally further a legitimate interest" of the other party, and do not 'disproportionately benefit' the aggrieved party. This principle has been applied mainly in bankruptcy cases in the US. In *Re Chacon*, after recognising the split among bankruptcy courts regarding whether the amended clause of the US laws on bankruptcy should be interpreted to exempt co-signed consumer debt from the Unfair Discrimination Test, the Court opined, in part, as follows:[60]

> The argument for applying the unfair discrimination test even to a co[-]signed consumer debt is that the word "differently" must be given a meaning different from unfair discrimination, and reading the however clause as an exception would not do so. See, e.g., [In re Easley, 72 BR 948, 956 (Bankr. MD Tenn. 1987)]. This rationale is wholly unconvincing. In its desire not to give any two distinct words or phrases the same meaning, it reads out the however clause. If a co[-]signed debt could be prioritized only if it does not discriminate, then the however clause serves no purpose whatsoever.

Moreover, to try to reframe this as an implicit discrimination issue is itself wrong because, in doing so, one shrinks the individual down into the restrictive little box that marks their group affiliation. If a short woman is prevented from joining the army, this is unfortunate because she is valuable as a human being. When feminists turn it into a gender issue, they instead say she is valuable insofar

58 *President of the Republic of South Africa v Hugo*, 1997 (4) SA 1.
59 202 F.3d 735, (5th Cir. 1999).
60 (ibid.).

as she is a woman and height does not matter. Feminists often ignore the real individual person, and see her merely as a token of a type which has to be proportionally represented in each economic or public sector. But this is denied by sexists, who see the individual female solely as a member of some group.

When it comes to discrimination on the basis of sex, it should be noted that *sexism* occurs when one fails to see the individual beyond the gender they belong to. When feminists go looking for implicit discrimination, they, too, cannot see past the gender of the individuals. They fertilise this one characteristic to the exclusion of all else that makes up the community.

Under the Namibian Constitution, discrimination on the basis of sex is prohibited not only in Article 10(2), but also in Article 95(a), which deals with the principles of state policy. Article 95(a) expresses the government's commitment and duty to promote and maintain the welfare of the people through the introduction of policies aimed at, inter alia, "the enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society". In *S v Damaseb & Another*,[61] the court opined as follows in this regard:

> [T]he cautionary rule in sexual cases could be seen as discriminating against women because women are the overwhelming majority of complainants in sexual cases and held in obiter that the rule is probably also contrary to Article 10 of the Constitution, which provides for equality of all people before the law, regardless of sex.

Regarding discrimination based on race, Naldi62 acknowledges that racial discrimination is not only a criminal matter as per the Racial Discrimination Prohibition Act,63 but that it also offends against the Constitution. The purpose of the Act is to render criminally punishable, in accordance with Article 23, certain acts and practices of racial discrimination and apartheid in relation to, inter alia, public amenities, the provision of goods and services, educational and medical institutions, employment, religious services, and the incitement of racial disharmony and victimisation.

There is a tendency to interpret *racial imbalance* as being equivalent to *racial discrimination*, especially in the context of corporate employment and the school enrolment system in the country. It should be noted that, in the context of the Namibian Constitution, *racial imbalance* is not segregation; neither can *racial imbalance* be interpreted to mean "racial discrimination" unless such imbalance is a calculated means of excluding members of another

61 1991 NR 371 (at 375C–D).

62 Naldi, G. 1995. *Constitutional rights in Namibia. A comparative analysis with international human rights*. Kenwyn: Juta & Co. Ltd, p 58.

63 No. 26 of 1991.

race. Although presently observed racial imbalances might result from past de jure segregation, racial imbalance can also result from any number of innocent private decisions, such as the ethnic composition of the community surrounding a school. Under Namibian laws, because racial imbalance is not inevitably linked to unconstitutional segregation, it is not unconstitutional in and of itself unless other factors are proved.

The above comments demonstrate how deep and irrevocable the constitutional and/or legal commitment is to, inter alia, equality before the law, non-discrimination, and the proscription and eradication of the practices of discrimination on the basis of sex and race, for example, and the consequences of practices of discrimination on the basis of sex may be regarded as being fundamental aspects of public policy, as Article 95 shows.

Rationally connected? – Yes discriminate!

General exposition and comment

In the *Mwellie* case, the plaintiff was employed by the Ministry of Works, Transport and Communication, but was dismissed by the Acting Postmaster-General. The plaintiff alleged that such a dismissal was unlawful and claimed reinstatement in his previous position. The defendant raised a special plea based on section 30(1) of the Public Service Act,[64] which provides as follows:

> No legal proceedings of whatever nature shall be brought in respect of anything done or omitted under this act: unless the proceedings are brought before the expiry of a period of 12 months after the date upon which the claimant had knowledge, or after the date on which the claimant might reasonably have been expected to have knowledge of that which is alleged to have been done or omitted, whichever is the earlier date.

The plaintiff contended that section 30(1) was unconstitutional for being in conflict with Article 10(1) of the Namibian Constitution that guarantees that all persons shall be equal before the law. In interpreting Article 10(1) in terms of the Act, the court adopted the approach that –[65]

> … a questioned or particular legislation would be unconstitutional if it allows for differentiation between people or categories of people and that differentiation is not based on a rational connection to a legitimate purpose.

In terms of Article 10(1), all people are to be prima facie seen and treated as equal, and a difference in treatment is only possible where specific legislation provides for and justifies the difference in treatment in relation to a certain group of persons. The appellant took a formal equality approach to the interpretation of this Article, arguing that Article 10(1) implies that everybody is to be treated

64 No. 2 of 1980.

65 At 1132E–H.

and seen as being on equal footing, and that no one is above the law but all are subject to the law. The appellant argued that, if a statute differentiated between people or classes of people, it could only be constitutionally valid if there was a constitutionally acceptable reason for such statute to be constitutional. In the appellant's view, there was no constitutionally acceptable reason for the differentiation made by section 30(1) of the Public Service Act.

The court assessed the arguments from both parties and held as follows:

> [T]he equal protection clause guarantees that similar individuals will be dealt with in a similar manner by the government. It however does not reject the government's ability to classify persons or "draw lines" in the creation and application of laws, but it does guarantee that those classifications will not be based upon impermissible criteria arbitrarily used to burden a group of individuals.

In addition, if the government's classification relates to a proper governmental purpose, then the classification will be upheld. Such a classification does not violate the guarantee when it distinguishes persons as *dissimilar* upon some permissible basis in order to advance the legitimate interests of society.[66] In the *Mwellie* case, the court concluded that –[67]

> … the constitutional right of equality before the law is not absolute but that its meaning and content permits the Government to make statutes in which reasonable classifications that are rationally connected to a legitimate object are permissible and that the only limitation placed on Article 10 is that contained in Article 23 [dealing with affirmative action].

In other words, according to the court, under Article 10(1), legislation may treat persons differently if there is a sensible or rational reason for the difference in treatment. However, as the court noted, the legislation also needs to have been enacted for a legitimate purpose. That is, there has to be reasonable justification why specific legislation will provide for the preferential treatment of certain persons.

Nevertheless, the court noted that, in applying the Rational Connection Test to Article 10(1) in order to give content to the words *equal before the law*, courts needed to give due recognition to the generally accepted principle found in *Prinsloo v Van der Linde & Another*,[68] namely that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. However, it is impossible to do so without classifications which treat people differently and which impact on people differently. Moreover, in regard to such differentiation, the constitutional state is expected to act rationally and

66 At 1127.
67 At 1138E–H.
68 1997 (3) SA 1012, at 1024, paragraph 24.

not to regulate in an arbitrary manner or manifest naked preferences that serve no legitimate governmental purpose that would be inconsistent with the rule of law and such state's fundamental premises.

Burden of proof under the Rational Connection Test

The *Mwellie* case was decided in the first decade of Namibia's existence. The High Court referred with approval to an extract from *Lindsley v Natural Carbolic Gas*,[69] where it was stated that the "[o]ne who assails a classification must carry the burden of showing that it does not rest upon any reasonable basis". In this case, the High Court held that the onus was on the plaintiff who had challenged the constitutionality of a statutory limitation for the institution of claims. The court continued as follows: [70]

> If therefore, in the present case, the onus is on the plaintiff to prove the unconstitutionality of section 30(1) on the basis that it infringes the plaintiff's right of equality before the law, it will, on the findings made by me, have to show that the classification provided for in the section is not reasonable, or is not rationally connected to a legitimate object or to show that the time of prescription laid down in the section was not reasonable. Until one or all of these factors are proved it cannot be said that there was an infringement of the plaintiff's right of equality before the law. … [T]the constitutional right of equality before the law is not absolute but … its meaning and content permit the Government to make statutes in which reasonable classifications which are rationally connected to a legitimate object, are permissible.

The philosophy and internationality of the test

The Rational Connection Test shows that discrimination on the basis of group membership might under certain conditions be rational behaviour on the part of economic agents in the employment sector, for example, and might lead to efficient outcomes. In Namibia, therefore, if the law creates stereotypes, for example, and such stereotypes are rationally connected to a legitimate objective and are 'sufficiently' accurate in how that objective is to be achieved, it will pass the test of Article 10. Therefore, the means used need to be carefully designed to achieve the objective. They cannot be arbitrary, unfair, or based on irrational considerations – otherwise they will not pass constitutional muster.

The approach employed by Namibian courts is supported by international jurisprudence. In Canada, in the case of *R v Big Drug Mart Ltd*,[71] Dickson J asserted that limitations on rights are to be motivated by an objective of sufficient importance. Moreover, the limitation has to be as minimal as possible. In the *Oakes* case,[72] Dickson elaborated on the standard when one

69 Co., 220 US 61, 78-79 (1911).

70 *Mwellie*, 1995 (9) BCLR 1118 (Nm), at 1138E–H.

71 [1985] 1 SCR 295.

72 *R* v *Oakes* [1986] 1 SCR 103.

David Oakes was accused of selling narcotics. Dickson, for a unanimous court, found that David Oakes' rights had been violated because he had been presumed guilty. This violation was not justified under the second step of the two-step process, however, namely that –

- there had to be a pressing and substantial objective
- the means to that objective had to be proportional to such objective
- the means had to be rationally connected to the objective
- only a minimal impairment of rights was permitted, and
- proportionality had to obtain between the infringement and the objective.

This approach is not new to Namibian courts. Indeed, it was applied by the Appellate Division in the *Chikane* case decided two years before Independence, which has been expounded on above as an 'early reminder' of how the concept of equality has been interpreted in Namibia. Thus, the Rational Connection Test is founded solidly on factual analysis. Hence, strict adherence to the requirements of the Rational Connection Test is not always practised by the courts in Namibia: the determination whether there is a rational connection is a case-to-case analysis. A degree of overlap is to be expected as there are some factors, such as vagueness, which are to be considered in laws or provisions of statutes which are challenged in courts. If the legislation fails any of the above requirements of the Rational Connection Test, then the piece of legislation is unconstitutional. Otherwise the impugned law passes the Oakes test and remains valid. It has been observed that the steps of the Rational Connection Test resemble a Proportionality Test found in *Central Hudson Gas and Electric Corporation v Public service Commission of New York*,[73] and may have been its source.

The position of the court in the *Mwellie* case was not new to Namibian courts. Indeed, it was highlighted a year after Independence in *Ex parte: In re Corporal punishment by organs of the State*,[74] where Mahomed AJA (as then he was) held that the system of corporal punishment in Namibia, which discriminated between males and females, constituted a violation of Article 10 as the purported discrimination was not rationally related to the object sought to be achieved by the relevant statutory provisions and regulations. Furthermore, in *Council of the Municipality of Windhoek v Petersen & Others*,[75] the High Court submitted that economic status in Article 10(2) related to pecuniary or financial status or position, and was primarily concerned with protecting the impoverished against discrimination.

Although sub-Article 10(1) is couched in peremptory terms and sub-Article 10(2) is directory, it need to be made explicit here that, if the Rational Connection Test is to have more impact in Namibian jurisprudence, then sub-Article10(1)

73 447 US 557 (1980).
74 1991 NR 178, at 196I.
75 1998 NR 8.

should be read together with sub-Article 10(2). This means that the courts should apply a pluralistic approach to the question of reasonable limits under the Constitution. Such an approach envisages a range of differing standards for judging limits on constitutional rights. The constitutionally allowed limitation standard in Articles 21 and 23 of the Constitution should, therefore, be treated as an integral part of Article 10 in its entirety. When viewed in this context, the abstract terms of the standard gain a concrete meaning which is adapted to the specific subject matter in any case the court might be analysing. Nevertheless, it is important to note that integrating sub-Article 10(1) into sub-Article 10(2) in the light of the limitations in Articles 21 and 23 does not collapse the enquiry into the one-stage analysis outlined in the *Oakes* case.

A monistic approach is not recommended under Article 10. Under the latter approach, the court either applies a uniform standard that does not reflect the specific constitutional right, or it concentrates only on one sub-Article without looking at the issue holistically. By contrast, under the pluralistic approach, the test whether an Act or section thereof is unconstitutional or not is part and parcel of each particular constitutional guarantee, and such test employs detailed criteria that reflect its distinctive nature, purpose, and genesis, as well as the specific subject matter of the case under consideration. Slattery[76] notes that the essential difference between the pluralistic and monistic approaches does not lie in the number of analytical stages or the location of the burden of proof; rather, it lies in the character of the Justificatory Test, i.e. the existence of the factors or facts which will convince the court as to why a differentiation exists. Justice in a liberal society can be enhanced through this pluralistic or holistic approach to interpreting constitutional limitations to the right to equality.

A differentiation on any other grounds will violate Article 10(1) if it is unreasonable and not rationally connected to a legitimate object. It may also, in circumstances that have not yet been fully explained in jurisprudential works, especially those on Namibian law, which laws might also be in violation of the right to dignity enshrined in Article 8. Moreover, Naldi[77] is of the view that Article 10(1) reflects in part the rule of law in that every person is equally subject to the law of the land as administered by the courts. However, this is where Naldi stops: he does not go into any appreciable detail about the plurality of the Constitution and the specifics of sub-Articles (1) and (2) of Article 10.

If we go back to the basics, however, one needs to establish whether the legislative means of achieving the (legitimate) objective impair the constitutionally protected right to equality as minimally as possible. It is rather

76 Slattery, B. 2009. "The pluralism of the Charter: Revisiting the Oakes Test". In Tremblay, Luc B & Gregoire CN Webber (Eds). *The limitation of Charter rights: Critical essays on* R v Oakes. Montreal: Editions Themis, pp 13–35.

77 Naldi (1995:53).

difficult to ascertain with certainty whether any other modes exist in respect of furthering Parliament's objective that infringement of the right to equality is minimised. Legislation cannot be overbroad or unduly vague, as was held in the *Kauesa*[78] *and Kessel* cases, respectively.[79]

Typically, an outright ban of the prohibited grounds on which there can be discrimination will be difficult to support, minimally impairing the rights which one claims to have been infringed. However, the means to ban do not necessarily have to be the most minimally intrusive. Indeed, this is one of the steps of the Rational Connection Test that has been modified. In *Oakes*, the step was phrased to require the limitation as being "as little as possible". In Canada's *R v Edwards Books and Art*,[80] this was changed to "as little as is reasonably possible", thus allowing for more realistic expectations for the populace in a given country, and indeed the same can hold for Namibia. In consequence, the enquiry focuses on the balance of alternatives. In Canada, specifically in *Ford v Quebec*,[81] it was found that Quebec laws requiring the exclusive use of French on public signs limited free speech. The court noted that, while the law had a sufficient objective of protecting the French language, the court held that such law was nevertheless unconstitutional because the legislature could have accepted a more benign alternative, such as signs including smaller English words in addition to larger French ones.

One could argue that to treat people as equal who are in fact not so may lead to the abrogation instead of the protection of rights. Strydom JP (as then he was), in the *Mwellie* case, opined that –[82]

> … although Article 10(1) is not absolute, it nevertheless permits reasonable classifications which are rationally connected to a legitimate object and that the content of the right to equal protection takes cognisance of 'intelligible differentia' and allows provisions thereof.

Section 30(1) of the Public Service Act of Namibia was seen as relegating employees of the state to a class of their own. The court considered it relevant to determine whether that classification accorded a plaintiff worse treatment than others in a similar position. As to the question of whether, for the purpose of the Act, the distinction drawn between employees of the state and others not so classified was a reasonable one, and whether there was a rational connection to a legitimate object, Strydom was satisfied that "the classification

78 *Kauesa v Ministry of Home Affairs*, 1994 NR 102.

79 This was a consolidation of the cases of *Gunter Kessel v Ministry of Lands and Resettlement*, Case No.'s (P) A 27/2006 and 266/2006; *Heimaterde CC v Ministry of Lands and Resettlement*, Case No. (P) A 269/2005; and *Martin Joseph Riedmaier v Ministry of Lands and Resettlement*, Case No. (P) A 267/2005.

80 *R v Edwards Books and Art Ltd* [1986] 2 SCR 713.

81 *Ford v Quebec* (Attorney General) [1988] 2 SCR 712.

82 At 1132E–F.

contained in Section 30(1) is rationally connected to a legitimate object and that the period of twelve months was reasonable".[83] Thus, the differentiation which the section effects does not infringe upon Article 10(1) because of its constitutionality.

Namibian courts have been rather slow in developing the right to equality. This slow approach to the interpretation of the Article is rather welcome because – as was noted in South Africa, which shares the same political history as Namibia, and specifically in the case of *Prinsloo v Van der Linde & Another* [84] – courts of law should not lay down sweeping interpretations. Rather, they should allow the equality doctrine to develop gradually because it is an area where issues should be dealt with incrementally and on a case-by-case basis with special emphasis on the actual context in which each problem arises. Moreover, Gubbay JA, in *Stambolie v Commissioner of Police*,[85] after a review of relevant case law in regard to the Constitutions of India and America, opined that statutes of limitations are necessary in order for a state to be wholly governable. In this case, the court said the following:[86]

> [S]tatutes of limitation … are founded on grounds of public policy and give effect to two maxisms: first, interest *republicae ut sit firis litium* – the interest of the state requires that there should be a limit to litigation. Second, *vigilantibus non dormientibus jura subveniunt* – the laws aid the vigilantes and not those who slumber. They exist to prevent oppression, to protect individuals from having to defend themselves against claims when basic facts have become obscured with the passage of time.

Considering Namibian and South African history, the social philosophy underlying this conception of *equality* is an egalitarian understanding of social justice and of the good life, wherein the moral worth of equality and non-discrimination is centred on its ability to provide equal outcomes for individuals – or, at the very least, a satisfactory outcome for the most disadvantaged groups. In this sense, equality of outcomes submits to a socialist agenda, albeit one which has limits imposed on it by the central tenets of a liberal democracy.[87] The socialist agenda comes as no surprise since most of the public leaders and policy formulators in Namibia were based and militarily trained in socialist countries during the Cold War before Namibia's independence.

Consequently, the application of this conception of *equality* illuminated in the *Mwellie* case is subject to stringent scrutiny from classical liberalism, which maintains that the distributive justice theory is abhorrent to liberal democratic thought for it imposes too high a burden on the state and individual autonomy. Likewise, one perceived danger of this approach, which Namibian courts seem

83 (ibid.).
84 (ibid.).
85 1990 (2) SA 369.
86 (ibid.:375A–B).
87 For example, the prevention of harm to the individual; see Mill (1859/[1980]:13).

to be more inclined to, is that it places too little emphasis on the importance of accommodating diversity by adapting existing structures.[88] In this regard, some philosophers and theorists believe that the focus on certain disadvantaged social groups under this conception of *equality* misdirects the wider debate away from more serious and arbitrary distinctions that lead to disadvantage. For example, Nagel argues that the greatest source of injustice is not sexual or racial discrimination but intellectual discrimination, where intellectual merit is regarded as a non-arbitrary moral virtue indicative of worth: [89]

> One may be inclined to adopt admission quotas, for example, proportional to the representation of a given group in the population, because one senses the injustice of differential rewards per se … The trouble with this solution is that it does not locate the injustice accurately, but merely tries to correct the racial or sexual skewed economic distribution which is one of its more conspicuous symptoms … In most societies reward is a function of demand, and many of the human characteristics in most demands result largely from gifts or talents. The greatest injustice in this society, I believe, is neither racial or sexual but intellectual.

This point of conjecture reveals the quandary of whether Namibia can or will ever view previously advantaged groups as being capable per se, or, more challengingly, as being as capable as the growing number of non-Namibians – the so-called 'foreigners' – in the labour market, for example. This is coupled by the question whether Namibia or at least its national leaders can expect to successfully incorporate individuals whose values and traditions are different from those of the majority, whether in terms of colour, nationality or ethnic origin. The answer remains unknown: it is a question of fact to be answered in 2030, perhaps, when the national long-term development plan, *Vision 2030*, is proved to have been achieved or not. On a constitutional note and on more theoretical lines, the answer may be in the affirmative: human rights and equality discourses have consistently and organically incorporated issues relating to diversity and cultural appreciation into their rubric. Such issues are clearly inherent to the human rights mainstreaming agenda. This theory has to be put into practice, and rhetoric should accompany practical legal approaches and reforms.

Article 10 and access to justice

Opportunity to sue

In the middle of the second decade, a constitutional challenge was brought to the High Court wherein the applicant questioned the constitutionality of

88 See Parekh, B. 1992. "A case for positive discrimination". In Hepple, B & E Szyszczak (Eds). *Discrimination: The limits of the law.* London: Mansell Publishing Limited, p 261–280.

89 Nagel, Thomas. 1973. "Equal treatment and compensatory discrimination". *Philosophy and Public Affairs*, 2(4):356–357.

section 39(1) of the Police Act.[90] This was the case of *Minister of Home Affairs and Immigration v Majiet & Others*.[91] Section 39 provides that any civil proceedings against the state or any person in respect of anything done in pursuance of the Police Act have to be instituted within 12 months after the cause of action arose, and notice in writing of such proceedings and the cause of action thereof has to be given to the defendant not less than one month before they are instituted.

The applicant argued that the section was unconstitutional because it produces an unreasonable rigidity which has the effect of either denying applicants their right of access to court, or, because of its failure to provide for safeguards employed in other comparable statutory schemes, the section treats applicants unequally. The High Court came to the conclusion that section 39(1) infringed Articles 10(1) and 12(1)(a) of the Namibian Constitution. The High Court also noted the application of the Rational Connection Test, but was more attracted to interpreting Article 10 in the context of the socio-economic conditions in which Namibians live. After careful consideration of the purpose of enacting for a shorter prescription period under section 39(1), the High Court accepted that a shorter prescription period, which the Act provides for, constituted a legitimate differentiation that did not go beyond constitutional propriety. To that end the court stated the following:

> For the reasons set out in this judgment I have come to the conclusion that, all things being equal, the twelve month limitation period and the requirement of prior notice before commencement of proceedings contained in section 39(1) of the Police Act are not per se unconstitutional. They are connected to a legitimate governmental purpose of regulating claims against the State in a way that promotes speed, prompt investigation of surrounding circumstances, and settlement, if justified.

Despite this holding, the Judge-President who delivered the judgment engaged in a volte-face when he looked at section 39(1) as a composite. He had a socio-economic approach to the interpretation of Article 12. Thus, the court opined that allowing section 39(1) of the Police Act to survive in its present form carried the risk that poverty and ignorance – which are the lot of the vast majority of Namibians because of past discriminatory policies – would only serve to perpetuate that condition.

The High Court reasoned that, instead of enabling as many people as possible to exercise the right to access to court, which had been "denied to them for so long,"[92] the law would achieve the opposite result. According to the court, therefore, a proper balance had to be struck between realising the legitimate governmental purpose sought to be achieved by special limitation clauses, on

90 No. 19 of 1990.

91 Unreported case No. SA 9/2005.

92 See *Minister of Home Affairs and Immigration v Majiet & Others*, Unreported case No. SA 9/2005.

the one hand, and the imperative of guaranteeing the right of access to court on the other. The High Court said that not only did section 39(1) fail in that respect, but it also weighed too heavily against the interests of the individual to be able to have justiciable disputes adjudicated upon by a competent court. Thus, the section was not reasonably connected to a legitimate governmental objective.

On appeal, the Supreme Court reversed this judgment. In holding that section 39(1) was not unconstitutional, the Supreme Court applied the Rational Connection Test. It said that –

> … in order to violate the constitutional rights and freedoms encapsulated in Articles 10(1) and 12(1)(a), namely the right of equality before the law and of access to the courts, respectively, a statutory provision has to purport to ensure that every reasonable avenue to the enjoyment of those rights is closed.

In the Supreme Court's view, section 39 did not do that because it provided for a waiver to the rigidity of the section. It held that the section was justified by the need "to regulate claims against the State in a way that promotes speed [and] prompt investigation of surrounding circumstances",[93] so that, where necessary, the state could ensure that it was not engaged in avoidable and costly civil litigation.

Criticising the High Court's interpretive approach, Mutambanegwe AJ said that the socio-economic situation the court had described could still handicap quite a number of people even if the law in section 39(1) were to be amended as contemplated by the court a quo's order pursuant to Article 25(1)(a) of the Namibian Constitution. Furthermore, the Supreme Court per Mtambanengwe AJA said that poverty should not be cited as a factor when it came to access to courts because, at Independence, Parliament had enacted the Legal Aid Act[94] "to provide for granting of legal aid in civil and criminal matters to persons whose means are inadequate [and] to enable them to engage legal practitioners to assist and represent them".[95]

Right to appeal

In 2008, two years before the end of the second decade of independence, Parker J, with Hoff J concurring, showed judiciary astuteness on the application of Article 10 to the appeal provisions of the Criminal Procedure

93 At paragraph 44.

94 No. 29 of 1990.

95 Preamble to the Act. The Supreme Court commented that "in the wake of the enactment of the legal aid law, no one should necessarily feel left out, on account of poverty, from the right of access to the courts of law. So, the poverty-stricken potential claimant referred to in the Judge-President's hypothetical example is catered for".

Act. The applicants in the *Hamwaama* case[96] submitted that the distinction made in section 316 regarding the hearing of application for leave to appeal was in breach of Article 10 of the Constitution in that the determination of the application was heard in chambers as opposed to open court, where other applications were heard in public. They also argued that the section discriminated against those who were involved in civil and criminal trials in that the leave applications in civil cases were treated differently from appeals in criminal hearings. The applicants submitted further that –[97]

> … questions for leave to appeal in chambers only paves the way to institutionalized oppression against the poor, illiterate, laymen and former disadvantaged people.

The court noted from the outset that, in Namibia, there is no constitutionally guaranteed right to appeal. This situation is different from South Africa, where the Constitution specifically provides for this right. The High Court made this distinction clear in the *Ganeb* case,[98] which was decided two years into the second decade of independence, when the court was considering the constitutionality or otherwise of section 309(4)(a) of the Criminal Procedure Act.[99] The court held that "the right of appeal is given to everybody in terms of the Criminal Procedure Act".[100]

The reading of this case is rather interesting because Parker J applied both the Rational Connection Test and the Unfair Discrimination Test – without mentioning them, of course. Regarding the application of the latter test, Parker J drew his authority from the *Müller* case expounded on above. He said that, inherent in the meaning of the word *discrimination* in Article 10 of the Constitution, was an element of unjust or unfair treatment brought about principally by unjustified and illegitimate unequal treatment. Without mentioning that he was considering the first question under the Unfair Discrimination Test – whether or not the law makes any distinction between individuals or groups of people – he answered the unstated question by saying that the leave provisions required that anyone, without exception, who was convicted of an offence had to obtain leave to appeal against the conviction or sentence and that it was not a right. That being the case, the court said "we fail to see the unequal treatment that the applicants have suffered when the leave provisions apply to all persons".[101] Thus, in the High Court's opinion, as long as all persons appealing from or to a particular court were subject to the same

96 *Hamwaama & Others v Attorney-General*, unreported case No. A 176/2007.

97 (ibid.:para. 24).

98 *S v Ganeb*, 2002 NR 294.

99 No. 51 of 1977.

100 *Ganeb*, at 303G. In terms of the International Covenant on Civil and Political Rights (ICCPR), to which Namibia is a State Party, the right to appeal should be exercised "according to law". See also McKean, W. 1983. *Equality and discrimination under international law*. New York/Oxford: Clarendon Press/Oxford University Press

101 *Hamwaama*, at paragraph 22.

procedures as provided by the leave provisions, the requirement of equality before the law had been met.

The High Court held further that the challenged leave provisions were not discriminatory in that "they apply equally to all convicted persons petitioning the Chief Justice".[102] In addition, the High court said that the three Supreme Court judges who consider petitions put before them "apply the same rules and principles to all petitions put before them".[103] Furthermore, the High Court held that "it is not unequal treatment within the meaning of Article 10 of the Constitution that the appeal provisions in civil matters are different from those of criminal matters".[104] The court noted that –[105]

> … it is an irrefragable fact that civil proceedings and procedures are different from criminal proceedings and procedures; and what is more, the two are subject to fundamentally different substantive laws.

The court also applied the Rational Connection Test derived from the cases discussed above, and held that "it is clear that the underlying purpose of the leave provisions is to protect the higher Court from the burden of having to deal with appeals in which there is no prospect of success".[106] Thus, in the High Court's opinion, "that is a legitimate and rational purpose".[107] This was informed by the authority from South Africa in *Mphahlele v First National Bank of SA Ltd*,[108] where Goldstone J stated that "it is not in the public interest to clog the rolls of such Courts by allowing 'unmeritorious' and vexatious issues of procedure, law or fact to be placed before them".[109] This dictum implies that the determination of the legitimate object can be done on a public policy or public interest basis.

There are either sound practical reasons or legitimate objectives for the hearing of applications for leave to appeal to be heard in chambers. As Parker J noted, "[i]f such matters had to be dealt with in open court, the court rolls would be clogged and the result would be additional expense and delays".[110] Consequently, the court was not persuaded that the leave provisions violated the applicants' rights to non-discrimination and equality before the law – rights granted to them under Article 10 of the Constitution.

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102 (ibid.:para. 23).
103 (ibid.).
104 (ibid.:para. 24).
105 (ibid.).
106 (ibid.:para. 22).
107 (ibid.).
108 1992 (2) SA 667 (CC).
109 At 672B.
110 *Hamwaama*, at paragraph 16. See also *S v Pennington & Another*, 1999 (2) SACR 329, at 346b–d.

Furthermore, as Parker J correctly noted in the *Hamwaama* judgment, the settled practice of Namibian and even South African courts has always been for appeals to be heard in public, but that applications for leave to appeal are not ordinarily heard in open court, although a hearing might be called if the application raised issues on which it was considered desirable to hear oral argument. In most cases, however, the applications are dealt with in chambers and are either granted or refused on the basis of the judgment of the court a quo and the reasons advanced in the application in support of the submission that such judgment was wrong. Naldi[111] points out that Article 10(1) enshrines the principle of equality applicable in both civil and criminal proceedings, that seeks to ensure fairness between the parties to judicial proceedings. Parker J's statements, however, show some contestation that the two proceedings cannot be treated the same. Hence, people going through civil proceedings will 'legitimately' be treated differently, and there is a rational connection between such differentiation and the delivery of justice by courts.

Conclusion

It has been shown that the principle of equality has a fundamental position in the Namibian Constitution. Its main importance is that it requires the legislator to make law in accordance with the principle laid down in Article 10 of the Constitution, and restricts public officials and other private actors bound under Article 5 from creating classifications without 'intelligible differentia'. Article 25 of the Constitution offers the Namibian courts an actual opportunity to test Acts of Parliament against the principle of equality, while Article 18 offers any aggrieved person the right to challenge discriminatory administrative actions. Thus, there are a number of interlinked legal sources and facilitators of the equality principle and the courts have used them in showing their perspicacity.

The jurisprudence which has been developed in Namibia in the past two decades supports both formal and substantive equality. In testing whether there has been discrimination, the courts have applied both the Unfair Discrimination Test and the Rational Connection Test. This paper has highlighted a number of cases decided over the past two decades in the light of the above points. It has also looked at the philosophy that underlines Article 10 of the Constitution through a comparative scrutiny of other jurisdictions and their decided cases. The paper has also highlighted the importance of the right to equality or its corollary in the area of procedural laws, especially in the context of the right to access to justice, concentrating on the opportunity to sue and the right to appeal.

111 Naldi (1995).

Towards the elimination of the worst forms of child labour in Namibia: The implementation and internalisation of international law relating to the worst forms of child labour

Francois-X Bangamwabo*

Introduction

According to the 2009 International Labour Organisation (ILO) Report, more than 200 million children around the world are presently involved in child labour.[1] The consequences and negative effects of child labour are self-evident: not only does such labour hamper the intellectual, mental and physical development of the children affected, but it also has redistribution effects on the labour markets. Thus, the fight against child labour and the worst forms of it are contemporary issues, and have become a serious challenge for the United Nations (UN) Millennium Development Goals (MDGs).[2]

It needs to be acknowledged that, although child labour is a universal problem, it is more widespread in the developing world, where millions of children are exposed to the worst forms of child labour (WFCL). The term *worst forms of child labour*, as defined in the **ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182 of 1999)**, refers to –[3]

- all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom, and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict
- the use, procurement or offering of a child for prostitution, for the production of pornography, or for pornographic performances
- the use, procurement or offering of a child for illicit activities, in particular

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1 ILO/International Labour Organisation. 2009. *ILO Report 2009: Child labour*. Available at http/global/Themes/Child_labour/lang—en/index.htm; last accessed 12 November 2009.

2 Rena, R. 2009. "The child labour in developing countries: A challenge". *Industrial Journal of Management and Social Sciences*, 3(1):1–8.

3 Article 3, ILO Convention 182. This Convention was adopted in 1999, and entered into force in 2000. Namibia ratified the Convention on 15 November 2000.

for the production and trafficking of drugs as defined in the relevant international treaties, and
- work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

The purpose of this paper is to examine the nature and scope of the WFCL found in Namibia. Furthermore, we shall look at the domestic laws, policies, administrative measures, and programmes which have been put in place by the Namibian state to meet its legal obligations and expectations as spelt out in international instruments, in particular the ILO Conventions and other human rights instruments. Finally, an attempt will be made to ascertain the possible gaps between Namibian domestic action and international law relating to the elimination of the WFCL. As a conclusion, some recommendations are given as a way forward on how to address the identified gaps and grey areas.

The nature and scope of the WFCL in Namibia

Evidently, the WFCL is more than ordinary child work or labour due to the huge adverse impact it has on a child.[4] In Namibia, the WFCL have been identified as including –[5]

- commercial sexual exploitation of children (CSEC), especially in the form of children being used as child sex workers
- children being used by adults to commit crimes (CUBAC)
- children engaged in hazardous work, such as in the charcoal production industry, loading and offloading heavy or dangerous goods from trucks, and possibly in the areas of fish processing and road construction
- child trafficking, and
- child soldiers.

Commercial sexual exploitation of children

The phrase *commercial sexual exploitation of children* (CSEC) is given the following meaning in the **Declaration of the First World Congress against Commercial Sexual Exploitation, 1996**:

> Sexual abuse by the adult and remuneration in cash or kind to the child or a third person or persons. The child is treated as a sexual and commercial object.

Sexual exploitation in Namibia as a form of child labour has been prevalent

4 *Child labour*, as defined in Article 32 of the Convention on the Rights of the Child (CRC) is "economic exploitation [and] any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development".

5 LeBeau, Debie. 2003. *Towards the development of time-bound programmes for the elimination of the worst forms of child labour In Namibia. Discussion Document July 2003. International Labour Organisation's (ILO) International Programme on the Elimination of Child Labour (IPECL).* Geneva/Pretoria: ILO, p 6.

for a long time, yet not much had been reported on it to date.[6] This state of affairs can be attributed to cultural practices, apartheid, the status of the child within families and the community, lack of adequate pressure groups and organisations, and a child-unfriendly legal system. In Namibia, sex work takes two forms. The first is where one person has sex with another person, and in return 'pays' with food, clothes and other household support (referred to as *exchange sex work*). The second is classic sex work, where a person openly solicits sex in exchange for money.[7] Exchange sex work is more common in Namibia than classic sex work, and young girls participate in both forms. Evidence indicates that child sex workers in Namibia are common, and include girls as young as 8 and 10 years of age.[8]

Research shows that sexual exploitation is prevalent in the family and is mostly targeted at the girl child.[9] It is the girl child that is normally forced to engage in commercial sex work in order to sustain the family.[10] This has a mental and psychological impact on the girl child and may force her to drop out of school, and expose her to unwanted pregnancy and HIV/AIDS. There are also adult commercial sex workers and sex syndicates that force children into commercial sex for monetary and other gain. This form of child labour is rampant amongst shebeen operators who employ young girls as waitresses with the underlying aim of getting their patrons to engage with them sexually.[11]

Children being used by adults to commit crimes

There are a number of instances in Namibia where children have been caught in the act of committing a crime. Some children voluntarily participate in illegal activities, while others are recruited or forced by adults or older children – in some cases their parents or other extended family members.[12] In terms of the WFCL, the focus is on children who have committed crimes because they were used or forced to do so by adults or older children. Although, in practice, there have not been major cases in Namibia that have implicated a syndicate, this does not mean such syndicates do not exist.[13]

Children engaged in hazardous work

6 (ibid.:20).

7 UNDP/United Nations Development Programme. 2001. *Namibia Human Development Report 2000/2001: Gender and violence in Namibia*. Windhoek: UNDP, p 119.

8 (ibid.).

9 LeBeau (2003:31).

10 (ibid.).

11 (ibid.).

12 Terry, E. 2007. *Elimination of child labour in Namibia. A discussion on what is known, existing policy and programmes and possible gaps*. Windhoek: Ministry of Labour and Social Welfare & Programme: Towards the Elimination of the Worst Forms of Child Labour, p 54.

13 Terry (2007).

In respect of hazardous work, it has been found that working children in Namibia handle tools or machines as part of their work duties and, thus, they are exposed to the risk of injury. Other children report falling ill due to the nature of their work.[14] Cases such as these include children spending a lot of time collecting firewood and fetching water, working with farming equipment, working with electrical equipment during domestic work, working long hours in informal beer-selling establishments while being exposed to sexual harassment, offloading hazardous materials from lorries, being exposed to abuse and exploitation while working on the street, working in mines, and sex work or sexual exploitation.[15] There is a high incidence of child work for these children living and working on commercial and communal farms, with the agricultural sector probably having the highest incidence of child work in the country.[16]

Child trafficking

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the UN Convention Against Transnational Organised Crime defines *child* as any person under the age of 18 years, and defines *trafficking* as follows:[17]

> recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.

Child trafficking falls under the rubric of forms of slavery or practices similar to slavery.[18]

Namibia is a source, transit, and destination country for children trafficked for the purposes of forced labour and commercial sexual exploitation.[19] Namibian children are trafficked within the country for domestic servitude and forced agricultural labour, cattle herding, vending, and commercial sexual exploitation. In some cases, Namibian parents may have unwittingly sold their children into trafficking conditions, including child prostitution. Reports have emerged of Namibian children being trafficked to South Africa, typically by

14 LeBeau (2003).
15 (ibid.).
16 (ibid.).
17 Available at www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf; last accessed 19 July 2010.
18 LeBeau (2003)
19 USDS/United States Department of State. 2009. *Trafficking in persons 2009 – Namibia*. Available at http:www.unhcr.org/refworld/docid/4a4214a0c.html; http://windhoek.usembassy.gov/june_16_2009.html; last accessed 2 October 2009.

truck drivers, for the purpose of sexual exploitation. Zambian and Angolan children are trafficked into Namibia for domestic servitude, agricultural labour, and livestock herding.[20]

The domestication of international law relating to the elimination of the WFCL

Namibia's approach to domesticating international Instruments

International obligations as spelt out in international law or international legal instruments are created upon a state ratifying or acceding to such instruments. For compliance with such obligations, a state either incorporates them by observing or respecting them in its national laws (its constitution or statute law) which are consistent with international norms, or by transforming them into national laws or policies through domestication or internalisation.

Traditionally, scholars posit two approaches in respect of the reception of international law into national legal systems. Depending on the approach taken, a country is characterised either as *monist* or *dualist*.[21] *Monists* view international and national law as part of a single legal order. Under this approach, international law is directly applicable in the national legal order. There is no need for any domestic implementing legislation: international law is immediately applicable within national legal systems. Indeed, to monists, international law is superior to national law.[22] This approach is common in France, Holland, Switzerland, the United States of America, many Latin American countries, and some francophone African countries. It is worth noting that Namibia, through Article 144 of its Constitution, has adopted the monist approach.[23] Thus, under this approach, once a state has ratified an international instrument or acceded to it, the national courts of that state should interpret and apply the legal rights and obligations contained in the instrument in question as part of its domestic laws.

Dualists, on the other hand, view international and national law as distinct

20 At the time of writing, the Ministry of Labour and Social Welfare, in collaboration with the Ministry of Gender Equality and Child Welfare, was investigating child labour in many Regions across the country. One of the findings has been that both internal and external child trafficking exists in Namibia. However, the findings have not yet been publicly reported.

21 See Steiner & Alston (2000:1004–5).

22 See also McDougal, Myres. 1959. "The impact of international law upon national law: A policy-oriented perspective". *South Dakota Law Review*, 4(25):27–31.

23 Article 144 of the Constitution of the Republic of Namibia reads as follows: "Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia".

legal orders. For international law to be applicable in the national legal order, it must be received through domestic legislative measures. The effect of this is to transform the international rule into a national one. It is only after such a transformation that individuals within the state may benefit from or rely on the international – now national – law.[24] To the dualist, international law cannot claim supremacy within the domestic legal system, although it is supreme in the international law legal system. This method of incorporation is commonly applied in the United Kingdom, Commonwealth countries, and most Scandinavian jurisdictions.

In Namibia, Article 144 makes international law directly applicable in the national legal order without a need for any domestic implementing legislation. In other words, international law is immediately applicable within the national legal system. Thus, all human rights instruments or any international treaty ratified or acceded to by Namibia are part and parcel of its domestic law and should be applied as such, unless they are in conflict with an existing Act of Parliament, or where they are not in conformity with the supreme law of the land, i.e. the Constitution.[25]

However, specific international law instruments, as shall be discussed below, require a certain level of compliance and implementation in order for domestication to be complete. For instance, according to the Committee on the Rights of the Child (hereafter *Committee*), the body responsible for monitoring compliance and implementation of the provisions of the Convention on the Rights of the Child (CRC), states parties to the latter are obliged to submit a comprehensive review of all domestic legislation and related administrative measures to ensure full compliance with the Convention. The review needs to consider the Convention not only Article by Article, but also holistically, recognising the interdependence and indivisibility of human rights. The review needs to be continuous rather than once-off, reassessing proposed as well as existing legislation. Incorporation by itself does not avoid the need to ensure that all relevant domestic law, including any local or customary law, is brought into compliance with the Convention.[26]

Having established how Namibia incorporates international law into its legal system, what follows now is an analysis of the international obligations upon Namibia towards the elimination of the WFCL.

International instruments dealing with the elimination of the

24 Steiner & Alston (2000).

25 Article 144, Namibian Constitution.

26 Committee on the Rights of the Child. 2003. *General Comment No. 5*, paragraphs 18 and 20.

WFCL as ratified or acceded to by Namibia

ILO Conventions

Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (Convention C182 of 1999)

This Convention, which was unanimously adopted in 1999 by the ILO Conference and ratified by Namibia in 2000, requires governments to take measures to effect the immediate abolition of the WFCL. In other words, it obliges member states to take time-bound measures to eliminate the WFCL.[27] It defines the four above-mentioned forms of child labour,[28] and requires that member states work together with social partners such as employers' and employees' organisations in their respective countries to determine,[29] monitor,[30] and implement[31] national laws or regulations, subject to periodic review, and the types of work falling under the forms of child labour. The Convention further requires member states to create penal and other sanctions necessary to ensure effective implementation and enforcement of its measures.[32] In carrying out their obligations in terms of this Convention, member states also need to take into account the importance of education and the special situation of girls.

Convention concerning Minimum Age for Admission to Employment (Convention C138 of 1973)

This Convention, also ratified by Namibia in 2000, requires that members pursue a national policy designed to ensure the effective abolition of child labour and to raise, progressively, the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.[33] In this regard, the Convention places the minimum age for work that might jeopardise the health, safety or morals of the child at 18 years.[34] National laws or regulations may permit employment of children 16 and 17 years of age –[35]

> … on condition that the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instructions or vocational training in the relevant branch of the activity.

Convention C138 further states that laws may permit employment of children

27 Article 7, Convention C182 of 1999.
28 (ibid.:Article 3.)
29 (ibid.:Article 4).
30 (ibid.:Article 5).
31 (ibid.:Article 6).
32 (ibid.:Article 7).
33 Article 1, Convention C138 of 1973.
34 (ibid.:Article 2).
35 (ibid.:Article 3).

13 to 15 years of age in light work that will not be harmful to their health or development, or prejudice their benefiting from school or vocational programmes.[36] In Article 9, states are obliged to create appropriate penalties and identify competent authorities to ensure the Convention's effective enforcement.

ILO Declaration on Fundamental Principles and Rights at Work, June 1998

This Declaration states that the effective abolition of child labour is a fundamental principle and right, and that eliminating child labour is critical for ensuring that the economic growth fuelled by increasing international economic integration leads to more equity and social justice, and less poverty. The principle of the effective abolition of child labour entails ensuring that every girl and boy has the opportunity to develop physically and mentally to her or his full potential.[37] The Declaration's aim is to stop all work by children that jeopardises their education and development. This does not mean stopping all work performed by children per se: international labour standards allow the distinction to be made between what constitutes acceptable and unacceptable forms of work for children at different ages and stages of their development.[38]

The Declaration extends from formal employment to the informal economy where indeed the bulk of the worst forms of child labour are to be found. It covers family-based enterprises, agricultural undertakings, domestic service, and unpaid work carried out under various customary arrangements whereby children work in return for their keep.[39]

To achieve the effective abolition of child labour, governments required should fix and enforce a minimum age or ages at which children can enter into different kinds of work. Within limits, these ages may vary according to national, social and economic circumstances. The general minimum age for admission to employment should not be less than the age of completion of compulsory schooling, and should never be less than 15 years. But developing countries may make certain exceptions to this, and a minimum age of 14 years may be applied where the economy and educational facilities are insufficiently developed. Sometimes, light work may be performed by children two years younger than the general minimum age.[40]

For effective monitoring, the Declaration requires a four-yearly global report

36 (ibid.:Article 7).

37 ILO/International Labour Organisation. 2006. *Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work: Effective abolition of child labour.* Available at http://www.ilo.org/declaration/follow-up/annualreview/countrybaselines/lang--en/docNam--WCMS_091263/index.htm; last accessed 16 September 2009.

38 (ibid.).

39 (ibid.).

40 (ibid.).

on child labour, which needs to be translated into a programme of technical assistance to countries.[41] It is worth noting that, as opposed to treaties or conventions which are binding on member states, declarations such this one do not have any legal force: they only serve as guidelines to states in the formulation of their policies.[42]

International human rights instruments

Convention on the Rights of the Child, 1989

Namibia ratified the CRC on 30 September 1990. A major principle embodied in this Convention is "the best interest of the child" as a primary consideration in all actions affecting children, whether undertaken by government or private actors.[43] Another highly important consideration is that the child's own views need to be taken into account in all matters affecting him/her.[44] It is against this background that the Convention provides for protection against economic,[45] sexual,[46] and all other forms of exploitation,[47] as well as the child's right to physical and psychological recovery and social reintegration.[48] Specifically, Article 32(1) states that every child has a right to be protected from economic exploitation and from any work that is likely to be hazardous to or to interfere with its education, or to be harmful to its health or physical, mental, spiritual, moral or social development. Furthermore, Article 27(1) stipulates that states are to provide special protection to children who, due to inadequate living conditions, are forced into situations which harm their safety and well-being.

The Convention does not set a minimum age for employment, but makes reference to other international instruments in this regard. However, member states are obliged to implement legislative, administrative and social measures to provide for the minimum age for admission to employment, for the hours and conditions of employment, and for sanctions to ensure effective enforcement of these measures.[49] Article 33 of CRC specifically provides for CUBAC, saying that:

> States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit

41 (ibid.).
42 Thus, it is immaterial whether Namibia has signed and/or ratified the 1998 ILO Declaration on Fundamental Principles and Rights at Work.
43 Article 3(1), CRC.
44 (ibid.:Article 12).
45 (ibid.:Article 32).
46 (ibid.:Article 34).
47 (ibid.:Article 36).
48 (ibid.:Article 39).
49 (ibid.:Article 32(2)).

production and trafficking of such substances.

Article 40 calls for the respect and protection of child rights, especially those rights contingent to fair trial and where a child violates the law and is subject to penal sanctions. Notably, despite Namibia's commitment to the CRC, its state reporting has been inconsistent. Since 1990, the year in which Namibia ratified the CRC, only two reports have been submitted to the UN Committee on the Rights of the Child. The initial report was duly and timeously submitted in 1992. Subsequent periodical reports were due in 1997, 2002, and 2007. In 2008, Namibia submitted a combined report for all three overdue reports. The delays in submitting these reports, the government stated, were due to the restructuring of governmental institutions and departments which deal with children's rights. Indeed, in the past, issues relating to child rights fell under the Ministry of Health and Social Welfare. However, with the new structure, the Ministry of Gender Equality and Child Welfare is now responsible for child rights and protection.

African Charter on the Rights and Welfare of the Child, 1990

The ACRWC, which was based on the African Charter on Human and Peoples' Rights[50] principle of the supremacy of human rights, was adopted by the Assembly of Heads of State and Government[51] of the then Organisation of African Unity (now the African Union).[52] The ACRWC, which is similar to the CRC in many ways, is particularly important in that it requires governments to promote the dissemination of information about the hazards of child labour in both the formal and informal sectors of the economy.[53] However, a shift from the CRC is seen in Article 31, which places upon the child the duty to, inter alia, work for the cohesion of the family and to assist in case of need. In so doing, the Charter recognises the child's responsibilities towards the family, society, the state, other legally recognised communities, and the international community. Namibia ratified this instrument in 2004.

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, May 2000

The Optional Protocol on the Involvement of Children in Armed Conflicts (OPAC) is the first Protocol to the Convention on the Rights of the Child. Namibia ratified the Protocol on 16 April 2002. As its title indicates, the core

purpose of this instrument is to prevent the involvement of children in armed

50 The African Charter on Human and Peoples' Rights, adopted on 27 June 1981, entered into force on 21 October 1986 (OAU Doc. CAB/LEG/3, rev. 5, 21 I.L.M. 58 (1982)); hereafter referred to as *the African Charter*.

51 The Assembly of Heads of State and Government is the supreme organ of the African Union.

52 See Preamble to the African Charter.

53 Article 15, ACRWC.

conflicts and to protect places that are significant to children's welfare, such as schools and hospitals, in times of armed conflicts.[54] The Optional Protocol strongly condemns the recruitment, training and use of children in hostilities by armed groups distinct from the armed forces of a state.[55]

In regard to the implementation and enforcement of the provisions of OPAC, states parties are expected to take all necessary legal, administrative and other measures to incorporate its provisions into their respective national jurisdictions.[56] In addition, Article 6 of the Optional Protocol calls upon states parties to, inter alia, make the principles and provisions contained in the Optional Protocol widely known to adults and children alike. Furthermore, states parties are to ensure that all persons used or recruited in armed conflict contrary to the provisions of OPAC are demobilised. Such persons are to be assisted physically as well as psychologically in their reintegration into normal civilian life.[57]

Equally relevant is the minimum age in respect of voluntary recruitment. Article 3 of OPAC provides that, within two months of ratification, states parties are expected to deposit a declaration stipulating the minimum age of voluntary recruitment as well as the safeguards adopted to ensure that such recruitment is not coerced. In addition, each recruit's parents or guardians need to be informed of their child or charge's intentions. Article 4 of OPAC deals with the recruitment of child soldiers in countries ravaged by conflicts of a non-international character, such as civil and ethnic wars. Under this Article, OPAC prohibits armed groups or rebel movements from enlisting children under the age of 18 for purposes of engagement in hostilities.

Linked with OPAC in this regard is the Rome Statute establishing the International Criminal Court, to which Namibia is a state party. The Rome Statute criminalises the enlisting and conscription of child soldiers in international as well as non-international armed conflicts.

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 2000

The Optional Protocol on the Sale of Children (OPSC) was adopted and opened for signature, ratification and accession by UN General Assembly Resolution A/RES/54/263 of 25 May 2000, and entered into force on 18 January 2002. The OPSC deals specifically with preventing the exploitation of children through trafficking, prostitution and pornography. In its Preamble, the Optional Protocol declares that states parties to the Protocol need to recognise that, amongst the vulnerable groups at risk of sexual exploitation,

54 Preamble, OPAC.
55 (ibid.).
56 Article 6(1), OPAC.
57 Article 6(2) and (3), OPAC.

the girl child ranks as most at risk, and is disproportionately represented among the sexually exploited.

The OPSC prohibits the sale of children, child prostitution and child pornography,[58] and defines each of these acts.[59] States parties are obliged to ensure that any acts related to the sale of children, child prostitution or child pornography are punishable under their national laws, whether such acts are committed within or beyond their borders.[60] The OPSC further obliges member states to raise public awareness of the sale of children for prostitution or pornography so that consumer demand for the sale of children, child prostitution and child pornography can be reduced.

Namibia ratified the Optional Protocol on 16 April 2002. Its first and subsequent country reports were due from 2004 onwards, but none have been submitted to date. The OPSC is one of two such instruments to the CRC. Although Namibia has not yet filed its country report with the Committee concerned, a number of legislative measures can be said to be directly applicable and in line with this instrument.

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000

This Protocol supplements the **UN Convention against Transnational Organized Crime** which entered into force in September, 2003. It calls for states parties to criminalise conduct in relation to trafficking in children.[61] Namibia signed this Protocol in December 2000, and became a member state to it in August 2002.

Other international human rights instruments[62]

- Model Guidelines for the Effective Prosecution of Crimes against Children, 2005[63]

The Model Guidelines are meant to be a practical instrument for the prosecution of crimes against children, including the treatment of child victims and witnesses in court. Paragraph 11 of the Guidelines makes note of the need to provide services in a manner that is respectful of children's rights and needs, and recognising that children are victims of exploitation rather than perpetrators of crime. This point emphasises the need to make justice officials sensitive

58 Article 1, OPSC.
59 (ibid.:Article 2).
60 (ibid.:Article 3).
61 (ibid.:Article 5, read with Article 3(b)–(c)).
62 These include UN Guidelines and Declarations.
63 See http://www.icclr.law.ubc.ca/Publications/Reports/children2.PDF; last accessed 27 July 2010.

to situations of social risk that cause children to be used by adults to commit crimes. In addition, appropriate sanctions should be applied against adults who are the instigators of crimes, rather than against the children involved who are victims of criminality by virtue of being compelled into crime.

- Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes, 2005

The Guidelines provide for, inter alia, best practices based on relevant international and regional norms and principles; a practical framework to assist in the review, design and implementation of law and policy; and assistance for those caring for children to deal sensitively with child victims and witnesses. The guideline in paragraph 9(a) specifically refers to children as victims of CUBAC, regardless of their role in the offence or in the prosecution of the alleged offenders or groups of offenders. In fact, paragraph 7 of the Guidelines stipulates that it is a mistake to view children who are victims and witnesses to CUBAC as offenders. In addition, paragraph 7 provides for important insights into the management and treatment of child victims and witnesses. For instance, paragraph 7(i) states that improved responses to child victims and witnesses of crimes can make children and their families more willing to disclose instances of victimisation and more supportive of the justice process.

- Other guidelines that address the treatment of alleged child offenders

Other documents that may help to determine whether a CUBAC occurred include the **UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)**; the **UN Guidelines for the Prevention of Juvenile Delinquency**; and the **Recommendations from the UN Congress on the Prevention of Crime and the Treatment of Offenders**. These Guidelines incorporate the concept of *restorative justice* and stress that institutionalisation of young persons should be a measure of last resort and for the shortest possible period, with the best interest of the young person in mind at all times.

The African Common Position: Africa Fit for Children, 2001

Principle 32 of the African Common Position: Africa Fit for Children, 2001, indicates that children should be given increased protection against all forms of violence, abuse and exploitation. The same Principle states that urgent steps have to be taken to eliminate the WFCL as defined in ILO C182, and concludes that states should make use of the technical and financial support provided by the ILO, the United Nations Children's Fund (UNICEF) and other international agencies to create programmes and policies to root out child labour. Principle 32 also specifically addresses child trafficking, noting that

African states need to curb this growing phenomenon through prevention and protection measures, as well as by prosecuting traffickers and putting into place effective regional and bilateral agreements on border controls and handling the victims of child trafficking.

Stockholm Declaration and Agenda for Action, 1996

The Stockholm Declaration and Agenda for Action has been adopted by 122 countries, including Namibia. Unlike Conventions, the Declaration was adopted by intergovernmental organisations and non-governmental organisations (NGOs) as well. The Declaration calls for government and civil society to work together to combat child prostitution, pornography, and trafficking for sexual purposes. It prioritises five forms of intervention:

- Coordination of actions at local, national and regional levels, through agendas for action, indicators, goals, and time frames
- Preventative measures, through formal and informal education and raising awareness about rights
- Protection through laws and policies of those already being sexually exploited
- Rescue and reintegration of victims into society through non-punitive, gender-sensitive, medical, psychological and other support systems, and
- Participation of children in such actions.

Namibia's domestic action to curb child labour, particularly the WFCL[64]

Legislation relevant to child labour

The Constitution of the Republic of Namibia, 1990[65]

The Constitution, as the Supreme Law of the land,[66] serves as the key basis upon which Namibia can meet its international obligations. It provides for the protection of children from exploitation, labour practices and work that is likely to be hazardous or to interfere with their education or be harmful to their health or physical, mental, spiritual, moral or social development. Specifically, Article 15, which provides for children's rights, states the following, inter alia:

> (1) …
> (2) Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their

64 *Domestic action* includes national laws, policies, programmes and any other administrative measure adopted by Namibia on the topic.

65 Act No. 1 of 1990.

66 (ibid.:Article 1(6)).

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

(3) No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament. Nothing in this Sub-Article shall be construed as derogating in any way from Sub-Article (2) hereof.

(4) Any arrangement or scheme employed on any farm or other undertaking, the object or effect of which is to compel the minor children of an employee to work for or in the interest of the employer of such employee, shall for the purposes of Article 9 hereof be deemed to constitute an arrangement or scheme to compel the performance of forced labour.

The above provisions are similar to Articles 32 and 36 of the CRC as well as to Article 15 of the ACRWC as discussed earlier, but also resemble Article 10(3) of the International Covenant on Economic, Social on Cultural Rights (ICESCR), 1966, which was ratified by Namibia in 1992.

It is important to note at this juncture that, unlike the international instruments[67] ratified by Namibia on children's rights, the Namibian Constitution does not seem to envisage the concept of the best interest of the child to be a paramount consideration in the paragraphs mentioned above on child labour.[68] Nevertheless, it can be submitted that, in interpreting the above constitutional provisions broadly and purposively,[69] the best interests of the child are an important consideration. An inconsistency with international law on the working definition of *child* is evident in this key constitutional provision. For instance, Article 1 in the CRC provides that a *child* is a person under the age of 18 years, whereas the Constitution puts the minimum age at 16 years. While the Constitution is specific on economic exploitation – employment of children under 14 years of age on a mine or factory and forced labour – it contains no specific prohibition on the sale of children, use of children in pornographic activities, prostitution, the production and trafficking of narcotics, and in organised begging. Such exclusion automatically reflects a failure to entrench international rules against sexual exploitation as provided for, say, in the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour. However, it is argued that these activities are covered in Article 15(2).[70]

In line with Article 15, Article 9 of the Constitution also prohibits slavery or servitude, including forced labour. This is consistent with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and

Children, Supplementing the UN Convention against Transnational Organized

67 Article 3(1), CRC.

68 Naldi, GJ. 1995. *Constitutional rights in Namibia*. Kenwyn: Juta, p 79.

69 *S v Acheson* 1991 1 NR 1 (HC) 10.

70 Naldi (1995:81).

Crime. Additionally, Article 95(b) seeks to protect children from work unsuited for their age and strength by providing that the health and strength of the workers and tender age of children are not abused, and that these citizens are not forced by economic necessity to enter employment unsuited to their age and strength. Furthermore, Article 95 covers broader labour practices and promotes adherence to international Conventions that can influence child labour practices. However, the enforceability and justiciability of these practices is doubtful if one is to read Article 95 in conjunction with Article 101, which provides that the provisions in Article 95 are mere state policy guidelines and are not enforceable in a court of law.

Labour Act, 2007[71]

After the Constitution, the Labour Act is the principal legislation dealing with labour issues. It should be seen to adequately address the problem of child labour as provided for not only in the Constitution, but also in under ratified international instruments binding on Namibia. Principally, the Labour Act gives effect to the Constitution and the ILO Convention dealing with the elimination of the WFCL.

Section 3 of the Labour Act prohibits persons from employing or requiring or permitting a child to work if the child is under the age of 14. Where the child is between 14 and 16 years of age, such child is not permitted to be employed in any circumstance contemplated in Article 15 of the Constitution,[72] or in any circumstance contemplated by the Minister of Labour and Social Welfare in any regulation which prohibits the employment of such children.[73] The same section prohibits children between the ages of 14 and 16 to be employed in work where the working hours are between 20h00 and 07h00.[74] However, it does not pronounce specifically on working children, nor does it specify the number of hours or days they should be allowed to work. Thus, there is a need for regulations pertaining to working children as regards the number of hours in the day and the number of days in the week that they are permitted to work, as well as on their overtime payments and leave periods – as is provided for other workers. Generally, section 3 prohibits children from working underground in a mine; in construction where demolition takes place; where goods are manufactured; where electricity is generated, transformed or distributed; or in any environment which places the child's health, safety, or physical, mental, spiritual, moral or social development at risk.[75]

In terms of the Act, a child who is between 16 and 18 years of age can only

71 No. 11 of 2007.
72 Section 3(2)(a).
73 Section 3(2)(b).
74 Section 3(2)c).
75 Section 3(2)(d).

be employed in the circumstances mentioned above if the Minister has so permitted by regulation.[76] The Act also requires the Minister make regulations in relation to the prohibitions set out in the section. Moreover, in terms the Act, it is an offence for any person to employ or require or permit a child to work in circumstances prohibited in terms of the Act. Any person convicted of such an offence is liable to a fine of not more than N$20,000 or to imprisonment, or to both such fine and imprisonment.[77]

A very pertinent issue worth mentioning here – and which is not covered in the Labour Act – concerns independent contractors or subcontractors in regard to children. The Act is silent on the protection of this group of workers, thus exposing them to gross injustice without remedy. For instance, loopholes have been identified in respect of wages and payments for contract workers or casual labourers because they are not adequately covered in the provisions set out for employed workers in the Act. Thus, there have been reports of workers not getting paid, getting less pay than initially agreed upon, or getting paid late, or workers who are exposed to various physical dangers and health hazards without them being able to complain for fear of losing their source of income.[78] The Act is also silent on the protection of children who work as artists (models, actors, etc.). However, this group of activities has been included in the Child Care and Protection Bill (CCP), which is under review. Therefore, if and when that piece of legislation becomes law, such provisions will address this matter.

The age restrictions on child labour in the Act are commendably consistent with the ILO Convention concerning Minimum Age for Admission to Employment. The Convention sets out the minimum age for work in detail.[79] With respect to its obligations under the ILO Convention on the elimination of the WFCL, the Act indirectly provides for child labour through its age restrictions. However, it would have been more effective, as the principal instrument on labour in Namibia, if it had specifically included a section on the meaning and scope of child labour, including its worst forms.

Provisions for health and safety in sections 39 to 42 of the Act cover not only employees, but also their dependants, as well as anyone else coming into the working environment or premises. If enforced rigorously, employers would not be able to get away with failures to provide a safe environment for any of their workers, including self-employed contract labourers, sub-contractors, casual labourers or those doing piece work.[80]

76 Section 3(4).
77 Section 3(6).
78 Terry (2007:84).
79 See the discussion above on this Convention.
80 Terry (2007:77).

Defence Act, 2002[81]

The Defence Act regulates, inter alia, the actions and conduct of members of the armed forces during hostilities. For instance, section 28 of the Act provides that *any* member of the forces may be called for mobilisation. Section 30(2) further provides that failure to report for such mobilisation may lead to the disobedient member being charged with and prosecuted for desertion under the Military Code.

Section 7 of the Act lays down the requirements and conditions to be met for one to join the forces. However, although the OPSC defines *child* as a person younger than 18, section 7 of the Act does not lay down the minimum age for recruitment into the armed forces. Moreover, the Act fails to distinguish between members who may be called for mobilisation. Thus, in effect, the Act does not prevent members of the armed forces who are below the age of 18 from engaging in armed conflict. It remains ambiguous, therefore, whether the Namibian statute law complies with the legal expectations required by Article 1 of OPAC. Clearly, the work involved in the armed forces is potentially harmful to a child's health. It would, therefore, be important to lay down the minimum age of recruitment.

Welfare-related legislation on child labour issues

Children's Act, 1960[82]

The Children's Act in Namibia is an outdated piece of legislation inherited from South Africa, and is currently under review. It is scheduled to be replaced by the Child Care and Protection Bill.

Section 1 of the Act defines *child* as a person under the age of 18 years, including persons between 18 years and 21 years of age.

The Act makes provision for "children in need of care" who are defined, inter alia, as children –[83]

> … who are in the custody of a person who has been convicted of a crime in connection with those children, or children who frequent the company of any immoral or vicious person; or who are otherwise living in circumstances calculated to cause or conduce to their seduction, corruption or prostitution; who are beggars; who are under the age of twelve years, or between the age of twelve and sixteen and who engage in any form of street trading.

Section 19 provides that any parent or guardian or any other person having custody of a child who allows that child to reside in or to frequent a brothel

81 No. 1 of 2002.
82 No. 33 of 1960.
83 Section 1 of the Children's Act, 1960.

commits an offence. It further makes it an offence for such parents/guardians/custodians of a child to cause or conduce the seduction, abduction or prostitution of that child or the commission of immoral acts.

Section 21 prohibits a child's parent, guardian or custodian from causing such child to beg, induce the giving of gifts, or solicit donations or contributions towards any object. The Children's Act also covers cases of abuse or neglect, which ultimately include cases of child labour and of child prostitution. Equally significant is section 23. It requires that, where children – especially those who are fourteen or younger – are performing at areas of public entertainment, the person facilitating that performance may only do so upon a licence being issued to him/her by the commissioner after such commissioner is satisfied that the performance will not be to the detriment of the children's physical, moral or mental well-being.

Child Care and Protection Bill

The proposed Child Care and Protection Bill,[84] which was expected to be tabled in the National Assembly at the end of 2009, would complement the Labour Act by providing additional provisions on the WFCL. However, these provisions are worded in very general terms, without much definition or detail.[85] The Bill is aimed at protecting children and promoting child welfare by giving effect to the CRC and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.[86] Section 2 of the proposed law reads that one of its main objectives is to give effect to Namibia's obligations concerning child welfare in terms of international agreements binding upon the country.[87] However, this provision appears to single out international obligations on child welfare, and does not necessarily include child development and protection that which would be wide enough to cover all forms of child labour obligations.[88]

Vital to the present study is the specific prohibition of the WFCL in section 176. In terms of this section, a person is not permitted to –

- use, procure, offer or employ a child for purposes of commercial sexual exploitation
- use, procure, offer or employ a child for illicit activities, including drug production and trafficking
- force a child to perform labour for that or any other person, whether for reward or not

84 Final Draft prepared by the Ministry of Justice, 2009.

85 MGECW/Ministry of Gender Equality and Child Welfare. 2009. *Draft Child Care and Protection Bill – Issues of public debate: Other child protection measures*. Windhoek: MGECW, Legal Assistance Centre & UNICEF.

86 Preamble, Child Care and Protection Bill.

87 Section 2(c), Child Care and Protection Bill.

88 Legal Assistance Centre (LAC) recommendations on section 58 of the Bill in MGECW (2009:35).

- encourage, induce or force a child, or allow a child, to perform labour that is likely to harm the health, safety or morals of a child, or places the child's well-being, education, physical or mental health, or spiritual, moral or social development at risk.

There is a need to include the forcing of a child to beg for the benefit of another, which is another form of economic exploitation prevalent in Namibia. Therefore, the Minister of Gender Equality and Child Welfare is obliged take all reasonable steps to assist in ensuring that the prohibition on the WFCL is enforced.[89] It has been opined that, as this provision stands, its effectiveness will be weakened by its vagueness in respect of supporting or delineating criminal charges.[90]

The Bill dedicates a whole chapter to child trafficking. Thus, according to section 157, a person is not permitted to traffic a child or allow a child to be trafficked, and cannot use as a defence the fact that the person having control of the child consented, or that the intended exploitation or adoption of a child did not occur. A contravention of this provision is a ground for revoking the licence or registration of the employer or principal to operate.

The Act further prohibits the intentional lease or sublease or allowance of any room, house, building or establishment to be used for the purpose of harbouring a child who is a victim of trafficking; and the advertising, publishing, printing, broadcasting, or distributing of information that suggests or alludes to trafficking by any means, including the use of Internet or other information technology.[91] The responsibility for the safety of children who are victims of trafficking has been endowed upon the Minister of Foreign Affairs, who must facilitate the return to Namibia of a child who is a citizen or permanent resident of Namibia and who is a victim of trafficking. It is also this Minister's responsibility, at the request of another state that is a party to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, or to an agreement relating to trafficking in children, to verify that the child who is a victim of trafficking is a citizen or permanent resident of Namibia.[92]

However, the provisions above do not provide for privacy of legal proceedings involving victims of trafficking. Thus, they fail to address the comprehensive range of services for victims of trafficking recommended in the said Protocol, i.e. provision of appropriate housing, counselling, information on the victim's rights in a language the victim understands, medical and psychological services, material assistance and employment, and educational and training opportunities.[93]

89 Section 176, Child Care and Protection Bill.
90 See LAC recommendations on section 176 in MGECW (2009:42).
91 Section 158, Child Care and Protection Bill.
92 Section 159, Child Care and Protection Bill.
93 See the recommendation by the LAC to section 159 in MGECW (2009:37).

The trafficking of a child by its parent, guardian or other person who has parental responsibilities and rights in respect of that child is prohibited in section 160 of the envisaged legislation. Once a court establishes that any such thing occurred, it may suspend all parental responsibilities and rights of that parent, guardian, or other person; and place the child in temporary safe care, pending an inquiry by a Children's Court.

Section 161 places upon immigration officials, member of the police force, social workers, medical practitioners or registered nurses who come into contact with a child who is a victim of trafficking in Namibia the duty to refer that child to a designated social worker for investigation. The weakness of this provision, however, lies in its lack of a requirement that the trafficking case be referred to the police.

According to section 162, a child victim of trafficking is obliged to be referred to a designated social worker for investigation and may, pending such investigation, be placed in a place of safety. Where the child is an illegal foreign child, a Children's Court may order that the child be assisted in applying for asylum in terms of the Namibia Refugees (Recognition and Control) Act,[94] or, if the child is in need of care and/or protection, that he/she remains in Namibia for the duration of the Children's Court order.

Before a Minister returns such child to the country of origin or the country from where the child was trafficked, consideration must be had to the availability of care arrangements in the country to which the child is to be returned, the safety of the child in the country to which the child is to be returned, and the possibility that the child might be trafficked again, harmed or killed.[95] In terms of section 164 extra-territorial jurisdiction is applied for offences committed outside Namibia that are offences in terms of the provisions of child trafficking. This is supplemented by the Prevention of Organised Crime Act.[96]

Section 58 of the Bill deals with children in need of protection as including a child who lives or works on the streets or begs for a living; or who lives in or is exposed to circumstances which may seriously harm the physical, mental or social welfare of the child. This provision would be more exhaustive against child labour if it would also include a child who has been exploited or lives in circumstances that expose the child to exploitation; is begging or receiving alms, whether or not there is any pretence of singing, playing, performing, offering anything for sale or otherwise, or is found in any street, premises or place for the purpose of begging or receiving alms; frequents the company of any reputed thief or reputed prostitute; is found acting in a manner from which it is reasonable to suspect that he is, or has been, soliciting or importuning for immoral purposes; is prevented from receiving education; has been sexually

94 No. 2 of 1999.

95 Section 163, Child Care and Protection Bill.

96 No. 29 of 2004.

abused or is likely to be exposed to sexual abuse and exploitation including prostitution and pornography; is engaged in any work likely to harm his or her health, education, mental or moral development; is engaged in the use of, or trafficking of drugs or any other substance that may be declared harmful by the Minister responsible for health.[97]

Finally, section 24 of the Bill provides for a Children's Ombudsperson whose mandate would be to receive and investigate complaints that come to his/her attention, from any source, including a child, concerning children who receive services under this envisaged Act, or relating to services provided to children under it. In its current form, the provision does not charge the Children's Ombudsperson with the monitoring of the implementation of the envisaged legislation, but only with investigating complaints. Yet, s/he is mandated to monitor the implementation of the CRC and any other international instruments relating to child welfare and those that are binding on Namibia. This monitoring power is a very essential tool in meeting Namibia's international obligations, but for more effectiveness it should extend to the implementation of the proposed Child Care and Protection Act. This will be more effective in allowing for the ongoing general monitoring of implementation issues, as opposed to acting only on specific problems reported.[98] The Legal Assistance Centre also suggests broadening the mandate of the Children's Ombudsperson, following the examples from other countries, to allow for a more general and proactive involvement in the promotion and protection of children's rights.

This proposed piece of legislation will, together with the Children Status Act[99] and the Maintenance Act,[100] afford children greater economic protection, thereby reducing the likelihood of children engaging in work to support themselves. However, although the Bill covers adoption and the removal of children from the family home in cases of abuse or neglect, as well as other related areas of concern such as forced labour, it does not cover the provision of grants.[101]

Children's Status Act, 2006[102]

The key objectives of this Act are to promote and protect the best interests of the child, and to ensure that no child suffers any discrimination or disadvantage

97 See the LAC's recommendations on section 58 in MGECW (2009:36).

98 Section 24, ibid.

99 No 6 of 2006.

100 No 9 of 2003.

101 http://www.crin.org/email/crinmail_detail.asp?crinmaillD=3165#na; last accessed 2 October 2009.

102 No. 6 of 2006. Recent reports have suggested the Act might be repealed and its provisions incorporated into the Child Care and Protection Bill. If these recommendations are adopted by the Ministry of Gender Equality and Child Welfare, the Act would be repealed by the new legislation.

because of his/her parents' marital status.[103] Thus, by creating a legal duty to maintain children despite their status,[104] the Act provides for the recognition of the social and economic rights and protection of children born outside marriage,[105] who are more vulnerable than those born within it. Furthermore, the Act entitles children born outside marriage to inherit in the same way as those born within marriage.[106] The importance of this provision is that such children do not end up destitute and, therefore, desperate after the death of the deceased parent. The Act's relevance in eliminating the WFCL would be to minimise the incidences of children born out of marriage from being forced into circumstances in which they are engaged in forced labour or anything of the sort.

Maintenance Act, 2003[107]

The Maintenance Act is another piece of legislation that indirectly aids in curbing child labour. Inter alia, the Act places a legal duty upon parents to maintain their children, be they born within or outside marriage. The duty includes the responsibility of a parent to render support to his/her child, and provide the child with a proper living and upbringing, including food, accommodation, clothing, medical care and education.[108] In terms of section 9, children can lodge maintenance complaints against their parents in an attempt to secure a maintenance order or compliance with such an order. In this way, the Act facilitates the reduction of child labour by virtue of guaranteeing that the appropriate financial support will be rendered so that children may be less likely to have to support themselves by working.

Education-related legislation relevant to child labour

Central to any effective strategy to abolish child labour is the provision of relevant and accessible basic education.[109] However, education needs to be embedded in a whole range of other measures aimed at combating the many factors such as poverty, lack of awareness of children's rights and inadequate systems of social protection which give rise to child labour and allow it to persist. Article 15 of the Namibian Constitution provides for the protection of children under the age of 16 from exploitation or employment that is hazardous to them or interferences with their education. In addition, Article 20 therein states that primary education is compulsory and free, and that children are not allowed to leave school before they have completed their primary education or have attained the age of 16, whichever is sooner.

103 Section 2, Children's Status Act.
104 (ibid.:section 17).
105 Section 2, Child Care and Protection Bill.
106 (ibid.:section 16).
107 No. 9 of 2003.
108 Section 3, Maintenance Act.
109 ILO (2006).

Crime-related legislation relevant to child labour issues

Prevention of Organised Crime Act, 2004[110]

The Prevention of Organised Crime Act, which became operational in May 2009, is intended to give overall effect to the Convention against Transnational Organized Crime. Thus, the legislation covers situations of child trafficking since the Convention seeks to prohibit such practices.

Section 1 of the Prevention of Organised Crime Act defines *trafficking in persons* as –[111]

> … the recruitment, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation and includes any attempt, participation or organising of any of these actions.

Section 5 of the Act prohibits benefiting from the proceeds of unlawful activities. In section 6, the acquisition, possession or use of proceeds of unlawful activities is prohibited. Of particular significance in this context is section 15, which prohibits the trafficking of persons. Thus, the Act is very relevant to the implementation of the OPSC and the Convention against Transnational Organized Crime, but it does not make a distinction between *adults* and *children*. Such a distinction would have made it even more useful as a means of protecting children against one of the WFCL.

Closely related to the Prevention of Organised Crime Act is the **Drugs and Drug Trafficking Act**,[112] which deals with aspects of the possession and selling of drugs. A new Bill, the **Combating of the Abuse of Drugs Bill**, was recently introduced in the National Assembly. It bans the consumption, trafficking, sale and possession of dangerous, undesirable and dependence-producing substances.[113]

Extradition Act, 1996[114]

The Extradition Act is particularly relevant as criminal law legislation in that it criminalises any acts related to the sale of children, child prostitution, and child pornography. Thus, the Act aims at meeting Namibia's international obligations in compliance with the OPSC. In Article 3, the OPSC imposes

110 No. 29 of 2004.
111 (ibid.:section1).
112 No. 140 of 1992.
113 MLSW/Ministry of Labour and Social Welfare. 2008. *Action Programme on the Elimination of Child Labour in Namibia 2008–2012*. Windhoek: MLSW, p 48.
114 No. 11 of 1996.

upon states parties the obligation to criminalise acts related to the sale of children, child prostitution, and child pornography. Namibia's Extradition Act provides that the use of children for such purposes is an extraditable offence, and perpetrators of such offences can be dealt with under this Act.[115]

Combating of Domestic Violence Act, 2003[116]

This act defines *domestic violence* as acts that include physical abuse, sexual abuse, economic abuse, intimidation, harassment, and serious emotional, verbal or psychological abuse.[117] With regard to child labour, the Act was found to be relevant in a recent study which exposed the fact that many children were intimidated, threatened and/or beaten by family members if they did not perform household tasks, commercial sex work, or certain illegal activities expected of them.[118] The criminalisation[119] of domestic violence, therefore, becomes important for any child or person concerned with the well-being of a minor to lay a complaint[120] and request a protection order.[121] In addition to the protection orders and the role of police officers in this system against domestic violence, Namibia has set up a special unit within the police service, namely the Woman and Child Protection Unit (WCPU), to protect women and children from domestic violence, abuse and parental neglect, respectively.

Combating of Immoral Practices Act, 1980[122]

This Act is aimed at combating brothels, prostitution and other immoral practices. The Act criminalises activities such as soliciting in a pubic place,[123] exhibiting oneself in an indecent dress or manner in public view,[124] keeping a brothel,[125] procuring any female to have unlawful intercourse,[126] furnishing information to have unlawful carnal intercourse with a female,[127] and detaining a female against her will in a brothel.[128]

Section 10 criminalises the act of living wholly or in part on the earnings of prostitution, and knowingly assisting in the commission of an immoral act. This section could be applied to the cases in which parents, guardians, caregivers

115 Section 2, Extradition Act, 1996.
116 No. 4 of 2003.
117 Section 2 of the Combating of Domestic Violence Act, 2003.
118 Terry (2007:24).
119 Section 21, Combating of Domestic Violence Act.
120 Section 22, ibid.
121 Section 4, ibid.
122 No. 21 of 1980.
123 Section 7, Combating of Immoral Practices Act.
124 (ibid.).
125 (ibid.:section 2).
126 (ibid.:section 5).
127 (ibid.:section 6).
128 (ibid.:section 5).

or relatives force children into commercial sex work or are aware of such work being done by children and benefit either directly or indirectly from it.[129] More importantly, the Act provides criminal penalties for persons who detain minor females for purposes of unlawful carnal intercourse.[130] Where, for instance, the girl is older than 16 but still a minor, such detention cannot be against her will or that of her parents, guardian or other caregivers.[131] Section 14 specifically states that any male who has or attempts to have sexual intercourse or an immoral or indecent act, or solicits or entices girls under the age of 16 years to commit such acts will be guilty of an offence. Clearly, this provision can be employed to deal with situations where men enjoy the services of child prostitutes. As vital as this piece of legislation is against commercial sexual exploitation, however, it is blatantly discriminatory against boys and men. However, this discriminatory approach is addressed in the **Combating of Immoral Practices Amendment Act**,[132] which amends section 14 of the 1980 Act by providing for the protection of children against sexual abuse and sexual exploitation. The amendment of section 14 reads as follows:

> [H]aving any sexual act with a child under the age of 16, by anyone who is three years older than such a child and who is not married to such child is a criminal offence punishable with a fine of up to N$40 000 and/or imprisonment of up to 10 years.

Thus, the amendment takes away the discrimination against boys and men by referring to a *child* or *children*.

Indecent Photographic Matter Act, 1967[133]

This Act makes it an offence to possess indecent or obscene photographic materials. As in the above statutes, the Act complies with the OPSC obligation to criminalise acts related to the sale of children, child prostitution, and child pornography.

Combating of Rape Act, 2000[134]

This Act is crucial to the elimination of sexual exploitation of children by introducing into the crime of rape the element of coercive circumstances. In addition, such circumstances have been extended to include the age of consent. Thus, *coercive circumstances* arise where the sexual intercourse, consensual or not, was between a child under the age of 14 years and a perpetrator more than three years older than such child.[135] The penalties for

129 Terry (2007:27).
130 Section 13, ibid.
131 Ibid.
132 No.7 of 2000.
133 No. 37 of 1967.
134 No. 8 of 2000.
135 Section 2(2)(d), Combating of Rape Act.

rape under the Act are generally more severe where children are concerned.[136] Furthermore, the Act is gender-neutral and, therefore, covers instances where boys may also be sexually exploited.

There are, however, inconsistencies in the laws related to curbing the sexual exploitation of children. The Act sets the minimum age of consent to sexual activities at 14 years, whereas the Combating of Immoral Practices Amendment Act places it at 16 years. The effect of this is that the age limitation of the Immoral Practices Amendment Act would prevail over that of the Combating of Rape Act in a case where both Acts were to be used in conjunction in a court of law.[137] These Acts have been criticised for not being effective in combating the demand for child prostitutes as there may be no complainant and, therefore, no charges laid if a sexual act takes place between a willing child and a willing client.[138] However, one can argue that the Combating of Rape Act, in its definition of *complainant*, may in fact allow for a person other than the victim to lay a complaint. If this is the case, then the Act can be interpreted to mean that complaints can be made on behalf of children.

Legislation dealing with children involved in conflict with the law

Criminal Procedure Act, 1977[139]

Children who are accused of crimes in Namibia are governed by the same legislation as adults who enter the criminal justice system. The Criminal Procedure Act sets out the procedural system that governs the prosecution of all persons who come into conflict with the law. There are only minimal provisions that take the status of being a child into account. These include requiring court proceedings to be held in camera when a person under 18 years of age appears in court; allowing children to be assisted by their parents or guardians in court proceedings; and provision for children to be placed under the supervision of a probation officer. These provisions are largely outdated and inconsistent with the international obligations – hence the amendment of 2003 (see below).

Criminal Procedure Amendment Act, 2003

The Criminal Procedure Amendment Act, unofficially known as the 'Vulnerable Witnesses Act', was enacted to make it easier for courts to hear and consider

136 Section 3.

137 This is because the prosecution has to prove, beyond reasonable doubt, that a criminal act has been committed by the accused. Thus, it is a way of lightening the burden of proof in such cases, making it easier for the prosecution to argue its case.

138 Terry (2007:28).

139 No. 51 of 1977.

the evidence of children.[140] This is crucial to the effective prosecution of crimes committed against children. The Amendment Act aims to make the court process less traumatic for child victims and other vulnerable witnesses, especially in cases of sexual abuse, by allowing video testimony. The Amendment Act includes a protocol on how to handle traumatised complainants and witnesses, and helps prevent victims from being victimised twice, i.e. both by the perpetrator and by the legal system. This Act may facilitate testimony by child victims against perpetrators of sexual exploitation, trafficking, CUBAC, and other serious labour exploitation.

However, it appears that some of the protections provided by the Act will be removed by the Criminal Procedure Act, 2004, which has been passed and assented to by the President, but is not yet in force. Specifically, the 2003 Act required the courts not to regard the evidence of a child as inherently unreliable, and not to treat such evidence with special caution only because that witness was a child. The 2004 Act, discussed below, has excluded this provision altogether. However, the Ministry of Justice stated in January 2008 that they had recognised this gap, and were working on a solution.

Criminal Procedure Act, 2004[141]

Though not yet in force, this Act is aimed at making the court process less traumatic for child victims and other vulnerable witnesses, especially in cases of sexual abuse, by allowing such witnesses to make use of video testimony rather than testifying in front of the accused.[142] As provided in the OPSC, children need to be protected in criminal proceedings because of their vulnerability. In section 189, the Act provides for the handling of traumatised complainants and witnesses, especially in rape and domestic violence cases. The children envisaged under the said section are those under the age of 18 who have suffered sexual or indecent offences, and against whom domestic violence offences have been committed, as well as those who, as a result of physical or mental disabilities, fear intimidation by the accused or any other person. In addition to this, whenever children are involved in criminal proceedings, court sessions are usually held in camera so as not only to protect the identity of the child, but also to avoid the usual publicity of court cases. This Act may have implications for enabling children to testify with greater ease against perpetrators of sexual exploitation, child trafficking, CUBAC, and any cases of serious labour exploitation.[143]

140 MLSW (2008:20).

141 No. 25 of 2004.

142 Section 189, Criminal Procedure Act, 2004.

143 LeBeau, D, D Bosch, D Budlender & A Fourie. 2004. *Towards the elimination of the worst forms of child labour in Namibia*. Windhoek: Multi-disciplinary Research and Consultancy Centre, University of Namibia & Gender Training and Research Programme.

It has not been ascertained when this Act will be implemented, but if and when it enters into force, Namibia will have achieved the incorporation within its law the 2005 UN Model Guidelines for the Effective Prosecution of Crimes against Children, the 2005 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crimes, the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the 1990 UN Guidelines for the Prevention of Juvenile Delinquency, and the 1995 Recommendations of the UN Congress on the Prevention of Crime and the Treatment of Offenders.

Child Justice Bill

In 2002, to cater for the specific circumstances of children who are found on the wrong side of law, the Child Justice Bill was drafted. If it is passed, this Bill will create a juvenile justice system in line with international standards that responds to the needs of children in conflict with the law. Schedules 1, 2 and 3 of the Bill indicate specific offences. For example, offences falling under Schedule 3 include any offence committed by a person, group of persons, syndicate or and other enterprise acting in the execution or furtherance of a common purpose or conspiracy. If these offences take place, and a child was involved, this could be a possible case of CUBAC and warrants a stringent investigation. However, apart from the list of crimes in its Schedule 3, the Bill does not explicitly provide for CUBAC cases. Furthermore, there is nothing in this Bill to consider the child not as a perpetrator but a victim of crime. The one exception is section 80(2)(e), where a magistrate can remand the preliminary inquiry and require further assessment of a child if the child may be a victim of sexual or other abuse. It is assumed that the "other abuse" referred to in this section could include verbal, emotional or physical threats or actual abuse which would effectively force a child to commit a crime.[144]

Section 44(4) of the Bill allows for a social worker to conduct a joint assessment of two or more children alleged to be involved in the commission of the same offence, while section 78(2) allows for the same during the proceedings of a preliminary inquiry. The problem with these provisions is that if one child had been coerced, intimidated or forced to commit a crime by an older child and both are present at the same assessment, it may be impossible for the younger child to provide evidence of CUBAC. In the same vein, section 78(1) allows for the joinder of the proceedings of a preliminary inquiry with the trial of an accused child and co-accused adult, only if it is in the interests of justice. Furthermore, section 94 allows for the co-accused child and adult to be tried together if there are compelling reasons for the joinder of the trial. In these instances, the matter has to be transferred to the court in which the adult is to appear. However, these sections are potentially ineffective in that they place the child victim of CUBAC in an untenable position and prevent an opportunity for the child to disclose CUBAC. Nonetheless, it is hoped that these sections

144 Terry (2007:122).

will expose CUBAC to a greater extent than has been the case to date, especially via the testimony given by the adult.[145]

Chapter 5 of the Child Justice Bill covers the assessment and interviewing of children in trouble with the law. Section 18 of the Bill deals with pre-trial procedures where evidence is given or a confession is made in the presence of a legal practitioner; section 39 provides for social worker assessments before the child's first court appearance; and section 54 provides for police officials to consider administering a caution before charging a child. Sections 32, 70 and 74 provide for preliminary inquiries in the presence of a prosecutor and magistrate. Section 91 provides for how the child is to be handled during court proceedings. However, there is the notable danger that the child may choose to admit full guilt without implicating others if /she believes that diversion may be an easier option than undergoing normal trial procedures and possible incarceration.[146]

A major setback in the Bill is that it seems to depend heavily on the subjective opinion of, firstly, the police officers if they choose to caution children rather than arrest them, and secondly, of social workers if they conduct assessments to determine if diversion should be recommended. There is a need for extensive training both for the police officers and the social workers, including training on the best ways to assess whether children are victims of CUBAC, and to make recommendations for addressing the immediate and long-term needs of the children to prevent CUBAC from recurring. In addition, more social workers would have to be trained and placed in the Regions if this Bill is to be implemented properly.

There are a number of provisions within the Bill that follow the labour legislation that is already in place. Section 48 stipulates that a child 14 years and older who is required to perform community service as an element of diversion may do so for as long as it promotes the dignity and well-being of such child and the development of his/her self-worth and ability to contribute to the community. Such an option will also be allowed if it is not exploitative, harmful or hazardous to a child's physical or mental health; if it is appropriate to the age and maturity of the child; and if it does not interfere with the child's education or lawful employment. In line with section 48, section 106(2) stipulates the terms of the type of community service as part of sentence when a child under the age of 14 receives a sentence. Therefore, due consideration should be given to the child's age and development in determining the type of community service the child is required to render, the number of hours the child is required to perform such service, and the extent of the child's duties. However, there is no provision that addresses community service as a diversion option for a child under the age of 14 when the child is not going to trial; nor does the Bill

145 Terry (2007:57).
146 Terry (2007).

address the community service option for a sentence for children over the age of 14.[147]

In its current form, the Bill falls short of international standards as laid down and reiterated in Article 40 of the CRC, Article 17 of the African Charter on the Rights and Welfare of the Child, and the UN Guidelines dealing with the protection of and services provided to child witnesses. Much needs to be improved, therefore, to make this crucial piece of legislation effective and relevant in eliminating the WFCL. Of utmost importance is the need for the Bill's speedy enactment so that it can address the gap in dealing with CUBAC.

Policies relevant to child labour issues

National Policy on Orphans and Vulnerable Children, 2004

This Policy supports children who are orphaned or made vulnerable by relatives living with AIDS[148] and other causes of vulnerability. The document builds on Namibia's legal and policy framework supporting children's rights, and refers to Namibia's ratification of the CRC. In recognition of the CRC, Namibia was among the first countries to adopt a National Programme of Action (NPA) for children in 1991. The NPA was incorporated into the First and Second National Development Plans (NDP1 and NDP2),[149] with their stated goals of halving the malnutrition rates among children, providing access to safe drinking water and proper sanitation, providing access to basic education, and protecting children in especially difficult circumstances.

The Policy also recognises that Namibia ratified the UN Declaration of Commitment on HIV/AIDS in 2001, and commits the state to providing a supportive environment for OVC, e.g. those infected and affected by HIV[150] and AIDS and to protect children from all forms all forms of abuse, violence, exploitation, discrimination, trafficking, and loss of inheritance. The Policy sets out objectives, guiding principles, financial implications, institutional arrangements, monitoring and evaluation, and policy review provisions. Certain provisions in the Policy emphasise support to OVC, which in theory could lead to a reduction in the need for children to work. For example, provision is made for interventions to meet the economic needs of families with assistance via long-term partnerships with communities and their existing structures. The Policy states that government should ensure that –

147 Terry (2007:127).

148 Acquired immune deficiency syndrome.

149 NPC/National Planning Commission. 1995. *First National Development Plan (NDP1): 1995/1996–1999/2000*, Vol. I & II. Windhoek: NPC; NPC. 2001. *Second National Development Plan (NDP2): 2001/2002–2005/2006*, Vol. 1–3. Windhoek: NPC.

150 Human immunodeficiency virus.

- the necessary policy and legal framework is constructed for the protection of children
- adequate resources are made available to agencies tasked with child protection
- access to financial assistance such as grants is speedy and efficient
- education and other essential services are delivered, including emergency food supplies, and
- an appropriate system is set up to identify vulnerable children requiring assistance, and ensure their access to essential services.

National Gender Policy, 1997

This Policy deals with the girl child, and covers both general welfare issues and issues related to schooling. In terms of the welfare of the girl child, the Policy points out that discrimination against girls, in favour of boys, in access to nutrition and health care services endangers their current and future well-being and indicates certain conditions that force girls into early marriage, pregnancy and child-bearing, and subject them to harmful practices such as prostitution.[151] The Policy proposes a host of strategies to be implemented to eliminate discrimination against girls, with some having a direct link to a reduction in child labour. These strategies include –

- effective child-support laws
- elimination of the injustices and obstacles faced by the girl child regarding inheritance
- programmes to support girls to acquire knowledge and develop confidence and self-esteem, and
- protection for the girl child against violence, exploitation and abuse in the household.

Child-related welfare grants

Most of the existing welfare policies in Namibia provide for direct and immediate support of poor and vulnerable people. These include policies on safety grants, pensions, drought relief aid, and food-for-work programmes. All of these welfare policies have the potential, if not the precise effect, of reducing child labour. Examples of child-related welfare grants currently available include **Maintenance Grants**, **Special Maintenance Grants**, **Foster Care Grants** and **Place of Safety Allowances**.[152] The Ministry of Gender Equality and Child Welfare (MGECW) administers Maintenance Grants, Foster Care Grants, and Place of Safety Allowances for children under 18, and the Special

151 Section 17 of the National Gender Policy.

152 MWACW/Ministry of Women Affairs and Child Welfare. 2003. "Services for children in need", Brochure. Windhoek: MWACW & UNICEF.

Maintenance Grants for children under the age of 16. These grants facilitate in reducing or preventing child labour in that they provide a form of support to vulnerable children or their families, which may reduce the need for a child to work or be on the street.[153]

A **Special Maintenance Grant** caters for disabled children under the age of 16, and provides a monthly payment of N$200. **Foster Care Grants** are available for foster parents who obtain custody of a child in terms of the Children's Act[154] at the same rates as a **Maintenance Grant**. A **Place of Safety Allowance** was created for persons or places of safety mandated by the Commissioner of Child Welfare[155] to care for children under the age of 18. A *place of safety*, in terms of the Children's Act, is a place where the occupier is willing to receive the child, and it is a place suitable for the reception of a child.[156] The grant is N$10 per child per day and has not been increased since its establishment.[157] It is suggested that this grant be reviewed and increased. The MGECW should take necessary steps in this direction.

There are also adult-focused grants and pensions that have assisted a number of families. These clearly also indirectly reduce the number of children that take to the streets or elsewhere to earn an income. Examples of adult-focused grants include **Old Age Pensions** (administered by the Ministry of Labour and Social Welfare), **War Veterans' Grants**, and **Disability Grants** to people older than 16 years. The MGECW assists with disability grants for those younger than 16.

In addition, there are **Maintenance Grants for Biological Parents**. To qualify for this grant, a biological parent's spouse (the breadwinner) must either be receiving a pension or disability grant, must have died, or must have been in prison for six months or longer. Currently, the grant consists of N$200 per month for the first child, plus N$100 for every additional child for a maximum of three children per applicant until each of them reaches 18 years of age.

The **War Veterans' Trust Grant** of N$500 goes to all war veterans for the rest of their lives if they are older than 55 and unemployed. War veterans under 55 who are disabled or who for any reason cannot be employed will receive a monthly **Social Grant** of N$500 for the rest of their lives. These grants, like any of the others, may reduce the need for war veterans' children to be involved in work.

153 Terry (2007:25).
154 Section 31, Children's Act.
155 Section 33, Children's Act.
156 MWACW (2003).
157 MGECW/Ministry of Gender Equality and Child Welfare. 2005. "Child welfare grants". Brochure. Windhoek: MGECW.

Education-related policies and other measures

The Education for All National Action Plan, 2002–2015

The Education for All (EFA) National Action Plan constituted the national priority objectives for free education. Interestingly, this policy has interpreted the constitutional provision for providing free education as not ruling out a parent's obligation to contribute towards his/her child's education through contributions to the school development fund, school uniforms, food, and transport. In other words, the policy does not interpret *free education* as being completely free. However, the policy does not permit learners to be barred from attending school on the grounds that they cannot pay these costs. Therefore, mechanisms have been put in place to exempt those who cannot pay. Notably, in respect of meeting its ILO obligations as per the Second Global Report on Child Labour,[158] Namibia has not identified child labour as a key obstacle to achieving Education for All.

National Gender Policy, 1997

This Policy deals with the girl child and covers both general welfare issues and issues related to schooling. The Policy specifically aims to reduce the incidence of poor academic performance and the early drop-out rate for girls, which is caused by their obligations to manage both educational and domestic responsibilities. Therefore, it emphasises the importance of ensuring that women and girls have access to and are retained in all levels of education and academic fields. Regrettably, the Policy does not address the vulnerability of boys to specific forms of harm in child labour situations, considering the fact that there are relatively more boys than girls found in child labour.[159] The issue of many more boys in trouble with the law than girls is also not addressed in the Policy or the Child Justice Bill.

National Policy on OVC, 2004

This Policy outlines the importance of keeping OVC in school as being central to strengthening their capacity to meet their own needs. By way of this Policy, the government has committed itself to ensuring that all relevant parties are informed about the allowable exemptions from payments to School Development Funds for learners who are unable to make such contributions. Additionally, the government will ensure that no learner is excluded from a school or examination due to an inability to pay. Furthermore, education sector staff are to be sensitised to the needs of vulnerable children and play a role in setting up various support programmes. The Policy also notes that OVC

158 ILO/International Labour Office. 2006. *The end of child labour: Within reach. Global report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*. Geneva: ILO World Employment Programme.

159 Terry (2007:45).

should be assisted by the government, to whatever extent possible, to pursue tertiary education. The Policy also requires government, in cooperation with NGOs and other partners, to ensure that children are afforded the opportunity to participate in the design and implementation of such programmes.

School Policy on Learner Pregnancy in Namibia

This Policy allows girls who fall pregnant to continue with their school education until their confinement,[160] being the time the pregnancy becomes visibly apparent. After giving birth, such girls will only be readmitted to school in the following school year. In its current form, the Policy actually increases the rate of school drop-outs because, more often than not, the girls cannot afford to go back to school after a one-year suspension. The Policy is inappropriate, therefore, as it discourages young mothers from continuing their education – which is likely to disadvantage their own children in the long run. Thus, because of the length of the waiting period, financial hardship or parental pressure may induce the new mother to seek work during her one-year absence from school, with the likelihood that the young parent that finds employment will not return to school at the start of the new school year.[161] This eventually defeats the current Policy's stated purpose of encouraging the young mother to spend more time with her new baby, and illustrates that parent–child bonding is not an issue that can be forced by law or policy.

In light of Namibia's international obligations towards the elimination of the WFCL, the Policy is inconsistent with the CRC. There is a need for developing policies that allow adolescent mothers to stay in school, encourage regular school attendance, and promote the enrolment and retention of girls in school and other training institutions.[162] To this end, the Ministry of Education is working on a new Policy on Learner Mothers which would allow adolescent mothers to return to school immediately after giving birth on condition that there is someone to look after their babies.[163]

Policies directed at eradicating poverty

Poverty Reduction Strategy, 1998

There are various policies and strategies in Namibia that can potentially impact on child labour, either through immediate or long-term poverty reduction. The policy objectives for reducing poverty set out in Article 95 of the Constitution, NDP1, NDP2, and Vision 2030 have laid out sector-based strategies for

160 Circular Formulary Ed. 5/2001 of 2001, Ministry of Education, Sport and Culture, on teenage pregnancy.

161 (ibid.).

162 Shejavali, N. 2009. "LAC calls for reform of school pregnancy policy"; *The Namibian*, 10 February 2009.

163 This new Policy has been adopted by Cabinet, but is yet to be formally launched and implemented as there are still some consultations under way to finalise it.

economic development and poverty reduction.[164] To meet these strategies that cut across various Ministries, the Poverty Reduction Strategy for Namibia (PRS) was approved in 1998.[165] The PRS assists in focusing on key priorities by providing a common vision for Namibia's development. This common framework also incorporates government's Affirmative Action policies in order to identify and create opportunities for the most vulnerable communities in society.[166]

In its attempts to reduce poverty, the PRS focuses on the following, inter alia:[167]

- How to foster more equitable and efficient delivery of public services (in the context of Namibia's commitment to regional decentralisation) for poverty reduction countrywide
- How to accelerate equitable agricultural expansion, including considerations regarding food security and other crop development options, and
- How to ensure non-agricultural economic empowerment, including an emphasis on the informal sector and self-employment options.

To ensure the PRS achieves its aims, there is a need to strengthen Namibia's safety net programmes that support existing cash-based labour-intensive work programmes and grant-based transfer programmes.[168] Yet, there are not enough jobs or decent employment opportunities within the Namibian economy to alleviate the high levels of poverty. Further support is granted by monitoring institutions such as the National Advisory Committee on Poverty Reduction (NACPR), which is the highest advisory body to the National Planning Commission on matters pertaining to poverty, and a National Task Force on Poverty Reduction (NTFPR), which provides technical advice to the NACPR.[169] The original intention was that the PRS would be implemented on the ground through the National Poverty Reduction Action Programme (NPRAP) within a set five-year period, namely 2001–2006.[170] However, the NPRAP was not rolled out, and now the PRS and all poverty issues for the next five years will be addressed through the Third National Development Plan (NDP3).[171]

164 NPC (1995); NPC (2001); Office of the President. 2004. *Namibia Vision 2030*. Windhoek: Office of the President.

165 NPC/National Planning Commission. 2008. *Poverty Reduction Strategy for Namibia*. Windhoek: NPC.

166 (ibid.:2).

167 (ibid.).

168 (ibid.:17–20).

169 See the framework outlined in (ibid.:25–26).

170 NPC/National Planning Commission. 2002. *National Poverty Reduction Action Programme 2001–2006*. Windhoek: NPC.

171 Terry (2007).

Basic Income Grant

The Basic Income Grant (BIG) is a programme advocated by civil society organisations to alleviate poverty. In terms of its scheme, the BIG would provide a monthly grant of N$100 to individual Namibians regardless of their level of income, with the assumption that this amount would significantly help families in poverty, without adding the significant administrative cost of identifying and certifying poor families versus those who are better off. The BIG would be relatively easy to implement and would lead to a significant reduction of poverty levels in Namibia's poorest households, as well as bring down the country's Gini coefficient to 0.60.[172]

Food and Nutrition Policy, 1995

This Policy addresses the issue of food insecurity. The Policy notes three basic conditions that need to be met for an individual to achieve a positive food and nutrition status:[173]

- Access to adequate resources to grow or purchase food
- Knowledge to use those resources to their best advantage, and
- Access to services such as safe water, health clinics, and reliable market structures.

To implement this Policy, the National Food Security and Nutrition Programme collaborates closely with the NPRAP to develop human and institutional capacity to manage local projects that address chronic food insecurity. Food Security and Nutrition Technical Committees have been established in all 13 Regions in the country with a view to developing Region-specific problem-oriented action plans.[174] This may be another nationwide programme that child labour interventions can link up with to avoid duplication of efforts.[175]

Programmes combating child labour and the elimination of the WFCL

Towards the Elimination of the Worst Forms of Child Labour

The Programme, entitled "Towards the Elimination of the Worst Forms of Child Labour", commonly known as the *ILO TECL Programme*, is the first

172 Haarmann, C & D Haarmann (Eds). 2005. *The Basic Income Grant in Namibia – Resource book*. Windhoek: BIG Coalition.

173 GRN/Government of the Republic of Namibia. 1995a*. Food and Nutrition Policy for Namibia.* Windhoek: National Food Security and Nutrition Council, Ministry of Agriculture, Water and Rural Development, pp 15–17.

174 MAWRD/Ministry of Agriculture, Water and Rural Development. 2004. *Follow-up Report on the Implementation of the World Food Summit Plan of Action in Namibia*. Windhoek: Government of the Republic of Namibia, p 43.

175 Terry (2007:44).

of two programmes directly dealing with the elimination of child labour. The Programme is supported by the ILO's International Programme on the Elimination of Child Labour, based in Geneva, and is funded by the United States Department of Labor. The TECL Programme started in 2004 and ended in 2008. During this period, the Programme focused on the following:

- Contributing to knowledge on the extent, nature and causes of the WFCL
- Assessing the policy environment as a framework for establishing an Action Programme on the Elimination of Child Labour
- Formulating an Action Programme on the Elimination of Child Labour with an emphasis on the elimination of the WFCL, and
- Sharing of experience and best practices in researching the WFCL amongst member states of the Southern African Customs Union, of which Namibia is one.

In 2008, the Programme received further funding from the US Department of Labor to implement its second phase – *TECL II*. Currently, the Programme is being implemented in three southern African states, namely Botswana, Namibia, and South Africa. The Programme's main objective is to contribute towards the elimination of all forms of child labour by focusing on HIV and AIDS, and supporting the implementation of the Action Programmes developed under TECL I. The Programme is guided by two immediate objectives:

- Strengthening the capacity of key partners to enable them to effectively mainstream child labour issues into national legislative and policy frameworks and take action against the WFCL, and raising awareness among the general public and among key stakeholders about such issues, and
- Developing models of intervention focusing on education and HIV and AIDS for addressing selected forms of child labour.

Reducing Exploitative Child Labour in Southern Africa

This Programme is the other one of two dealing directly with the elimination of child labour. The only Region in the country which it was implemented was Caprivi, where it fell under the management of Africare. The Programme aimed at addressing the situation of children not attending school because they were obliged to work. It further aimed at reducing the number of children engaged in the WFCL by increasing the number of children attending school.

The Resolution by the Extended Programme Advisory Committee on Child Protection (PACC) endorsing the National Action Programme Towards the Elimination of Child Labour adopted in January 2008 is the most recent development in Namibia dealing directly with the elimination of child labour. This Programme is aimed at meeting Namibia's obligations as per the ILO Minimum Age Convention (C138) and the ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour by adopting a time-bound and comprehensive policy framework

and plan for the elimination and prevention of child labour in Namibia, focusing on the WFCL. In terms of this Programme, the Ministry of Justice; the Ministry of Gender Equality and Child Welfare; the Ministry of Youth, National Service, Sport and Culture; the Ministry of Health and Social Services; and the Ministry of Safety and Security (the Women and Child Protection Unit), under the chair of the Permanent Secretary of the Ministry of Labour and Social Welfare, as PACC Chairperson, will meet to decide on their implementation accountabilities for CUBAC and the PACC's links to Namibia's juvenile justice system. The time-bound National Action Programme Towards the Elimination of Child Labour will be implemented through its inclusion in the national planning processes, in the NDPs, and through mainstreaming it into existing and proposed strategies, plans and programmes for the welfare of Namibia's children, especially those that are classified as vulnerable.[176]

Programmes dealing with children in conflict with the law

There are also programmes that focus on catering for children who have contravened the law as a result of being forced or influenced to do so by adults or older children. Most of these draft policies and programmes focus on restorative justice and are overseen by government under the Interministerial Committee on Child Justice (IMC), the Juvenile Justice Forum (JJF), and the Awaiting Arrest Committee, with representation from at least five line ministries and three NGOs. The JJF mandated the Legal Assistance Centre (LAC) in 1997 to implement a pilot Juvenile Justice Project (JJP) in Windhoek, focusing on –

- crime prevention through education, advocacy and awareness
- the implementation of diversion options, and
- the promotion of a progressive restorative justice system.

The JJP included an outreach programme focusing on the rehabilitation and reintegration of young offenders into society. Unfortunately, the project ended in 2006 due to a lack of funding.[177] The JJP itself has not met since mid-2005, and nor has the IMC, due to repeated leadership changes.[178] Consequently, the regional structures that were intended to provide support for the screening of accused juveniles and to seek to divert young offenders from the normal sentencing procedures have not been functioning properly.

National OVC Programme

The government's National OVC Programme is overseen by the Permanent OVC Task Force which falls under the Ministry of Gender Equality and Child Welfare, and supported by NGOs and donor agencies.

176 Extended Programme Advisory Committee on Child Protection. 2008. *Resolution Endorsing the Namibian National Action Programme towards the Elimination of Child Labour*. Windhoek: Ministry of Labour and Social Welfare.

177 MLSW (2008).

178 (ibid.).

Schooled for Success: Promoting Full School Participation by OVC

This Programme is run by Catholic AIDS Action, and aims at ensuring OVC attend and succeed in school. So far, the Programme has, through a joint venture with the private sector, managed to incorporate a major campaign on the rights of OVC to attend school, on psychosocial support at community level, and on the right of qualifying OVC to be provided with school supplies and uniforms.

AIDS Law Unit, LAC

The LAC's AIDS Law Unit (ALU) is an advocacy project focusing on the rights of people living with HIV and AIDS and of OVC. The ALU was instrumental in drafting the National OVC Policy. In addition, the ALU drafted the National HIV Policy for the Education Sector, which was endorsed by both Ministries of Education at the time and specifically speaks to the rights of vulnerable children in education.

National Policy Options for Educationally Marginalised Children, 2000

The National Policy Options constitute a programme emanating from the National Poverty Reduction Strategic Action Plan (NPRAP), which highlights gender, marginalised and vulnerable children, and the elimination of income and other disparities as key strategies in poverty reduction. The National Policy Options provide comprehensive and clear delimitations of categories of educationally marginalised children as well as the main reasons for their marginalisation in education, inclusive of their special needs. It sets out an implementation framework and defines the roles of NGOs and development partners in this area.[179]

There are also programmes spearheaded by the current Ministry of Education in collaboration with the Office of the President, which aim at getting street children back into school. Examples include the following, all of which have succeeded in ensuring more children stay in school:[180]

- School Feeding Programme
- Mobile School Programme
- Sensitisation of Marginalised Communities Towards Education
- Windhoek Working Group on Street Children, and
- Acacia Education Project in the Ohangwena Region.

179 Ministry of Basic Education, Sport and Culture. 2004. *National Report on the Development of Education in Namibia. International Conference on Education, Geneva*. Windhoek: MBESC; available at *unpan1.un.org/intradoc/groups/public/.../cpsi/unpan036436.pdf; last accessed 17 October 2009.*

180 UNESCO/United Nations Educational, Scientific and Cultural Organisation. 2002. *Primary research on children living and being on the street: The Namibian case. Conducted in co-operation with UNESCO.* Windhoek: UNESCO.

All these programmes to get children back into school are crucial in the fight against child labour, considering that quality education is a key element in preventing child labour.[181]

The School Feeding Programme

This Programme, apart from catering for street children as discussed above, is the main conduit for addressing children's nutritional needs. The programme attempts to secure adequate nutrition for impoverished learners, because such school feeding schemes boost enrolment and performance.[182] However, the Programme focuses on schools perceived to be 'more needy' than others, and therefore pockets of undernourished children in 'better-off' schools may be left out. Furthermore, the Programme does not yet cover all needy schools. There is, of course, a link between proper nutrition and school attendance, and between school attendance and the prevention of child labour.[183]

HIV and AIDS-related programmes relevant to child labour

National AIDS Control Programme

Programmes that address HIV and AIDS fall under the National AIDS Control Programme (NACP) launched in 1990, and in the Medium-term Plans (MTPs) in operation since 1992. Because of the sweeping national scope of these programmes and plans and the potential impact of HIV and AIDS to increase incidences of child labour, it is essential to link up any plans to reduce child labour with the national effort on HIV and AIDS. Under the umbrella of the NACP, there are programmes spearheaded by the Namibian HIV and AIDS Media Campaign which runs social mobilisation efforts such as the "My Future is My Choice" Youth Programme, which targets children between 8 and 13 years of age.

Many other programmes are run by central government offices based in the Regions, by regional and local authorities, and by NGOs, community-based organisations, faith-based organisations, the private sector, and civil society. Those Programmes identified as having potential links to child labour interventions include the following:[184]

- Namibia Network of AIDS Service Organisations (NANASO)
- Namibia Business Coalition on AIDS (NABCOA), and

181 See ILO (2006:57–58).

182 SIAPAC/Social Impact Assessment and Policy Analysis Corporation. 2002. *A situation analysis of orphan children in Namibia*. Windhoek: Directorate of Developmental Social Services, Ministry of Health and Social Services & United Nations Children's Fund (UNICEF), ES2–3.

183 Terry (2007:44).

184 (ibid.:39).

- organisations such as Childline, Lifeline and the Philippi Trust that counsel on HIV and AIDS-related issues along with other social problems.

The gaps between international obligations and domestic action

Most of the international obligations are not sufficiently met merely by the application of Article 144 of the Namibian Constitution. There are some lacunae that need to be filled by legislation that will deal specifically with each and every pertinent provision on child labour. The law does not operate in a vacuum, and having a comprehensive legal framework on children's rights will not automatically lead to full observance of these rights. There also needs to be accompanying political, economic, social and financial support for the effective realisation of these rights. Furthermore, the Namibian government needs to keep the promises it made when it ratified international instruments, and citizens and stakeholders need to hold them accountable for their promises. The following paragraphs identify the gaps in Namibia's laws and policies with respect to the main international instruments aimed at eliminating child labour and the WFCL.

Compliance with the Convention concerning Minimum Age for Admission to Employment

Namibian laws are not directly in line with this Convention, which places the minimum age at 18 in respect of work which may harm the health, safety or morals of young persons. This is because the Namibian Constitution in fact allows children who are 16 and 17 to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. In addition, the Labour Act allows 16- and 17-year-olds to be employed in a mine, factory, electricity plant or construction site.

To conform to this Convention, the Ministry of Labour and Social Welfare would need to place conditions and restrictions on the employment of all children under 18 to ensure that such employment is not harmful. In fact, the regulations that the Minister makes in terms of section 3 of the Act should be strict in ensuring compliance with the Convention. Therefore, companies involved in activities such as road construction, agriculture, fishing and charcoal production and which hire children under 18 to do hazardous work would be contravening the terms of this Convention. Additionally, failure to provide free protection for employees doing hazardous work would be considered to be operating illegally – according to the Labour Act.

Gaps are also found in the formal sector when employees, including legally hired 15- to 17-year-olds, are not in full-time positions or are employed as casual labourers or subcontracting workers and are not covered in the Labour Act. Other loopholes are found in the legislation on formal sector work because the age restriction categories for certain industries differ depending on one's source of reference, i.e. the Constitution, the 2004 Labour Act, or the above Convention. In all the existing laws and policies on regulating the informal sector, with the exception of the Children's Act as regards child vendors, there is a notable lack of provisions regulating and enforcing Namibia's labour laws when it comes to child labour.[185]

Beyond the legislation covering general age restrictions and the health and safety of those working in potentially hazardous conditions, there appear to be no other regulations or provisions. There is also nothing specific to domestic work or commercial sex work. Furthermore, beyond the general child welfare policies and legislation, especially those covering OVC, there is only the old legislation in the 1960 Children's Act covering children selling on the street or begging, and nothing on scavenging in waste bins or dumps.[186] In addition, with regard to exploitative child labour, two major problems have been identified:[187]

- The minimum wage bracket does not cover certain forms of informal work. For instance, there is no domestic workers' minimum wage in Namibia. Therefore, most people hire children instead of adults so that they can pay in kind or very low cash wages, and
- There are very limited investigative mechanisms for domestic labour problems. Even in terms of Namibia's child protection laws, investigating private homes in respect of exploitation of child labour seems to be difficult.

Compliance with the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour

Much has been done in programmes and strategies to eliminate the WFCL in Namibia recognition of the obligations placed upon the country by this Convention. What remains and which is most crucial is to incorporate within these programmes, strategies, laws and policies the urgency emphasised by the Convention. There is no move towards immediate abolition as such, especially because of a lack of financial and human resources. The penal sanctions that are required to be implemented in almost every piece of legislation relevant to child labour issues are not that prevalent in Namibian law. Concerning the special situation of girls, there is still room for improvement, especially when it comes to policies for school-going girls who fall pregnant.

185 Terry (2007:68).
186 (ibid.:77).
187 (ibid.:66).

Compliance with the Optional Protocol on the Sale of Children

A lot still needs to be done to comply with the OPSC. For instance, the OPSC has not yet been fully complied with despite the Prevention of Organised Crime Act and Chapter 12 of the Child Care and Protection Bill. There is in fact no specific policy or programme covering trafficking of children in Namibia. At the moment, Namibian laws against trafficking are only covered under laws against forced labour and under the international Conventions ratified by Namibia. A commendable action, however, is the country's involvement with the Southern African Regional Network against Trafficking and Abuse of Children (SANTAC). SANTAC mainly deals with the issue of human trafficking within the southern African region, especially the trafficking of children for sexual abuse. Its mission is to –[188]

> [b]uild synergies amongst Southern African institutions or individuals to fight all manifestations of child abuse, in particular child sexual abuse, commercial sexual exploitation, child labour and trafficking of children for any exploitative purpose, through advocacy, education, awareness, law reform, rehabilitation and services for the victims.

Another issue of concern, especially in southern Africa, is human trafficking. To date, no figures have been provided on this by any of the government stakeholders, yet it is undeniable that this evil is prevalent in Namibia. It has been widely reported that human trafficking seems to be a lucrative business in the region, with South Africa being the main destination in most cases. In the majority of cases, the girl child has been identified as the main victim in human trafficking. The unsuspecting girls, due to poverty, are lured into this dangerous circle by the prospects of finding greener pastures that will enable them to take care of themselves and their families. Upon arrival in South Africa, they are sold and forced into prostitution and other forms of labour. Though there are no confirmed reports of human trafficking in Namibia, particularly of children, the Combined Second and Third Country Reports by Namibia to the Committee on the Elimination of Discrimination against Women stated that two girls had reportedly been abducted from Swakopmund while on their way to Windhoek for the holidays.[189] The girls were apparently held as sex slaves at separate shacks east of Johannesburg. This incident ought to set off alarm bells for the legislative bodies as well as the government so as to prevent future incidents.

According to SANTAC's assessment of the situation in Namibia, the government has introduced a special course on gender sensitivity for the Police; opened safe houses; and, in collaboration with NGOs, has opened centres for counselling, places of safety, and court preparations, amongst

188 See http://www.santac.org/eng/About-us/Mission; last accessed 28 July 2010.
189 CEDAW/C/NAM/2-3, submitted in 2005.

other things. In addition, NGOs have trained and sensitised the Police and the judiciary to crimes of sexual exploitation and assault. All this has been done in order to bring national legislation in line with its commitments to children in respect of the UN Convention on the Rights of the Child.[190]

The Namibian government does not yet fully comply with the minimum standards for the elimination of trafficking. However, it is making significant efforts to do so. The distribution of anti-trafficking brochures and the commissioning of a baseline study on human trafficking by the Ministry of Gender Equality and Child Welfare demonstrate the government's increasing awareness of the issue and commitment to addressing it. The government also hosted the ninth annual International Criminal Police Organization (INTERPOL) working group meeting on trafficking in persons in September 2008.[191]

In assessing all the efforts already made by the government in putting legislation, policies and programmes in place, it seems clear that the problem is not so much about the gaps in policies, but about inadequate policy implementation.[192] For instance, although children in conflict with the law are not supposed to be incarcerated unless absolutely necessary, many children are in fact being detained in police cells before trial for a lengthy period of time and are incarcerated in various prisons around the country. It has been reported that the treatment of children and the condition of cells are definitely not up to international standards. Even though children under 18 years are not supposed to associate with adults if they are detained, the shortage of alternative facilities has meant that children are kept in the same facilities as adults and sometimes in the same Police holding cells. Due to the shortage of facilities, girls are typically kept in the same Police holding and prison cells as adult women; and boys, where separated from adult males, are often found to be in very crowded and unsanitary conditions.[193]

It has been observed that the relevant ministries involved in eliminating child labour recognise the need for more action within their respective sectors, but they point out that the action already required in the existing laws and policies as well as action to be improved add substantially to their costs, and they would need supplementary funding. Others have alleged that the regular changes in

190 SANTAC/ Southern African Regional Network against Trafficking and Abuse of Children. 2010. *Tsireledzani: Understanding the dimensions of human trafficking in southern Africa*. Available at http:www.santac.org/eng/Media/Files/Tsireledzani-Understanding-the-dimension-of-Human-Trafficking-in-Southern-Africa; last accessed 28 July 2010.

191 http://windhoek.usembassy.gov/june_16_2009.html; last accessed 16 June 2009. Cf. also USDS/United States Department of State. 2009. *Trafficking in persons 2009 – Namibia.* Available at http:www.unhcr.org/refworld/docid/4a4214a0c.html; last accessed 2 October 2009.

192 See the examples mentioned in Terry (2007:64).

193 Terry (2007:125).

ministerial leadership are impacting negatively on progress as regards their programmes and action plans.[194]

Most international instruments call for public awareness strategies to eliminate child labour. However, there appears to be limited understanding of these laws, policies and strategies among parents and other members of the public. This shows that there is still a lot to be done on public awareness, especially in remote areas which are the least accessible. Comprehensive, multi-channelled awareness campaigns on the importance of eliminating child labour, keeping children in school, and other incidental matters are urgently needed.

Compliance with the Declaration on Fundamental Principles and Rights at Work

Although the 2007 Labour Act adequately provides for children involved in formal and informal work, loopholes have been identified in the Act in regard to wages and payments for contract workers and casual labourers because they are not adequately covered in the provisions set out for employed workers.[195] Moreover, the Declaration explicitly prohibits children under the age of 14 years to be involved in any work; yet it is not clear whether all the laws recognise this age limit on admission to employment, especially in the informal sector.

Compliance with the CRC and ACRWC

The Namibian government has made visible strides in meeting its CRC and ACRWC obligations, especially in terms of submitting its prescribed reports. However, the Constitution and all other legislation do not seem to be in unison in respecting and applying the best interests of the child in labour matters. Also, the existing laws do not make the act of commercial sex illegal. Thus, sex workers and victims of sexual exploitation can still be arrested for various related activities, such as soliciting. None of the laws directly acknowledge that children engaged in prostitution should be seen as victims and not as criminals.[196] There are also no explicit laws to cater for CUBAC. The Child Justice Bill, which is meant to be exhaustive in this regard, makes no explicit provision for CUBAC, besides referring to a child as a "victim" in one of its sections. In this regard. Namibian laws also fail to meet the standards set out in international guidelines.

Compliance with OPAC

The main piece of legislation in Namibia relevant to OPAC is the Defence Act. However, this Act does not lay down the minimum age for recruitment

194 MLSW (2008:48).
195 Terry (2007).
196 MLSW (2008:47).

into the armed forces. Obviously, the work involved in the armed forces is potentially harmful to a child's health. It would, therefore, be important to lay down the minimum age of recruitment. The Act also fails to distinguish between members who may be called for mobilisation if and when Namibia is involved in an armed conflict.

Conclusion and recommendations

Recommendations on principles for a Child Labour Action Programme

The Namibian system needs to constantly bear in mind certain foundational principles in its efforts towards the elimination of child labour and the WFCL. There is a need for **social dialogue** to identify forms of child labour that should be eliminated or addressed. Where possible, children have to be given an opportunity to offer their input before decisions are taken about their work and life. When deciding what kind of action to take, the **child's best interests** are always the most important.

There is a need to **prioritise** and ensure that resources are used in a focused way to address the WFCL that can be tackled. Namibia should also develop an **indigenous programme**, borrowing best practices from other countries, where appropriate. Furthermore, there is a need for a commitment on necessary resources. **Specificity** on the responsibilities of all relevant government departments and a clear identification of the areas of responsibility and tasks of other stakeholders are both crucial. Notwithstanding the principle of *Prevention is better than cure,* it must not be forgotten that there are already children exposed to the WFCL who need to have their needs addressed as urgently as possible.

Recommendations based on child labour practices

Sexual exploitation

To protect children from sexual exploitation, both the age of sexual consent and the age of marriage for both genders need to be revised and applied consistently in all relevant legislation and policies. The age of sexual consent should ideally be 16, in the interest of protecting childhood in line with the *Best interests of the child* principle. Another way forward would be to amend and harmonise existing legislation to protect children more effectively from sexual exploitation, and ensure that they are treated as victims rather than offenders. Awareness campaigns and dissemination of information on child sexual exploitation should be developed using mass media, churches, schools, and sectors where commercial sex usually occurs. Existing institutions such as the Woman and Child Protection Units should be strengthened and more created.

CUBAC

Despite the provisions in the prospective Criminal Procedure Act and the Child Justice Bill, there is a need to legislate for the right to free legal representation for child victims and offenders, and to ensure access to this right. In any criminal case involving children, both the best interests of the child concerned and his/her natural right to be heard have to be respected. Furthermore, the prospective laws should establish child-friendly benches in both urban and rural areas around the country, in order to adjudicate on all cases relating to children by way of closed proceedings and quick adjudication timelines.

For effectiveness in implementation and monitoring, stiff and effective sanctions and penalties should be applied for perpetrators of abuse against children. Additionally, in line with CRC General Comment No. 10, proper data collection systems concerning children in conflict with the law should be established to enable monitoring of improvements in juvenile justice to be measured over time. This will ensure that an effective complaints system is established for addressing rights violations of children deprived of their liberty.

Child trafficking

The government needs to take into account the growing concern that the rate of child trafficking is high in the SADC region, and it should investigate whether children in Namibia are at risk and if any incidents have occurred. The government should also look into the issue of so-called street kids. There are an increasing number of street kids in the capital, and it is believed that they are the most at risk of being trafficked for prostitution or manual labour. Public awareness campaigns should be launched so that people are made aware of this problem and that their children need to be protected.

The government should also look into the adoption laws that are in place in the country because it has been observed that traffickers have found loopholes in these laws, enabling them to 'adopt' children and then sell them for exploitation purposes. In this regard, the Child Care and Protection Bill – which is yet to be tabled in Parliament – provides for procedural safeguards against any child exploitation through the adoption system. The Bill is in line with the Hague Convention on Child Adoption, although Namibia is not yet a signatory to it. Unfortunately, until the Bill becomes law, child adoption processes are still governed by the outdated Children's Act, which has many loopholes.

A study by the LAC[197] on commercial sex recommended that, with respect to trafficking in Namibia, –[198]

- there should be serious offences attached to anyone who traffics in persons

197 LAC (2002:194), cited in Terry (2007:80).
198 (ibid.).

- the offences themselves should be based on the definitions of trafficking and exploitation in the relevant international Conventions
- these offences should not be limited to trafficking that crosses international borders, but should also apply to situations where a person is trafficked from one part of Namibia to another, and
- even more importantly, Namibia should consider a broader law on trafficking, outside the context of sex work.

Children in agricultural work

To date there has been no law to regulate the kind of work to be done by children either in subsistence agriculture (usually for the family) or commercial agriculture as employment. It is recommended that the Ministry of Agriculture, Water and Forestry (MAWF) address this gap by harmonising existing legislation and policies pertaining to child labour in the agricultural sector. Child labour issues should be included in the National Policy on Agriculture. MAWF can also develop a clear definition of what constitutes *child labour* as against the normal responsibilities on subsistence farms.[199] For effective implementation of the existing laws and policies, MAWF should increase its inspections on commercial and communal farms to ensure no under-aged children are working, and to ensure that no child is working under hazardous conditions. MAWF could also work with the Ministry of Labour and Social Welfare to achieve this goal, and could be assisted by the Ministry of Justice to process its submissions in this respect.

Children working on the streets

Children working on the streets are extremely vulnerable to child labour. These children beg, direct car parking, push trolleys, steal, wash cars, scavenge in dust bins or garbage dumps, and solicit sexual clients in passing cars.[200] Working on the street exposes children to the increased possibility of harm, including violence or sexual exploitation. While the Children's Act prohibits children under the age of 18 to beg or accompany persons begging, there are no specific policies or programmes for children working on the street.[201]

Recommendations for effective monitoring mechanisms

A Children's Ombudsman as proposed in Child Protection Bill should be given the power set up directorates and committees that will allow for the effective monitoring not only of the implementation of the Bill once it becomes law, but also for all of Namibia's international obligations. Effective monitoring is necessary in schools, courts, hospitals, protection units, and various districts and communities as well, including communities in the remote areas. In this

199 MLSW (2008:100).
200 LeBeau et al. (2004), cited in Terry (2007).
201 Terry (2007:83).

regard, all relevant Ministries should be involved as a coalition that will ensure that this monitoring is done. Adequate incentives should also be offered if implementation from the bottom up is to be effective. The need for an economic safety net is key to addressing child work in Namibia. Without government financial assistance to children who have no other means of support, children will be forced to participate in income-generating activities regardless of the hazards.

Recommendations on a review of existing legislation

There is a need to audit and review existing legislation on children. Where audits of laws relating to children have not been undertaken, the first step should be a holistic, multi-sectoral and inclusive review. Where comprehensive assessments have been undertaken, there is a need for continuous review and revision of laws. All processes need to entrench the principles of non-discrimination, the best interests of the child, and participation of children in accordance with their evolving capacities. Ensuing legislation may either be in one consolidated statute or in several thematically based statutes. However, it is recommended that laws relating to child justice and child welfare should not be merged.

One major setback in Namibia concerns the delay in adopting and enacting, on a priority basis, bills relating to children's rights that have been submitted to Parliament but are still pending. Time and resources have been expended in undertaking reviews, and revising and drafting new legislation; this must not be in vain. Pending draft legislation should be enacted without further delay.

There is also a need to ensure there are mechanisms and bodies with wide representation from government and civil society that will promote and own the process of national harmonisation of laws and policies, including coordination and monitoring of their implementation. These could be existing bodies with the mandate to review and revise laws, such as the Law Reform and Development Commission, together with the relevant line Ministries.

There is also a need to implement laws on non-discrimination and ensure all children receive equal protection and enjoyment of rights within state jurisdictions. Furthermore, awareness needs to be raised of the fact that, in line with Article 3 of the ACRWC, the duty of non-discrimination rests on all actors, including communities, and not just the state.

Finally, there is a need to enact new laws which would help in the effective protection of OVC. Furthermore, Namibia should sign and ratify the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993.

Additional references

Horn, R. 2009. *Namibia: Behind the new Child Bill*. Available at http://ipnews.net/news.asp?idnews=48165; last accessed 25 September 2009.

LeBeau, D. 1992. *Phase I of Educationally Marginalised Children's Project: Baseline desk study*. Windhoek: Namibian Institute for Social and Economic Research.

Legal Assistance Centre. 2002. *Restorative approach to juvenile justice in Namibia*. Windhoek: LAC.

Ministry of Labour. 2000. *Namibia Child Activity Survey 1999: Report of Analysis*. Windhoek: Ministry of Labour.

MLSW/Ministry of Labour and Social Welfare. 2007. *Implementation Plan of the Programme Towards the Elimination of the Worst Forms of Child Labour in Namibia, 2005–2007*. Windhoek: MLSW.

Sherbourne, R. 2003. *Review of welfare grants*. Windhoek: Institute for Public Policy Research & Ministry of Women Affairs and Child Welfare.

Terry, M Elizabeth. 2001b. *The situation and needs of youth and the implications for sustainable livelihoods in rural Namibia*. Windhoek/Rome: Directorate of Youth Development, Ministry of Higher Education, Training and Employment Creation & Food and Agriculture Organisation.

Tiki, D. 2007. *Harmonisation of laws relating to children – Namibia.* Addis Ababa: The African Policy Forum.

The constitutionality of different types of life imprisonment suggested in the Criminal Procedure Act, 2004

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Abstract

This article argues, inter alia, that the relevant provisions in the Criminal Procedure Act, 2004[1] would, if the Act came into force, be unconstitutional. This is because they would empower the judge to impose life imprisonment without the prospect of parole, probation, or remission of sentence, thus violating the individual's constitutional right to freedom from cruel and inhuman or degrading treatment or punishment.

Introduction

The sentence of imprisonment is quite confusing in many jurisdictions because the years or months that the judge or magistrate imposes on the offender are not the exact years or months that the offender spends in detention. This is due to the existence of early release mechanisms in the form of parole, reprieve or pardon in the relevant pieces of legislation or policies that govern the incarceration of offenders. Thus, an offender sentenced to ten years' imprisonment, for example, could be released after serving one-third of that sentence should he or she behave meritoriously while serving the sentence. The possibility of the early release of prisoners serves, inter alia, as an incentive for them to obey prison rules and regulations. In Namibia, the Prisons Act[2] provides for a comprehensive regime relating to the remission of sentences and release of prisoners. However, unlike the prisons/corrections

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1 No. 25 of 2004.

2 No. 17 of 1998.

legislation of Uganda[3] and South Africa,[4] but like that of Mauritius,[5] Namibia's Prisons Act does not provide for the years that an offender sentenced to life imprisonment should serve before being released. This is so although the Criminal Procedure Act[6] promulgated in 2004 provides for three different types of life imprisonment. One of these is life imprisonment without the prospect of parole, probation, or remission of sentence. Relying on the Namibian and South African jurisprudence, it is argued here that the constitutionality of the Criminal Procedure Act provisions that provide for life imprisonment without the prospect of parole, probation, or remission of sentence is highly questionable in the light of Article 8(2)(b) of the Namibian Constitution, which prohibits torture or cruel, inhuman or degrading treatment or punishment. It should be mentioned at the outset that, although the Criminal Procedure Act was promulgated by Parliament in 2004, as stated previously, and assented to by the President of the Republic of Namibia in the same year, by July 2010 it had yet to come into force. This means that the Criminal Procedure Act of 1977[7] is still the applicable law; and, in terms of the manner in which it has been implemented since 1986, *life imprisonment* means a minimum period of detention of 20 years' imprisonment.[8] When addressing Parliament in early July 2010, the Deputy Minister of Justice, Mr Tommy Nambahu, reportedly said that –

> … while a revamped [Criminal Procedure Act] had been passed in Parliament in 2004, it has not yet been implemented "due to technicalities within the text" of the 2004 Act and because the Magistrate [sic] Courts Act has not yet been passed.

3 Section 86(3) of the Ugandan Prisons Act, No. 17 of 2006. It provides that, for the purposes of calculating remission, the sentence of life imprisonment means mean 20 years' imprisonment. For a detailed discussion of the law relating to life imprisonment in Uganda, see Mujuzi, JD. 2008. "Why the Supreme Court of Uganda should reject the Constitutional Court's understanding of imprisonment for life". *African Human Rights Law Journal*, 8:163–185.

4 Section 73 of the South African Correctional Services Act, 1998 (No. 111 of 1998). For a detailed discussion of the law relating to life imprisonment in South Africa, see Mujuzi, JD. 2009a. "Life imprisonment in South Africa: Yesterday, today, and tomorrow". *South African Journal of Criminal Justice*, 22(1):1–38.

5 For a detailed discussion of the law relating to life imprisonment in Mauritius, see Mujuzi, JD. 2009b. "The evolution of the meaning(s) of penal servitude for life (life imprisonment) in Mauritius: The human rights and jurisprudential challenges confronted so far and those ahead". *Journal of African Law*, 53(2):222–248.

6 No. 25 of 2004.

7 No. 51 of 1977.

8 The Department of Justice manual relating to the release of prisoners provides that "prisoners sentenced for life (for which the minimum period of detention is regarded as twenty (20) years for administrative purposes) may be considered for parole … after having served at least half of the minimum period of detention of twenty (20) years, irrespective of whether it was his first offence or not'. See "Release of prisoners on parole"; Department of Justice, Directorate of Prisons, File No. 10/8/B, 4 August 1986; para. 4.3.1(h)(i); on file with the author.

The Deputy Minister urged Parliament to amend the 1977 Criminal Procedure Act to, inter alia, increase "fines for offences like reckless or negligent driving, driving under the influence of alcohol, defamation of character, theft, trespassing and assault", and protect whistleblowers.[9]

Life imprisonment in Namibia: A brief overview

Article 6 of the Constitution of Namibia expressly prohibits the death penalty in the following terms:

> The right to life shall be respected and protected. No law may prescribe death as a competent sentence. No Court or Tribunal shall have the power to impose a sentence of death upon any person. No executions shall take place in Namibia.

The absolute prohibition of the imposition and execution of the death sentence in Namibia means that, should the 2004 Criminal Procedure Act be enacted in its present form, life imprisonment will be the maximum sentence that can be imposed for the most serious offences such as treason, murder, armed robbery, and rape, that have been committed in a heinous manner.[10] The Namibian experience is not unique: other African countries such as Mauritius, South Africa and Rwanda, where the death penalty has been abolished, have introduced life imprisonment as the ultimate sentence for the most serious offences.[11] Courts in Namibia have always had the power to impose life imprisonment and have done so in various cases.[12] Although section 1 of the

9 See Weidlich, Brigitte. 2010. "Changes protect whistleblowers, increase fines", 2 July 2010; available at http://allafrica.com/stories/201007050196.html; last accessed 5 July 2010.

10 Section 309, 2004 Criminal Procedure Act.

11 For the discussion on Rwanda, see Mujuzi, JD. 2009c. "Issues surrounding life imprisonment after the abolition of the death penalty in Rwanda". *Human Rights Law Review*, 9(2):329–338. For a discussion of life imprisonment in South Africa and Mauritius, see Mujuzi (2009a, 2009b, respectively).

12 See e.g. *S v Alexander* (SA5/99) [2003] NASC 5 (13 February 2003), where the appellant's appeal against the sentence of life imprisonment for murder was allowed and substituted with 16 years' imprisonment; in *S v Katjivari* (FA 2.97) [1998] NAHC 6 (18 May 1998), the appellant's life sentence for murder was substituted with 15 years' imprisonment; *S v Koopman* (SA6/00) [2001] NASC 3 (28 May 2001), in which the appellant's appeal against the sentence of life imprisonment for murder was dismissed; *S v Rooi* (SA17/03) [2004] NASC 1 (1 April 2004), in which the appellant's appeal against the sentence of life imprisonment for murder was struck off the court's roll; *S v Singanda* (SA 6/95) [1997] NASC 3, where the appellant's appeal against his murder conviction and life imprisonment were allowed; *S v Moses* (SA 2/96) [1996] NASC 8 (11 October 1996), in which the appellant's appeal against the sentence of life imprisonment for murder was allowed and substituted with 17 years' imprisonment; and *S v Shikunga* (SA 6/95) [1997] NASC 2 (20 August 1997), in which the appellant's appeal against his life sentence for murder was dismissed.

2004 Criminal Procedure Act defines *life imprisonment* to mean "imprisonment for the rest of the natural life of a convicted person", one can say that there are four different types of life imprisonment in the 2004 Criminal Procedure Act:

- Life imprisonment without the prospect of parole, probation, or remission of a sentence under sections 309(3)(a)(i), 309(3)(b)(i), 309(3)(c)(i), 309(3)d)(i)
- Life imprisonment with the prospect of parole, probation, or remission of a sentence after an offender convicted of treason has served a period of imprisonment of not less than 25 years in terms of section 309(3)(a)(ii)
- Life imprisonment with the prospect of parole, probation, or remission of a sentence after an offender convicted of murder has served a period of imprisonment of not less than 20 years in terms of section 309(3)(b)(ii), and
- Life imprisonment with the prospect of parole, probation, or remission of a sentence after an offender convicted of rape other than rape under a statute has served a period of imprisonment of not less than 15 years in terms of section 309(3)(c)(iii), and life imprisonment with the prospect of parole, probation, or remission of a sentence after an offender convicted of robbery has served a period of imprisonment of not less than 15 years in terms of section 309(3)(d)(ii).

What the above provisions indicate is that the sentence of life imprisonment suggested in the 2004 Criminal Procedure Act is somewhat confusing, and one would be very optimistic to assume that there will not be cases where it will not be confusing to prison warders, prisoners and the general public. This is because the sentence of life imprisonment could mean anything from imprisonment for 15 years or for the remainder of the offender's natural life.

Life imprisonment without the prospect of parole, probation, or remission of a sentence: The offences

Section 309(3) of the 2004 Criminal Procedure Act provides that the High Court "must in respect of a person who has been convicted of" the following offences sentence him or her to life imprisonment without the prospect of parole, probation, or remission of a sentence:

- Treason, "when committed in circumstances that caused death or grievous bodily harm to another person or serious damage to property"[13]
- Murder, when –[14]

13 Section 309(3)(a)(i).
14 Section 309(3)(b)(i).

(a) it was planned or premeditated;
(b) the victim was
  (i) a law enforcement officer performing his or her functions as such, whether on duty or not, or a law enforcement officer who was killed by virtue of his or her holding such a position; or
  (ii) a person who has given or was likely to give material evidence with reference to an offence referred to in Schedule 1;[15]
(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or having attempted to commit one of the following offences, namely –
  (i) rape, whether under a statute or at common law; or
  (ii) robbery, in any of the circumstances contemplated in this Part; or
(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

- Rape, other than rape under a statute –[16]

(a) when committed
  (i) in circumstances where the victim was raped more than once, whether by the accused or by any co-perpetrator or accomplice;
  (ii) by more than one person, where those persons acted in the execution or furtherance of a common purpose or conspiracy;
  (iii) by a person who has been convicted of two or more offences of rape, whether under a statute or at common law, but has not yet been sentenced in respect of those convictions; or
  (iv) by a person, knowing that he or she has the acquired immune deficiency syndrome or the human immunodeficiency virus;
(b) where the victim
  (i) is a child
    (aa) under the age of 16 years; or
    (bb) of or over the age of 16 years, but under the age of 18 years, and the accused is the victim's parent, guardian or caretaker or is otherwise in a position of trust or authority over the victim;
  (ii) is, in circumstances other than those contemplated in subparagraph (i), due to age rendered particularly vulnerable;
  (iii) is a physically disabled person who, due to physical disability, is rendered particularly vulnerable; or

15 Schedule 1 provides for 26 different offences, which include treason, sedition, public violence, murder, culpable homicide, rape (whether under a statute or common law), indecent assault, sodomy, bestiality, robbery, assault (when a dangerous wound is inflicted), kidnapping, child stealing, arson, malicious injury to property, fraud, an offence relating to money laundering, and an offence relating to coinage.

16 Section 309(3)(c)(i).

(iv) is a mentally ill person as contemplated in section 1 of the Mental Health Act, 1973 (Act No. 18 of 1973); or

(c) involving

(i) the use or wielding of a firearm or any other weapon; or

(ii) the infliction of grievous bodily or mental harm.

- Robbery –[17]

(a) involving

(i) the use or wielding of a firearm or any other dangerous weapon; or

(ii) the infliction of grievous bodily harm, by the accused or any of the co-perpetrators or participants on the occasion when the offence is committed, whether before or during or after the commission of the offence; or

(b) involving the taking of a motor vehicle.

What is not in dispute is that the above-mentioned are very serious offences that should attract the most severe penalty on the statute books. However, it is also indisputable that any form of punishment should pass the constitutional scrutiny.

Life imprisonment without the prospect of parole, probation, or remission of a sentence: The constitutional scrutiny

As mentioned earlier, Article 8(2)(b) of the Namibian Constitution prohibits torture or cruel, inhuman or degrading treatment or punishment. Whereas *torture* is defined under Article 1(1) of the United Nations (UN) Convention against Torture,[18] which Namibia acceded to on 28 November 1994 without any reservation or interpretative declaration,[19] the term is not defined under any law in Namibia. The government, in its report to the UN Committee against

17 Section 309(3)d)(i).

18 Article 1(1) of the Convention provides that, for "the purposes of this Convention, the term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions".

19 UN Treaty Collections, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en; last accessed 12 January 2010.

Torture in terms of Article 19[20] of the Convention, informed the Committee that –[21]

> [t]here is no national legislation prohibiting torture ... Rather, torture is prohibited under the Constitution. Torture is not defined by the Constitution, so it can safely be assumed that in a case in which the definition of torture becomes an issue, the definition in article 1 of the Convention will be given judicial recognition and will be used as an aid to interpretation.

This declaration in Namibia's report prompted the Committee to recommend, inter alia, that –[22]

> Namibia should enact a law defining the crime of torture in terms of article 1 of the Convention and should legally integrate this definition into the Namibian substantive and procedural criminal law system, taking especially into account:
>
> (a) the need to define torture as a specific offence committed by or at the instigation of or with the consent of a public official (delictum proprium)[23] with the special intent to extract a confession or other information, to arbitrarily punish, to intimidate, to coerce or to discriminate;
>
> (b) the need to legislate for complicity in torture and attempts to commit torture as equally punishable;
>
> (c) the need to exclude the legal applicability of all justification in cases of torture;
>
> (d) the need to exclude procedurally all evidence obtained by torture in criminal and all other proceedings except in proceedings against the perpetrator of torture himself; and
>
> (e) the need to legislate for and enforce prompt and impartial investigation into any substantiated allegations of torture.

The government also informed the Committee that –[24]

> [t]he common law on crimes and the constitutional provision prohibiting torture are adequate to a large extent to deal with the detection, prosecution and

20 Article 19 of the Convention against Torture provides that "[t]he States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request".

21 *Namibia's Initial Report to the Committee against Torture*, CAT/C/28/Add.2, 29 January 1997, para. 5.

22 See *Concluding Observations of the Committee against Torture on Namibia's Initial Report*, A/52/44 paras 227–252, 6 May 1997, at para. 241.

23 Underlining in original.

24 *Namibia's Initial Report to the Committee against Torture*, CAT/C/28/Add.2, 29 January 1997, para. 43.

> punishment of acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1 of the Convention.

Thus, there is no law in Namibia that defines cruel, inhuman or degrading treatment or punishment. The lack of a definition of *cruel, inhuman and degrading treatment or punishment* in Namibian law should be understood partly in light of the fact that those terms are also not defined under Article 16 of the UN Convention against Torture. It is against that backdrop that the Committee against Torture has developed jurisprudence on a case-by-case basis on what amounts to cruel, inhuman and degrading treatment or punishment.[25] Thus, the Namibian courts are also at liberty, as they have done previously,[26] to develop their own jurisprudence on what amounts to cruel, inhuman and degrading treatment or punishment. It is precisely against that background that the Namibian Supreme Court, after referring to the German Constitutional Court jurisprudence, held as follows in *S v Tcoeib*,[27] when the constitutionality of the sentence of life imprisonment was in issue:

> [T]he sentence of life imprisonment in Namibia can therefore not be constitutionally sustainable if it effectively amounts to an order throwing the prisoner into a cell for the rest of the prisoner's natural life as if he was a 'thing' instead of a person without any continuing duty to respect his dignity (which would include his right not to live in despair and helplessness and without any hope of release, regardless of the circumstances).

What the court is basically saying is that life imprisonment without the prospect of parole, probation, or remission of a sentence, as contemplated in the relevant provisions of the 2004 Criminal Procedure Act, violates the right to human dignity and is, therefore, unconstitutional. The South African Supreme Court of Appeal has also held that –[28]

> ... it is the possibility of parole which saves a sentence of life imprisonment from being cruel, inhuman and degrading punishment.

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25 It has been demonstrated that "[u]nlike torture, which is clearly defined under article 1 of [the Convention against Torture], the terms 'cruel', 'inhuman' and 'degrading' treatment or punishment are not defined in this treaty. The reason for this lies in its drafting history ... [T]he drafters of the Convention found it 'impossible' to define cruel, inhuman or degrading treatment or punishment". See Mujuzi, JD. 2009d. "Execution by hanging not torture or cruel punishment? *Attorney General v Susan Kigula and Others. Malawi Law Journal*, 3(1):133–146, at 143.

26 For example, in declaring corporal punishment to be unconstitutional for violating Article 8 of the Namibian Constitution, Mohamed AJA relied on the Oxford English Dictionary to define *cruel, inhuman and degrading treatment or punishment*. See *Ex parte: Attorney-General, in Re: Corporal Punishment by Organs of State* 1991(3) SA 76 (NmSc).

27 *S v Tcoeib* 1996 (1) SACR 390 (NmS) at 399.

28 *Bull & Another v The State* 221/2000 [2001] ZASCA 105 (26 September 2001] para. 23.

It has to be recalled that the *Tcoeib* judgment was decided in 1996 and the Namibian Supreme Court referred to the 1977 Criminal Procedure Act, the 1959 Prisons Act[29] and the Constitution. It is argued that, although a new Criminal Procedure Act has been promulgated and a new Prisons Act was enacted in Namibia, in 1998 the principle that was laid down in the *Tcoeib* judgment is of the same legal force today as it was in 1996. This is because the Supreme Court of Namibia was interpreting the meaning of the sentence of life imprisonment in the relevant pieces of legislation against the Namibian Constitution's prohibition of cruel and inhuman treatment or punishment. That prohibition is still in force.

In Namibia, section 92(2) of the Prisons Act, read together with sections 93 and 309(1) of the 2004 Criminal Procedure Act, specifically provides that an offender sentenced to life imprisonment without the prospect of parole, probation, or remission of a sentence could still have his/her sentence remitted by the President on the recommendation of the Minister of Justice. However, the problem is that the prisoners do not know what is expected of them before they can qualify for their cases to be referred to the President for reprieve. This means, inter alia, that they are not in a position to challenge the procedure that has been followed or not followed for them not to be released. It follows, therefore, that some offenders sentenced to life imprisonment might indeed be imprisoned until their death – which would violate their right to freedom from cruel, inhuman and degrading treatment or punishment.

As mentioned earlier, section 309(3) of the 2004 Criminal Procedure Act provides that the High Court, if it convicts the offender of treason, murder, rape or robbery, "must" sentence him or her to life imprisonment. This means that the court does not have the discretion to determine which sentence to impose on the offender. This is irrespective of whether or not there are mitigating factors such as the fact that the offender is a first offender or is relatively young. It is argued that a law that obliges a judge to impose such a lengthy sentence on an offender without giving him/her an opportunity to be heard in mitigation violates Article 78 of the Namibian Constitution, which guarantees the independence of the judiciary. This is so because, although it is the judge who convicts the accused, such judge does not have the discretion to determine which sentence to impose on the accused: the sentence is in fact imposed by the legislature. In Uganda[30] and Malawi,[31] it has been held that laws providing for mandatory sentences are unconstitutional on the grounds that they violate the doctrine of separation of powers. The argument is that the judge does not have the discretion to determine which sentence to impose on the accused. Should the 2004 Criminal Procedure Act be enacted in its present

29 No. 8 of 1959.

30 *Attorney General v Susan Kigula & Others* Constitutional Appeal No. 03 of 2006 (judgment of 21 January 2009, unreported).

31 *Kafantanyenyi & Others v Attorney General* Constitutional Case No. 12 of 2005 (unreported).

form, the Supreme Court could be petitioned to determine the constitutionality of section 309(3) because its application may result in the imposition of a "grossly disproportionate" sentence – to use the words of the Namibian High Court in the case of *S v Vries*,[32] in which the High Court held that section 14(1)(b) of the Stock Theft Act,[33] which imposed a minimum sentence of not less than three years' imprisonment on a second conviction for stock theft, violated Article 8(2)(b) of the Constitution.

Conclusion

The author has dealt with the different meanings of *life imprisonment* in the 2004 Criminal Procedure Act, that is, life imprisonment without the prospect of parole or release, and life imprisonment with the prospect of release after the offender has served 25, 20 or 25, depending on the circumstances. The author has argued that life imprisonment without the prospect of release is cruel and inhuman, and violates Article 8 of the Namibian Constitution. It has also been argued that section 309(3) of the 2004 Criminal Procedure Act, which provides for mandatory life sentences, is unconstitutional because it conflicts with Article 78 of the Constitution, which guarantees the principle of the doctrine of separation of powers. It is recommended, therefore, that the 2004 Criminal Procedure Act should be amended before it is enacted to remove life imprisonment without the prospect of release, and also that the Prisons Act should be amended to specifically provide for the regime governing the release of offenders sentenced to life imprisonment.

32 *S v Vries* [1996] NAHC 53.

33 Stock Theft Act, 1990 (No. 12 of 1990).

NOTES AND COMMENTS

SACU 100: Reflections on the world's oldest customs union

Oliver C Ruppel*

A memorable day was marked for the Southern African Customs Union (SACU) on 22 April 2010 in two ways. Firstly, SACU, the oldest customs union in the world, celebrated its centenary on that day. Secondly, the SACU Heads of State and Government – Botswana, Lesotho, Namibia, South Africa and Swaziland – met for a strategic meeting where a new direction of the customs union was initiated in terms of a reformulated vision and mission statement. These historical events can however not belie the fact that SACU currently faces a bundle of crucial challenges. This is reason enough to look back and ahead on SACU's developments in the light of the process of regional integration in southern Africa.

Historical outline

In 1910, the government of the Union of South Africa and the Territories of Basutoland, Swaziland, and the Bechuanaland Protectorate signed a customs agreement, being the first-ever customs agreement worldwide.[1]

In the mid-1960s, the three Territories asserted their independence from the United Kingdom and called for a revision of the customs union's principles, particularly in terms of fairer processes of decision-making and revenue-sharing. A new Agreement was, therefore, signed on 11 December 1969 by the sovereign states of Botswana, Lesotho, South Africa and Swaziland. Ongoing discussions on issues such as the lack of a joint decision-making process and the distribution of revenues as well as Namibia's independence and the end of apartheid in South Africa paved the way for a new round of negotiations, therefore, which started in 1994 and resulted in the 2002 SACU Agreement.[2]

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1 http://www.sacu.int/about.php?include=about/history.html; last accessed 29 May 2010.

2 SACU/Southern African Customs Union. 2002. *Agreement between 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*; available at http://www.sacu.int/main.php?include=docs/legislation/2002-agreement/main.html; last accessed 29 May 2010.

This new and comprehensive Agreement entered into force in July 2004 after ratification by all SACU members.

The 2002 Agreement has endeavoured to address the gaps of its 1969 counterpart by providing for, inter alia, joint decision-making processes based on consensus and involving all SACU member states, and by establishing common institutions such as the SACU Council of Ministers, the SACU Commission, the Tariff Board, Technical Liaison Committees, and the SACU Secretariat, a permanent institution based in Windhoek, Namibia.[3] With regard to dispute resolution, the Agreement established an ad hoc Tribunal[4] to resolve any differences that might occur between or amongst member states. A new revenue formula[5] was introduced as well, which takes into account the different levels of economic development of the various member states, and determines how revenue derived from customs and excise duties is to be shared. One further important aspect of the 2002 Agreement is that it recognises the need for the development of common or harmonised policies[6] and increased cooperation, in the areas of industrial development, agriculture and competition policy.

The issue of trade relations with third parties was also addressed by providing for a Common Negotiating Mechanism.[7] In 2006, SACU signed a Free Trade Agreement (FTA) with European Free Trade Area states (Iceland, Liechtenstein, Norway and Switzerland),[8] and a Preferential Trade Agreement (PTA) with Mercado Común del Sur (Mercosur)[9] countries in 2009.[10] In 2008, SACU and the United States signed a Trade, Investment and Development Cooperation Agreement[11] aimed at facilitating increased trade, while a PTA is currently being negotiated with India.

Today, some of the aforementioned improvements laid down in the 2002 Agreement merely exist on paper and have not been fully put into practice. This and other factors have brought SACU into a rather critical situation – as will be sketched below.

3 One major challenge for SACU is that, so far, the institutional framework has not been realised to a satisfactory extent. Neither the Tariff Board nor the Tribunal are yet in place.
4 Articles 7(f) and 13. The Tribunal has not yet been established.
5 Article 34.
6 Articles 38ff.
7 Article 31. This mechanism is de facto not yet in existence.
8 http://www.sacu.int/docs/tradeneg/efta-fta2006.pdf; last accessed 20 May 2010.
9 Common Market of South America (Argentina, Brazil, Paraguay and Uruguay).
10 http://www.sacu.int/docs/pr/2009/pr0403.pdf; last accessed 20 May 2010.
11 http://www.sacu.int/docs/tidca/agreement.pdf; last accessed 20 May 2010.

Recent and current developments

The voices warning that SACU is in danger of being discontinued have become louder. Two crucial issues have moved to the centre of the debate. The first is the European Partnership Agreement (EPA) negotiation process, and the second the financial shortfall due to plunging revenues due to reduced imports amidst the global economic crisis which affected African economies by way of a drop in export values.[12]

SACU revenues and the financial crisis

The new revenue formula introduced by the 2002 SACU Agreement has, since its inception, contributed to an increase of public revenues in Botswana, Lesotho, Namibia, and Swaziland (the so-called *BLNS* states), with South Africa continuing to manage the Common Revenue Pool.[13] One reason for the increase of revenues in the BLNS states has been the introduction of a development component designed to account for differences in members states' per capita income. While the largest portion of the excise pool is distributed according to members' gross domestic products, some 15% is reserved for the developmental component, which reallocates revenues from the large member – South Africa – to the smaller and generally poorer BLNS states.[14] SACU tariff revenues are distributed according to members shares of intra-SACU trade and not according to their contributions to the revenue pool. This practice is specifically applied in order to compensate the BLNS states for the cost raising impact of a tariff that has been designed primarily for the protection of industries in South Africa. [15]

SACU member states have managed to achieve an average growth rate of 4% since the last SACU Trade Policy Review in 2003.[16] Despite the fact that Africa managed to increase its production of goods and services by 1.6%

12 McCarthy, C. 2010. "The global financial and economic crisis and its impacts on sub-Saharan economies". In McCarthy, C, JB Cronjé, W Denner, T Fundira, W Mwanza & E Bursik. *Supporting regional integration in East and Southern Africa – Review of selected issues* Stellenbosch: Trade Law Centre for Southern Africa (tralac).

13 Erasmus, G. 2009. "Regional trade arrangements: Developments and implications for southern African states". *Namibia Law Journal*, 1(1):29–41.

14 Flatters, F & M Stern. 2006. "SACU revenue sharing: Issues and options". *Policy Brief*. Washington, DC: United States Agency for International Development & Serbia Economic Growth Actitivty.

15 (ibid.).

16 WTO/World Trade Organisation. 2009. *Trade policy review – Southern African Customs Union (SACU).* Record of the meeting. WT/TPR/M/222 7 December 2009; 39 para 261; available at http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCTPR%FCM%FC222%2A+and+not+WT%FCTPR%FCM%FC222%FCAdd%2A%29&language=1; last accessed 25 May 2010.

in 2009 compared with 2008,[17] the global economic crisis in 2009 affected SACU and its revenue pool. Namibia's share of SACU revenue was expected to drop by 30.4% in the 2010–11 financial year, and by a further 52.7% in 2011–12.[18] Before these drastic revenue shortages, Namibia's revenue out of SACU amounted to approximately N$8 billion a year.[19]

The BLNS countries rely largely on receipts from the common revenue pool to finance their governments' expenditures.[20] Falling revenues not only severely affect these four countries' relatively smaller economies: they also lead to criticism by South African economists, who argue that BLNS countries are favoured by the current revenue formula being applied. Indeed, the redistributive effects of the revenue formula under the 2002 Agreement, as described above, are subject to an ongoing debate. In its 2009–10 budget, South Africa gave more than 1% (about R28 billion) of its gross domestic product to its SACU neighbours. This was considered "silly",[21] in view of South Africa itself being a developing economy. It has been argued that the reliance of some members on the revenue arising from the formula has "become an impediment to the adoption of common industrial and trade policies that could foster deeper integration".[22] This position is not shared by the BLNS states, however, which defend the revenue formula as being pivotal, unique and a possible model of reference for other organisations.[23] It is argued that existing economic differences among SACU member states have to become more balanced.

EPA negotiations

The basis of the EPAs is the Cotonou Partnership Agreement concluded between 79 countries in the African, Caribbean and Pacific (ACP) region and

17 WTO/World Trade Organisation. 2010. *World Trade Report 2010 – Trade in natural resources.* Geneva: WTO Publications, p 22.

18 Statement made in Parliament by Namibia's Deputy Finance Minister, Calle Schlettwein, on 11 May 2010. Cf. Weidlich, B. 2010a. "SACU summit to look at revenue formula". *The Namibian*, 19 April 2010; and Weidlich, B. 2010b. "SACU revenue for Namibia less than half". *The Namibian*, 12 May 2010.

19 SACU executive Secretary Tswelopele Moremi of the SACU Secretariat. Cf. Weidlich, B. 2009. "SACU reflects on its first century". *The Namibian*, 8 April 2009.

20 Fundira, T. 2010. "The state of regional trading arrangements in southern Africa: Options and considerations". In McCarthy et al. (2010:140).

21 Mike Schussler, a South African economist; cf. *The Namibian*, 11 March 2010, "SACU is a waste of money".

22 Craemer, T. 2010. "Downgrading SACU could have political, economic costs". *Engineering News Online*, 21 May 2010; available at http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=87307&cat_id=0; last accessed 28 May 2010.

23 As stated by King Mwsati III of Swaziland on the occasion of the SACU centenary celebrations in Windhoek. See Ndlangamandla, M. 2010. "King shares new SACU vision". *Swazi Observer*, 23 April 2010; available at http://www.observer.org.sz/index.php?news=12824; last accessed 10 May 2010.

the European Community (EC). It was signed in June 2000, entered into force in 2003,[24] and aims, inter alia, at sustainable development of the ACP states and their gradual integration into the world market.

EPAs are intended to promote structural processing and economic diversification in the ACP states while supporting regional integration. As a matter of fact, being a customs union, SACU has to comply with the respective provisions laid down in the WTO legal regime. In this respect, Article XXIV is of particular importance. Creating a customs union would normally not be in line with the WTO's most-favoured-nation principle. As an exception to this principle, however, Article XXIV of the General Agreement on Tariffs and Trade (GATT) allows for regional trading arrangements under specific circumstances. If a free trade area or customs union is created, duties and other trade barriers should be reduced or removed on substantially all sectors of trade. Furthermore, regional trade arrangements should help trade flow more freely among the countries of the trade arrangement, without barriers being raised on trade with the outside world. Thus, regional integration should complement the multilateral trading system. By virtue of Article 36 of the Cotonou Partnership Agreement, the EU and ACP agreed to progressively remove barriers to trade between them, and to enhance cooperation in all areas relevant to trade, in line with Article 24 of GATT.

In September 2002, the EPA negotiations were launched with the objective of bringing the EC–ACP trade regime in line with the rules of the World Trade Organisation (WTO)[25] until 31 December 2007.[26] By the said deadline, however, none of the African negotiating groups[27] had concluded a full EPA with the EU. The negotiations have since extended beyond the initial deadline, with only one full EPA having been signed between the EC and the Caribbean Forum of African, Caribbean and Pacific States (CARIFORUM). In 2007, Botswana, Lesotho, Mozambique, Namibia and Swaziland initialled an interim EPA with the EU. This interim EPA was signed by Botswana, Lesotho, Mozambique

24 The EPA was revised in 2005 and 2010. The more recent revision incorporates changes that have taken place over the last decade, such as the growing importance of regional integration, food security, HIV and AIDS, climate change, and trade relations.

25 With regard to the EU's non-reciprocal preferences for goods imported from ACP countries, the WTO had issued a waiver permitting exceptional and preferential treatment for trade in goods that expired at the end of 2007.

26 UNECA/United Nations Economic Commission for Africa. 2008. *Economic Partnership Agreements negotiations: A comparative assessment of the Interim Agreements*; available at http://www.uneca.org/cfm/2008/docs/EcoPartnership.pdf; last accessed 10 May 2010.

27 The Pacific, the Caribbean, West Africa, Central Africa, Eastern and Southern Africa, and the Southern African Development Community (SADC, but without South Africa).

and Swaziland in 2009. The 2009 WTO trade policy review of SACU has, of course, referred to trade relations between the EC and SACU:[28]

> The EC is the largest trading partner of SACU, as well as the leading foreign investor in the region. Over a third of combined SACU exports of goods are sold in our market. A similar share of goods imported into SACU originates in the EC.

The EPA negotiations have put a lot of strain on SACU in the recent past as SACU members had differing views on them.[29] While some members had signed interim EPAs with the EU, Namibia and South Africa refused to do so.[30] Namibia argued that signing an EPA holds serious economic and policy consequences for the country, and it stands to lose if the implementation of the interim EPA goes ahead in its current form. Apart from the tariff cuts resulting from the EPA on more than 80% of products imported into the SACU market and, thus, a potential loss of revenue, the following arguments have led to Namibia's reluctant attitude towards signing the interim EPA:[31]

- Duty-free and quota-free market access conditions that Namibia is given by the EU may ultimately not be worth the concessions that Namibia has to give in return
- Namibia would have to forfeit the option of using export taxes on raw materials as a potentially important source of revenue, e.g. an envisaged uranium export tax would not be possible with an EPA
- Currently protected infant industries, e.g. dairy, and pasta, could face extinction which would go against Namibia's efforts to industrialise
- Quantitative restrictions on imports and exports would not be permitted under the EPA, putting at risk Namibia's achievements in horticultural and cereal production, and
- Past investments in the agricultural Green Scheme (e.g. grain storage, agricultural extension) to achieve food security and rural development by, inter alia, restricting imports of fruit, vegetables and cereals would be lost and would seriously disrupt rural livelihoods.

Nonetheless, trade between the EU and Namibia on the one hand and South Africa on the other continues. South Africa and the EU bilaterally concluded a

28 Statement by the European Communities' representative at the Trade Policy Review meeting held on 4 and 6 November 2009. WTO (2009:16, para. 90).

29 Erasmus (2009:37f).

30 Cf. Dessande, BH. 2010. "Trade policy implications of Economic Partnership Agreements (EPAs) between the European Union (EU) and Namibia". Unpublished thesis submitted in partial fulfilment of the degree of Master of Laws, University of Namibia.

31 Ministry of Trade and Industry. 2010. "An update on the EPA negotiations". Ministerial statement made by the Hon. Hage Geingob, Minister of Trade and Industry, in the National Assembly on 19 May 2010; available at http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=87408&cat_id=1052; last accessed 27 May 2010.

Trade Development Cooperation Agreement in 2004, while Namibia, by having initialled the interim EPA, has the benefit of its products enjoying duty-free, quota-free access to the European market – as enjoyed by all ACP countries by virtue of the EU concessions granted after the legal expiry of the Cotonou trade regime and WTO waiver that covered it.

The different approaches towards a final EPA with the EU are shaking the foundations of SACU, and the inequality as regards economies and development policies continues to be a major challenge. Already in 2008, at a retreat held in Botswana, the SACU Council of Ministers indicated that SACU states should move together as one bloc with regard to the EPA negotiations. The importance of finding a single trade agreement for all SACU members is essential, having seen that EU-subsidised goods entered the Namibian market via South Africa, which had concluded the separate Trade and Development Cooperation Agreement with the EU.

Article 31(2) of the SACU Agreement ensures a consultative decision-making process.[32] Therefore, the argument that SACU needs to have one voice in the EPA negotiations stands on a solid legal footing. Meanwhile, the EPA negotiations have de facto influenced SACU politics to the extent that the outcome of the negotiation process has repeatedly been linked to its continuance as a customs union.[33] A meeting of Heads of State and Government held in Pretoria, South Africa, on 16 July 2010, resulted in a communiqué[34] recognising the role that SACU could play in southern Africa as a building block for deeper regional integration. The EU aims at concluding a comprehensive EPA with the whole Southern African Development Community (SADC) EPA region by the end of 2010. If agreement with regard to the EPA cannot be found, it will not only put the existence of SACU into question, but will also probably bring about legal and economic consequences from the EU and the WTO. Countries not signing an EPA would have to be accommodated under the Generalised System of Preferences (GSP) resulting in higher duties and more stringent rules of origin. It is preferable, therefore, that the parties negotiate an agreement which is beneficial to them all.

32 The consultative decision-making process is one of the issues which need to be put into practice, as it was not applied when the bilateral agreement between the EU and South Africa was concluded.

33 Namibia's Minister of Trade and Industry, Hage Geingob, was quoted as saying that, if the five SACU member states could not find a solution, it might well spell the end of the customs union; Weidlich, B. 2010c. "If no EPA solution, SACU might end: Hage Geingob"; *The Namibian*, 21 May 2010.

34 Communiqué by the Heads of State and Government Meeting of the Member States of the Southern African Customs Union (SACU) adopted on Friday, 16 July 2010, in Pretoria, South Africa; available at http://www.sacu.int/docs/pr/2010/pr0716.pdf; last accessed 25 July 2010.

The centenary celebrations

The theme of SACU's centenary celebrations, "Implementing a common agenda towards regional integration in southern Africa", points to the challenges facing SACU. The celebrations, which took place on the site of the prospective headquarters in Windhoek, were attended by all SACU Heads of State and Government.[35] At the event, there was some evidence of the differences that SACU saw in 2009. South African President Jacob Zuma argued that, "if we cannot pursue the unfinished business of EPA negotiations as a united group, the future of SACU is undoubtedly in question". Namibian President and host of the celebrations, Hifikepunye Pohamba, stated in his opening address that the negotiations with third parties had brought to the fore the need to develop common positions, especially with regard to the ongoing EPA negotiations.[36]

However, the Namibian President also emphasised that all five SACU member states had underscored unity and vowed to hold a common position. The Summit resulted in a final communiqué, which states that SACU has to be transformed into a "vehicle for regional economic integration capable of protecting equitable development".[37] Although such political statement may run the risk of being considered as mere political lip service, and requires considerable effort and resources to be put into practice, the transformation into a modern customs union, ready to shape regional integration for southern Africa, is today accompanied by a new vision and mission.[38]

Current and future challenges

SACU, like other regional economic organisations,[39] is inevitably subject to changes within and outside itself. It is vital, therefore, that it adapts to political

35 President Hifikepunye Pohamba of Namibia, King Mswati III of Swaziland, President Jacob Zuma of South Africa, President Ian Khama of Botswana, and Prime Minister Pakalitha Mosisili of Lesotho.

36 Weidlich, B. 2010d. "SACU at 100 eyes transformation". *The Namibian*, 23 April 2010.

37 SACU/Southern African Customs Union. 2010. *Final Communiqué adopted by the Heads of State and Government Meeting on 22 April 2010 in Windhoek, Namibia*; available at http://www.givengain.com/cause_data/images/1694/SACU_Communique_20100422.PDF; last accessed 18 May 2010.

38 SACU (2010).

39 For the challenges SADC currently faces with regard to regional integration, see Ruppel, OC. 2009a. "The SADC Tribunal, regional integration and human rights: Major challenges, legal dimensions and some comparative aspects from the European legal order". *Recht in Afrika*, 2: 205ff; Ruppel, OC. 2009b. "The Southern African Development Community (SADC) and its Tribunal: Reflexions on a Regional Economic Communities' [sic] potential impact on human rights protection". *Verfassung und Recht in Übersee*, 173–186.

and economic developments challenging its legal and political realities. Some of these challenges will be discussed in the following sections.[40]

Common Negotiating Mechanism

The ongoing discussions on the EPAs have demonstrated impressively that a Common Negotiating Mechanism is a conditio sine qua non for SACU's continuance. It is imperative that Article 31 on trade relations with third parties of the 2002 SACU Agreement is put into practice for the current EPA negotiations as well as for future negotiations with third parties.

Overlapping memberships

Overlapping membership is generally a critical issue for members of regional trade blocs or regional economic communities (RECs).[41] This is also true in SACU's case. All SACU members are at the same time members of SADC,[42] while Swaziland, in addition to its memberships in SADC and SACU, is also a member of the Common Market of Eastern and Southern Africa (COMESA).

Despite the multiple costs for membership contributions and rounds of negotiations, issues which need further analysis include the relationship between the 2002 SACU Agreement and the SADC Protocol on Trade, the multiple jurisdiction of the SADC Tribunal[43] and/or the SACU Tribunal (once established), and particularly the question of possible conflicting external tariffs.[44] In the short and medium term, harmonising common external tariffs is an appropriate way to address such issues. In the long run, however, the only option to avoid such conflicts will be the merger of various overlapping customs unions into one.

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40 For further challenges, see e.g. Mwanza, WN. 2010. "Africa's continental integration agenda: Suggestions for African countries and regions". In McCarthy et al. (2010:67ff).

41 Jakobeit, C, T Hartzenberg & N Charalambides. 2005. *Overlapping membership in COMESA, EAC, SACU and SADC*. Eschborn: Deutsche Gesellschaft für Technische Zusammenarbeit.

42 SADC currently counts 15 member states : Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

43 On the jurisdiction of the SADC Tribunal, see Ruppel, OC. 2009c. "Regional economic communities and human rights in East and Southern Africa". In Bösl, A & J Diescho (Eds) *Human rights in Africa – Legal perspectives on their protection and promotion*. Windhoek: Macmillan Education Namibia, pp 295ff; and Ruppel, OC & F-X Bangamwabo. 2008. "The mandate of the SADC Tribunal and its role for regional integration". In Bösl, A, K Breydenbach, T Hartzenberg, C Mccarthy & K Schade (Eds). *Yearbook for Regional Integration*. Stellenbosch: Trade Law Centre for Southern Africa (Tralac), pp 187ff.

44 Jacobeit et al. (2005:4).

Possible different EPA configurations and their effect on regional integration in southern Africa might become another crucial issue within SACU. Regional integration can, in general terms, be described as a path towards gradually liberalising the trade of developing countries and integrating them into the world economy.[45] A scenario in which no common SACU voice in terms of the EPAs can be agreed upon, with some countries signing EPAs and others being accommodated under the GSP, may pose a direct threat to the regional integration process in Africa.

The first steps towards overcoming these conflicts are now being made in the region. As many SADC member states are also parties to other RECs, COMESA,[46] the East African Community (EAC) and SADC have decided to accelerate economic integration of the continent, with the aim of achieving economic growth, reducing poverty, and attaining sustainable economic development. To this end, it was resolved that the three RECs encompassing 26 countries (including all SACU members) should –[47]

> … immediately start working towards a merger into a single REC with the objective of fast[-]tracking the attainment of the African Economic Community.

In the area of trade, customs and economic integration, it was approved that an FTA be established, encompassing the three RECs' member states, with the ultimate goal of establishing a single customs union. With regard to SACU, either an absorption of SACU into SADC as the larger customs union may be an option in the long run, or SACU might increase its membership. The SACU Council of Ministers, SACU's highest decision-making body, decided that the customs union should be used as a nucleus for a SADC Customs Union.[48] A

45 Andresen, H, H Brandt, H Gsänger, U Otzen, R Qualmann & HM Stahl. 2001. "Promoting regional integration in SADC". *Reports and Working Papers No. 5/2001*. Bonn: German Development Institute, p 3.

46 In June 2009, COMESA launched its own customs union; see COMESA/Common Market of Eastern and Southern Africa. 2009. *Official Gazette of COMESA*, 14(4); available at http://about.comesa.int/attachments/062_2009%20Gazette%20Vol.%2015%20No4.pdf; last accessed 8 May 2010. However, only a few of the 19 COMESA countries actually signed up; cf. Van den Bosch, S. 2010. "SACU reaches 100th year despite recent divisions"; *Inter Press Service*, 26 April 2010; available at http://allafrica.com/stories/201004261303.html; last accessed 26 May 2010.

47 See COMESA–EAC–SADC/Common Market of Eastern and Southern Africa, East African Community & Southern African Development Community. 2008. *Final Communiqué of the COMESA–EAC–SADC Tripartite Summit of Heads of State and Government, held in October 2008 in Kampala, Uganda: Towards a single market – Deepening COMESA–EAC–SADC integration*; available at http://about.comesa.int/attachments/078_Final_Communique-Kampala_22_10_08.pdf; last accessed 13 December 2008.

48 As stated by Executive Secretary Tswelopele Moremi of the SACU Secretariat. Cf. Weidlich, B. 2009. "SACU reflects on its first century"; *The Namibian*, 8 April 2009; and SACU/Southern African Customs Union. 2009a. *Press statement on the outcome of the Special SACU Council of Ministers Meeting held on 17 September*

graduate expansion of SACU would be one option in this regard. Thus, SACU is considering entering into negotiations on a trade agreement with the EAC, and has initiated a study to look into its potential.[49]

Institutional and policy framework

Any organisation which lacks well-functioning institutions runs the risk of not operating effectively. Therefore, it is unfortunate that, eight years after members signed the 2002 Agreement and six years after it entered into force, many of the renewals have remained on paper instead of being put into practice. The institutional framework has not been realised to a satisfactory extent; and neither the Tariff Board nor the Tribunal have been set up yet. Moreover, member states still have to establish their own national SACU offices, and the Secretariat needs to be strengthened in terms of technical skills and resources.

While contractually established institutions are not in existence, others have been created. In July this year, a meeting of Heads of State and Government took place in Pretoria. Such a Summit is not provided for in the 2002 SACU Agreement; in fact, the Council of Ministers is the highest institution anchored in the SACU legal framework. In light of the critical issues on the SACU agenda, having a Summit supersede the Council of Ministers as the highest decision-making body is understandable. However, it raises a series of questions[50] with regard to the existing Agreement and legal certainty.

At this stage, no common SACU policy is in place,[51] although several efforts have been made[52] to meet the requirements of the 2002 Agreement on harmonised policies[53] or increased cooperation in the areas of industrial development, agriculture and competition policy.

2009 in Ezulwini, Swaziland; available at http://www.sacu.int/docs/pr/2009/pr0917.pdf; last accessed 29 May 2010.

49 As can be taken from recent advertisements in Namibian newspapers which request an impact analysis of a possible trade agreement between SACU and the EAC; cf. *The Namibian*, 23 April 2010.

50 Erasmus, G. 2010. "Will SACU have a permanent Summit?"; available at http://www.tralac.org/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=1694&news_id=86783&cat_id=1058; last accessed 27 May 2010.

51 As noted by Trudi Hartzenberg of the Trade Law Centre for Southern Africa (tralac). See Weidlich, B. 2010e. "Deep re-thinking required for future of customs union"; *The Namibian*, 19 May 2010.

52 The SACU Executive Secretary has identified an assessment of the agricultural sector in the SACU Region, and efforts have been made to establish key areas for cooperation; Weidlich, B. 2009. "SACU reflects on its first century"; *The Namibian*, 8 April 2009.

53 Articles 38ff.

New-generation issues

The so-called Singapore issues,[54] namely investment, competition and government procurement, are becoming increasingly relevant within SACU – as is the issue of intellectual property rights. For instance, new-generation issues such as services, investment and intellectual property rights were discussed at the SACU Council of Ministers' meeting in 2009, where the importance of developing a common strategy on the latter type of issue was emphasised.[55] Although none of these issues have explicitly been incorporated into the SACU Agreement, SACU trade agreements with third parties make such provision.[56] The FTA between SACU and EFTA, for example, refers to services, investment, public procurement and intellectual property rights. With the objective of progressively harmonising the legal framework on new-generation issues, EFTA and SACU states have affirmed their commitment to review the respective provisions within a period of five years after their FTA has entered into force.[57] It is essential, therefore, that SACU develops a joint position on new-generation issues, as already proposed in a work plan dated 4 December 2009.[58]

Concluding remarks

The world's oldest customs union appears to be balancing on the edge of an abyss. It is for this very reason that the positive attitude by all SACU Heads of State and Government as well as by SACU's Executive Secretary as regards SACU's continuance has to be commended. The latter, in her opening statement at the centenary celebrations, stated that SACU has to focus on the "renewal and consolidation of the Union".[59] It is strongly hoped that the tensions around the EPA negotiations will not lead to the dissolution of SACU,

54 These issues were the subject of the 1996 Singapore Ministerial Conference of the WTO, and are commonly referred to as *the Singapore issues*.

55 SACU (2009a).

56 Draper, P, D Halleson & P Alves. 2007. "SACU, regional integration and the overlap issue in southern Africa: From spaghetti to cannelloni?". *Trade Policy Report No. 15*. Braamfontein: The South African Institute of International Affairs, p 32; available at http://www.ecdpm.org/Web_ECDPM/Web/Content/Download.nsf/0/D9DA3E58E0145FD8C125730C003BB642/$FILE/SADC%20EPA%20Paper%20Peter%20Draper%20'From%20Spaghetti%20to%20Cannelloni'..pdf; last accessed 28 May 2010.

57 SACU–EFTA's FTA came into force in May 2008, meaning that provisions on intellectual property and investment have to be reviewed by the end of April 2013 at the latest.

58 SACU/Southern African Customs Union. 2009b. *Press statement on the 20th Meeting of the SACU Council of Ministers held on 04 December 2009 in Windhoek, Namibia*; available at http://www.sacu.int/docs/pr/2009/pr1207.pdf; last accessed 29 May 2010.

59 Moremi (2010).

as doing so would foster both economic and political instability in the southern African region.[60]

SACU countries have made considerable progress with regard to their trade liberalisation efforts. The WTO's 2009 Trade Policy Review of SACU points out that the structure of the common external tariff has been simplified and the tariff's simple average rate reduced from 11.4% in 2002 to 8.1% in 2009.[61] Trade in goods within SACU has become substantial, and SACU provides the necessary framework for such trade to continue and grow. In a recent study, the South African Institute for International Affairs (SAIIA) found that goods traded between South Africa and other SACU members accounted for about 10% of South African exports between 2001 and 2007.[62] Compared with the exports to key EU trading partners over the same period, the exports from Botswana, Namibia and Swaziland to South Africa were more value-added. Therefore, any change in SACU's current structure or, as the worst-case scenario, its dissolution has to be considered carefully before any irreversible steps are taken.

SACU's structure and its interplay with other economic communities such as SADC, COMESA and the EAC have to be reviewed in the long run. The same applies to the 2002 Agreement. Existing provisions need to be put into practice. This is particularly true for the institutional and policy framework. In addition, the inclusion of provisions that incorporate the need to cover new-generation issues has to be explored. One further crucial issue is the current revenue formula, which may require amendment. It is quite clear that South Africa is by far the most dominant member within SACU, obtaining over 46% of the common revenue pool in 2009/2010, as revealed by the recent WTO Trade Policy Review.[63] The current revenue formula with its redistribution mechanism in favour of the BLNS states is, however, one crucial issue which needs further discussion. If the revenue formula is amended according to the interests of pressure from the South African the fact that BLNS and especially the smaller states within this group are enormously dependent on the revenues from SACU. In Lesotho for example, revenues from the Southern African Customs Union (SACU) account for around 60% of the country's tax revenue.[64] Thus, reconsideration of the current revenue sharing formula should be done in a manner which does not result in destabilisation in the region.

60 As noted by Namibia's Deputy Finance Minister, Calle Schlettwein; cf. Weidlich, B. 2010e. "Deep re-thinking required for future of customs union"; *The Namibian*, 19 May 2010.

61 WTO (2009:47 at para 316).

62 Craemer (2010).

63 Compared with 2005/2006 when its share was still over 52%. See WTO document WT/TPR/M/222/Add.1, p 41.

64 Press release by the International Monetary Fund; available at http://www.imf.org/external/np/sec/pr/2010/pr10224.htm; last accessed 29 July 2010.

To take into account the fact that SACU involves countries with large disparities in income and economic strength, as well as uneven levels of development, will not be an easy task in the process of renewal and consolidation. If the respective decision-makers are guided by SACU's newly drafted vision and mission, however, they should successfully manage to tackle the challenges on the ground.

A New Sudan: Precondition of peace at the Horn of Africa?

Manfred O Hinz*

Introductory remark

A slightly different version of this article was presented at the Stakeholders' Workshop on the Alternative Political Organisations and Constitutional Options for Balancing Ethnic Diversity and Enhancing Unity, Stability and Development in the Horn of Africa, held in Djibouti from 25 to 29 January 2010.[1] Two reasons prompted the publication of the article in the *Namibia Law Journal*: What is currently going on in the Sudan will, in all probability, lead to a new independent state on African soil, namely Southern Sudan,[2] by way of an internationally sanctioned process, the end of which is most likely secession by referendum.[3] This is the first reason. The second is that the new political order in Southern Sudan is deliberately being built on the inherited traditional governmental structures with the various customary laws of the communities featuring prominently as the informing source of the law.[4]

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1 Organised by the Rule of Law Programme for Sub-Saharan Africa, Konrad Adenauer Foundation, under the directorship of Prof. Christian Roschmann, Nairobi.

2 Which already enjoys a semi-autonomous status within the Sudan.

3 This, at least, is the clear indication if one listens to the leading political force in Southern Sudan – the Sudan People's Liberation Movement/Army (SPLM/A) – which also scored an almost unchallenged victory in Southern Sudan in the recent elections, and to the ordinary person in the streets of Juba and elsewhere. The SPLM/A received 93% of the vote in the south. Its candidate for the office of President of Sudan as a whole received 22% of the vote, although Yasir Arman, whose name had remained on the ballot paper, had withdrawn his candidacy beforehand (cf. *Neue Zürcher Zeitung*, 29 April 2010).

4 The author of this article assisted a delegation of lawyers, traditional leaders, and members of the Local Government Board of Southern Sudan in familiarising themselves with traditional authority and customary law in Namibia in 2008, and drafted a customary law strategy for the Government of Southern Sudan (Hinz, MO. 2009a. *"... to develop the customary laws into the common law of the Sudan ...": Customary law in Southern Sudan: A strategy to strengthen Southern Sudanese customary law as a source of law in an autonomous legal system*. Juba & Windhoek: United Nations Development Programme, Ministry of Legal Affairs and Constitutional Development & University of Namibia).

The plea for a New Sudan: Background

Apart from Somalia (its failure to be a state, its harbouring of obviously uncontrollable gangs specialised in piracy, and its separatist challenges), but also apart from the still unsolved conflict between Eritrea and Ethiopia, which is more than a border conflict, the Sudan is high on the political agenda of anyone who looks at the Horn of Africa and considers strategies for promoting peace and stability in that region.[5] The Sudan, which has been at war for many years, only entered into an internationally brokered, fragile peace in 2005, when a Comprehensive Peace Agreement (CPA) was concluded between the Government of the Sudan and the Sudan People's Liberation Movement/ Army (SPLM/A). After promising approaches to strengthen the humanist potential of Islam had been forcefully terminated,[6] the Sudan has remained a source of support for predominantly fundamentalist Islamic movements in its neighbouring countries. It was, particularly between 1991 and 1996 – the years of open cooperation between the Sudan's National Islamic Front and Al-Qaeda – that jihadists and other Islamic groups were set in motion. When Osama bin Laden was made to leave the Sudan in 1996, an operational network of jihadists was in place in Eritrea, Ethiopia, Kenya, Somalia, Tanzania and Uganda.[7] For the government in Khartoum, the war against the southern parts of the country was propagated as a war to protect Islam: a jihad, a holy war. Even the war against the Nuba population, which was partly Muslim, was a jihad because of its support to the SPLM/A.[8]

5 On Somalia, see Bradbury, M 2008. *Becoming Somaliland*. Oxford: James Curry; on Eritrea, see Medhanie, T. 2008. *Constitution-making, legitimacy and regional integration: An approach to Eritrea's predicament and relations with Ethiopia*. Aalborg: Aalborg University.

6 Cf. here Taha, MM. 1990. *The second message of Islam*. New York: Syracuse University Press; An-Na'im, AA. 1990. *Towards an Islamic reformation. Civil liberties, human rights and international law*. New York: Syracuse University Press; Burr, JM & RO Collins. 2003. *Revolutionary Sudan. Hassan al-Turabi and the Islamist state: 1989–2000*. Leiden: Brill. The Sudanese Mahmoud Mohammed Taha promoted a reform of Islam from within. He was executed for apostasy in Khartoum in 1985 (cf. Bennett, C. 2005. *Muslims and modernity: An introduction to the issues and debates*. London/New York: Continuum, pp 56f). Hassan at-Turabi is said to be the architect of Khartoum's Islamist ideology (cf. Piro, GA. 2007. *The African jihad. Bin Laden's quest for the Horn of Africa*. Trenton Asmara: The Red Sea Press, pp 16ff). Abdullahi Ahmed an-Na'im translated Taha's second message to Islam into English and supports Taha's liberal Islam in his own writings (cf. Bennett 2005:75ff).

7 Cf. Piro (2007:6).

8 Cf. Johnson, DH. 2007. *The root course of Sudan's civil war* (Updated fourth impression). Oxford: James Currey, pp 22ff, 59ff, 130ff.

The Sudan was at war for more than 30 years.[9] The war started in 1955, the year before the country's independence and in protest at an expected constitutional independence arrangement which did not provide for the right of the south to maintain its autonomy as a non-Arabic-speaking and non-Muslim part of the country. The war ended in 1972 with the Addis Ababa Agreement, which accepted some level of autonomy for the south. The peace did not last long, however. Responding to internal pressure, the autonomy of Southern Sudan was abolished in 1983. This and a new edition of the policy of Arabisation and Islamisation led to the second civil war. All in all, the war resulted in about two million persons being killed, and four million persons being internally displaced or fleeing to neighbouring countries.

On 9 January 2005, the CPA was signed between the Government of the Sudan and the SPLM/A. After many difficult developments during the war years, the SPLM/A emerged as the dominant political force in Southern Sudan. It also has a substantial base in the north of the country.[10] The signing of the CPA was supported by the international community by way of Egypt, Kenya and Uganda on the continent; Italy, the Netherlands, the United Kingdom and the United States overseas; and the African Union, the European Union, the League of Arab States, the Intergovernmental Authority on Development – in which states of the Horn of Africa work together – and the United Nations. The international community representatives signed the CPA as witnesses. It is important to note that the political view of the SPLM/A, under its charismatic leader John Garang de Mabior,[11] understood the war as an effort to support the 'New Sudan'. The ultimate objective was not secession from the Sudan, but its reconstruction, thereby allowing other parts of the Sudan in opposition to Khartoum to participate in the power- and wealth-shared ruling of the country.

The CPA, however, did not result in a blueprint of the envisaged New Sudan, but in a compromise. According to this agreement, the military achievement of the SPLA was reflected in the acceptance of a constitutional framework for an Interim Constitution of the Sudan as a whole, an Interim Constitution of Southern Sudan, and a set of rules for the resolution of the conflict in three areas which, territorially, belong to the northern part of the Sudan, but which

9 For this and the following, see Holt, PM & MW Daly. 2000. *A history of the Sudan: From the coming of the Islam to the present day* (Fifth edition). London: Pearson Education; Petterson, D. 2003. *Inside Sudan: Islam, conflict, and catastrophe*. Boulder: Westview Press; Johnson (2007); Bankie, BF. 2008. "The experience of Africans under Arab colonisation and its antithesis". Juba (on file with the author of this article).

10 On the history of the SPLM/A, cf. Johnson (2007:91ff, 111ff).

11 John Garang led the SPLM/A through the CPA negotiations, but died in an air accident shortly after its signing.

have strong political links to the south, namely Abyei, Southern Kordofan, and the Blue Nile.[12]

In accepting the right to the south's self-determination,[13] the CPA's first objective is to provide for the transitional autonomous status of Southern Sudan within the Sudan as a whole. By way of a referendum in 2011, the south will decide whether it wants to remain part of the Sudan or become independent. During the transitional period, the CPA intends to put in place a government structure based on the rule of law that is, on the one hand, firm and precise in confirming the basic elements which led the parties to agree on the end of the war, but, on the other, also flexible enough for negotiations to continue towards a final solution for the various actors in the conflict. In more concrete terms, the CPA navigates between the SPLM/A's clear plea for autonomy in the south and the interests of the Khartoum regime to maintain national unity.

The monitoring of the implementation of the CPA is stipulated in its contents, namely in the Machakos Protocol of July 2002, which was made part of the CPA. The task of monitoring is entrusted to the parties to the CPA and, inter alia, countries which witnessed its signing. Accordingly, a mid-term report – the CPA sets an implementation term of six years – was submitted in July 2008.[14]

There is no guarantee that the CPA will hold what it was meant to. Internal, interethnic fights continue in the south. The Christmas edition of the *Sudan Tribune*[15] contained an article entitled "Washington accuses Sudan's NCP[16] of reneging on CPA accord". An article on the Sudan, appearing in the first issue

12 The Abyei area is special amongst the three mentioned, because of its ethnic relationship to the south and its economic importance. Most of Abyei belongs to the Dinka community, which is ethnically dominant in the south. Abyei was the focus of an international dispute between the south and the north because of its oil resources. As to the latter, cf. Permanent Court of Justice. 2009. *Final award in the matter of an arbitration before a tribunal constituted in accordance with article 5 of the arbitration agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army on delimiting Abyei area*. The Hague: Permanent Court of Arbitration. It is noteworthy that Darfur – the part of northern Sudan with which the international community has shown most concern over the past few years – has not been considered in the CPA. On Darfur, cf. Flint, J & A de Waal. 2008. Darfur. *A new history of a long war*. London: Zed Books; African Union. 2009. *Report of the African Union High Level Panel on Darfur*. Abuja: African Union.

13 Cf. chapeau of the CPA.

14 Cf. Assessment and Evaluation Commission. 2008. *Mid-term evaluation report submitted to the Comprehensive Peace Agreement*. [No place of publication indicated]: Assessment and Evaluation Commission; Thomas, E. 2009. *Against the gathering storm. Securing Sudan's Comprehensive Peace Agreement.* London: The Royal Institute of International Affairs.

15 E-newspaper www.sudantribune.com; last accessed 10 January 2010.

16 The National Congress Party, which the ruling party in the northern part of the Sudan.

for 2010 of the German weekly, *Der Spiegel*, anticipated chaos;[17] the Swiss *Neue Zürcher Zeitung* heads its article commenting on the five years of the CPA with "Im Südsudan wenig Grund zum Feiern".[18]

The main focus of the current article is to take note of the basic elements of the CPA. The main question here is to what extent the CPA and its translation into the governance of Southern Sudan has led, or will lead, to a rule-of-law-oriented, societally accepted socio-political reality. Only then – and this is the sociological/anthropological assumption – will the CPA eventually contribute to peace in the Sudan and, thereby, to the Horn of Africa. The drafting of a customary law strategy for the United Nations Development Programme (UNDP) and the Government of Southern Sudan (GSS), which the author of this article was committed to develop,[19] is of particular interest to questions about the rule of law in a ethnically/culturally diverse country such as the Sudan and will, therefore, be given a special place in the following elaboration.

The main elements of the CPA

In pursuance of its acceptance as an autonomous entity within the Sudan, the south has, in an asymmetric arrangement, been granted the right to have its own government: the Government of Southern Sudan. The GSS has also been granted far-reaching competencies, and its president is to be the first Vice-President in the GS. After holding nationwide elections in 2010, the south will have the right to decide whether to remain part of the Sudan or to secede and become an independent state in 2011. Wealth-sharing was of particular importance with respect to the oil resources located primarily in Southern Sudan. As a general rule, the CPA provided for the equitable distribution of all national wealth.

The CPA also contains provisions according to which the Interim Constitution of the Sudan as a whole, the Interim Constitution of Southern Sudan (ICSS),[20] and the administration of certain areas in the northern part of the Sudan are to be modelled. The framework deals in a constitution-like manner with –[21]

- general principles (respect of sovereignty, but also autonomy for the south with special reference to the protection of cultural diversity and the right to religious freedom)
- good governance
- administrative cooperation
- human rights and fundamental freedoms

17 *Der Spiegel*, 4 January 2010.

18 *Neue Zürcher Zeitung*, 9 January 2010; "Not much to celebrate in Southern Sudan".

19 See Hinz (2009a).

20 The Interim Constitution of Southern Sudan of 2005.

21 Cf. here Murray; C & C Maywald. 2003. "Sub-national constitution-making in Southern Sudan". *Rutgers Law Journal*, 37:1203ff.

- institutions at national level
- the GSS
- institutions in the sub-central states, and
- schedules setting out the competencies at a national level, at the GSS level, and at the level of the individual states.

The schedules are of particular importance in view of the anticipated federal structure of the Sudan.[22] The whole of the Sudan is to be divided into a number of states. Each state is to have a legislative assembly, an executive and a judiciary. The legislative and executive competencies are divided into the exclusive powers of the national government, the exclusive powers of the GSS, the exclusive powers of the states, the concurrent powers of the three layers of government, and the residual powers.

Part of the power-sharing agreement is also that the dominant force in the northern part and the dominant force in the south do not monopolise the respective governmental structures. Prior to the scheduled national elections, the ruling party of the Khartoum government, the National Congress Party, is obliged *to* hold 52%, the SPLM/A 28%, other political forces of the north 14%, and other forces of the south 6% of the seats in the National Assembly of the Sudan. The same key is to apply to the composition of the Sudanese Executive. The distribution key for the south provides for 70% to the SPLM/A, 15% to the National Congress Party, and 15% to other political forces of Southern Sudan. Furthermore, this key applies not only to the composition of the GSS executive, but also to the respective institutions of the states in Southern Sudan.

As indicated earlier, Abyei, Southern Kordofan and the Blue Nile enjoy special consideration in the CPA. The three areas are 'in-between zones': Abyei, in particular, is usually referred to as the bridge between the south and the north – and has been heavily affected by the war. Although the three areas have been accepted as being part of the north from a political point of view, the CPA has set out rules that recognise their special status. As far as Abyei is concerned, for example, the CPA entitles its inhabitants to belong to two states: the state of Western Kordofan in northern Sudan, and the state of Bahr el Ghazal in Southern Sudan. The inhabitants of Abyei have also been granted the right to decide whether they wish to belong to northern Sudan or Southern Sudan.

It is particularly noteworthy that the ICSS pays very special attention to the reconfirmation of the traditional structure of the south, and the customs and customary law observed by its many traditional communities. In all other respects, the ICSS fully reflects the standards in constitutionalism, particularly those that relate to fundamental rights and freedoms and the usual institutional

22 Which has since been implemented; the ten states exist, have adopted constitutions, and have established the envisaged governmental institutions.

mechanisms that modern constitutions contain in order to protect such rights. Although the existing infrastructure in Southern Sudan – *infrastructure* understood in the widest possible sense – is not in favour of the functioning of a modern state bureaucracy, the GSS, with the assistance of the international community, UN-organisations such as the UNDP have, together with non-governmental organisations (NGOs), succeeded in establishing ministries, operationalising the National Assembly, creating ten states, and setting up some of the institutions needed for the states to operate effectively. In establishing all these institutions, the GSS could at least to some extent rely on structures created by the SPLM/A in the then liberated areas.

A whole range of new laws were enacted by the GSS Parliament. Some of these pieces of legislation are re-enactments of Acts adopted under the SPLM/A, while others such as the Local Government Act of 2009, which directs government decentralisation, were newly drafted.

The pre-constitutional legal foundation, or: The call for the reappropriation of tradition and customary law in Southern Sudan

What to do with traditional leaders and customary law has been on the political agenda since the process of reconstructing the civil administration in liberated areas of Southern Sudan started. The reconstruction of a new local government system was guided by the desire to have a system that would integrate local government and traditional authority.

Customary law is a reality in Southern Sudan. Customary law basically affects all people.[23] Customary law is applied by the courts in towns, including the

23 The following is based on work done by the author of this article as part of an assignment by the UNDP and the Southern Sudanese Ministry of Legal Affairs and Constitutional Development (MoLACD). The objective of the assignment was to draft a customary law strategy for the GSS (see Hinz 2009a). Cf. also Mading Deng, F. 1971. *Tradition and modernization. A challenge for the law among the Dinka of the Sudan*. New Haven/London: Yale University Press; Wuol Makec, J. 1988. *The customary law of the Dinka people of Sudan*. London: Afroworld Publishing; Hinz, MO. 2009b. "The ascertainment of customary law: What is it and what is it for?" In USIP & World Bank (Eds). *Customary justice and legal pluralism in post-conflict and fragile societies. Conference Packet*. Washington: United States Institute of Peace, George Washington University & World Bank, pp 133ff; Hinz, MO. 2009b. "Observations about local government in Southern Sudan". In USIP & World Bank (Eds). *Customary justice and legal pluralism in post-conflict and fragile societies. Conference Packet*. Washington: United States Institute of Peace, George Washington University & World Bank, pp 47ff; Biong Mijak, D. 2010. "Traditional authority in the post-CPA Southern Sudan". In Hinz, MO (Ed., in cooperation with C Mapaure). *In search of justice and peace: Traditional and informal justice systems*. Windhoek: Namibia Scientific Society, pp 325ff.

capital of Southern Sudan, Juba. Customary law is applied outside the centres. In the cities and less remote parts of the territory under the jurisdiction of the GSS, state and non-state courts work complementarily. In many parts of the country, non-state courts are the only accessible judicial structures.

The reappropriation of traditional governance and customary law is part of the socio-political vision on Southern Sudan. The ICSS contains several articles of relevance to customary law and traditional authority. Article 174, for example, says the following:[24]

> (1) The institution, status and role of traditional authority, according to customary law, are recognised under this Constitution.
> (2) Traditional authority shall function in accordance with this Constitution and the law.
> (3) The courts shall apply customary law subject to this Constitution and the law.

The broader societal dimension of the socio-political vision relating to traditional governance and customary law can be illustrated best by referring to the traditional leaders' meeting held in Bentiu, Unity State, Southern Sudan, in May 2009. The meeting was convened by the GSS and was attended by over a thousand traditional leaders. The aim was to discuss a broad range of issues: not only those related to matters usually seen to be under the jurisdiction of traditional leaders, but also those concerning Southern Sudan as a political entity framed by the CPA. The meeting was held under the banner of the slogan "Together towards our common destiny".[25]

In the Preamble to the Bentiu Resolutions and Recommendations, the Kings, Chiefs and Traditional Leaders of Southern Sudan noted, with great satisfaction, –[26]

> … the appreciation and recognition accorded to us by H E the President of GoSS for the role we, the Kings, Chiefs and Traditional Leaders, had played in standing firmly with SPLM/A and supporting the war efforts of the SPLA during the liberation struggle.

The traditional leaders also expressed their appreciation for the call of the President of the GSS for peace, unity and reconciliation amongst all the communities of the south for holding free and fair elections and the referenda on self-determination for the people of Southern Sudan and the Abyei area.

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24 There are more articles in the ICSS which refer to traditional authority and customary law. Article 174 was obviously modelled after Section 211 of the Constitution of South Africa of 1996.

25 Government of Southern Sudan. 2009. *The Kings, Chiefs and Traditional Leaders Conference, Bentiu, Unity State, 18–19 May 2009*. Juba: Government of Southern Sudan.

26 (ibid.:3).

The leaders felt, in particular, encouraged by the –[27]

> [f]rankness and humility of H E the President in apologizing, on behalf of GoSS, SPLM and SPLA directly to the Kings, Chiefs and Traditional Leaders for mistakes and wrongs committed during the liberation struggle and thereafter; ... .

The resolution entitled "Governance and the Role of Traditional Authorities and Leaders" stated, inter alia, the following:[28]

1. The Conference appreciates the enactment of the Local Government Act 2009, which is in line with the provisions of the CPA, the Interim National Constitution and the Interim Constitution of Southern Sudan and clearly spells out the roles of the traditional authorities and leaders in the governance of the South, and resolved to support the efforts of GoSS to consolidate the decentralised system of governance.
2. The Conference urges the State Governors and County Commissioners to implement the provisions of the Local Government Act 2009 and empower Kings, Chiefs and Traditional Leaders to effectively exercise their functions and duties which were conferred upon them by law.
3. Each King and Chief should be facilitated by the local authority to recruit his/her own local police, up to a maximum of 10 persons, or as shall be determined by the county to enforce the decisions of their courts; they shall be trained and equipped by the State authorities.

Resolution 5.1 deals with ethnic conflicts. To quote only three demands, the Conference resolved as follows:[29]

(a) The Kings, Chiefs, and Traditional Leaders are to revive the traditional conflict resolution mechanisms, such as joint chief conferences, special courts and other consultative fora which used to take place in Bahr el Ghazal and Upper Nile, to address tribal and sectional conflicts between different communities. …

(e) The movement of pastoral tribes with their cattle be regulated and controlled to avoid conflicts, tensions and fights with sedentary farming communities within and across the States. …

(g) State authorities to support Kings and Chiefs in their roles by providing them with police forces or giving them access to police forces available in the Counties to respond to and contain emerging ethnic conflicts.

It is obvious that such a demanding view will not become reality in a day. The development of the above-mentioned customary law strategy[30] was only one step. Others have to follow, of which the most promising is the development of a Customary Law Centre (CLC) under the auspices of the Ministry of Legal

27 (ibid.:3).
28 (ibid:10).
29 (ibid:11).
30 Hinz (2009a).

Development and Constitutional Affairs.[31] The ascertainment of customary law is another challenging step, currently discussed for implementation.[32]

Conclusion, or: What are the chances for a New Sudan?

This is not the platform to give a detailed assessment on what has been achieved in the five years since the signing of the CPA and where problems arose. The mid-term evaluation submitted in accordance with the relevant stipulations in the CPA gives an account of the aspects of CPA implementation that were achieved, but also those that were not.[33] Some observers have expressed concern about 'gaps' in the CPA because it basically deals with the south and not with the Sudan as a whole. Furthermore, critics point out that Darfur is not considered in the CPA, nor is the position of civil society forces in the north.[34]

Indeed, the fact that the CPA was primarily intended to set out a framework for the settlement of the south-centred Sudan conflict, the very possible vote against national unity in the 2011 referendum in the south may not put an end to the conflict: apart from the northern territories considered in the CPA and Darfur (which has not been considered in the CPA), there are other parts of the north where the Khartoum government is not fully in control. There is the Beja area in the east of the country, which has its difficulties with Khartoum, and there are the Nubians in the north, who are equally in disagreement with the Khartoum regime. Among others, the following questions remain:

- Will the north survive a secession of the south? Will the north open up to democratic development?

31 The strategy, therefore, models the possible framework of the CLC, which is statutorily provided for in section 14(2)(c) of the Ministry of Legal Affairs and Constitutional Development Act of 2008. The envisaged CLC will be a unique institution, solely devoted to matters of customary law and, thus, the driving force behind the promotion and implementation of the proposed customary law strategy.

32 The ascertainment of customary law through the various traditional communities in Southern Sudan has been given a special place in the strategy. However, the ascertainment process will not necessarily respond to the need for change and development. For this reason, the customary law strategy addresses ways to achieve such change and development. In addition, the strategy suggests to the GSS the legal and social environment for the operation of customary law. All these suggestions were largely based on work done in Namibia over the past few years. Cf. Hinz, MO & JW Kwenani. 2006. "The ascertainment of customary law". In Hinz, MO (Ed., in collaboration with HK Patemann). *The shade of new leaves. Governance in traditional authority: A southern African perspective*. Münster: Lit Verlag, pp 203ff; Hinz, MO. 2009c. "Phase 1 of the Namibian Ascertainment of Customary Law Project to be completed soon". *Namibia Law Journal*, 1(2):109ff. See also the strategy referred in Hinz (2009a:77ff).

33 As referred to above, see footnote 15.

34 (ibid.).

- Will Khartoum be prepared to deal with the areas of conflict in the north?
- Will it resist the secession of the south in order to secure its access to the oil income?
- Will the south be able to consolidate into a fully-fledged government based on the principles of the rule of law, and be accepted by the people as their legitimate government?
- Will the south also in the future be able to rely on the assistance of international organisations and the donor community to enable it to develop its infrastructure?
- Will the south be able to bring ethnic conflicts to rest?
- Will it be possible to end destabilising interventions, such as the interventions of the Lord's Resistance Army?

Questions of this nature and the attempts to answer them will occupy the stakeholders in the Sudan as well as the observers committed to resolving problems in the Sudan in the months – if not years – to come. However, the fact that the CPA could have been even more comprehensive than it turned out to be means it will be difficult to implement if the parties to it want to create problems, and have the power to do so.

Therefore, shortcomings of the nature indicated should not detract from the fact that the CPA and the forces behind its implementation were able to secure peace in the Sudan for the past half decade – to an extent not experienced in the country for many years. Such peace was able to be secured on the basis of constitutional framework driven by the rule of law, which, in the south of the country, prompted a government to be accepted as the people in the area emerged from a long liberation war. The recognition of cultural diversity, of local rule based on traditional governance, and of local (customary) law was certainly essential for this acceptance to happen. Although the New Sudan – as envisaged by the SPLM/A before it signed the CPA – is not on the agenda of those involved in implementing the agreement, success as regards implementation may lead to *a* different New Sudan, even with the south opting for independence. Such a New Sudan will in all likelihood have the greatest potential to put the Sudan conflict to rest, and thereby contribute to peace in the Horn of Africa.

JUDGMENT NOTE

Towards a Southern African Development Community: The SADC Tribunal and its recent cases

Karin Klazen*

Background

The establishment of the Southern African Development Community (SADC) Tribunal in 1992 was brought about through the statutory enactment envisaged in Article 9(1)(g) as read with Article 16 of the SADC Treaty. The Tribunal is the 'judicial arm' of SADC, with its seat in the Republic of Namibia, and was created to protect the interests and rights of its member states[1] and their citizens.

The manner in which the Tribunal operates is regulated by the Protocol on the SADC Tribunal. SADC Declarations, Principles and the SADC Treaty as well as all Protocols that have been duly ratified and which are in force all constitute SADC law. The main objective of the Tribunal is to ensure that member states do not fall foul of SADC law.[2]

The Tribunal is constituted by ten judges who are known as *Members*. Five of these ten judges are regular Members, whilst the other five constitute a reserve pool should any one of the five regular judges be unable to perform his/her duties.[3] The Members of the Tribunal are nominated by member states[4] and then appointed by Summit of the Heads of State or Government[5] on the recommendation of the SADC Council of Ministers.[6]

Under international law, the Tribunal is considered an international court similar to the European and East African Courts of Justice.[7] Like other international courts, therefore, the requirement that a litigant has to have exhausted all

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1 The member states of SADC and the SADC Tribunal are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

2 Tribunal Registry. [n.d.]. "The SADC Tribunal in 20 questions. A guide to SADCT". Unpublished.

3 (ibid.).

4 As defined in Article 1, SADC Treaty.

5 (ibid.).

6 (ibid.).

7 Tribunal Registry. [n.d.].

local remedies before approaching the Tribunal also applies.[8] Notwithstanding the importance of this requirement, the Tribunal applies the condition with the necessary exceptions and flexibilities – as is the case with other international courts.[9]

When matters are brought to the Tribunal, litigants need not be represented by lawyers (referred to as *Agents*), but owing to the complexity of the issues inherent in any particular matter, it is normally practically necessary to acquire legal representation. Only registered lawyers in the member states have the right to appear before the Tribunal.[10]

In respect of the question of costs, the Rules of Procedure[11] dictate that parties to proceedings pay their own costs, and that only in exceptional circumstances may the Tribunal order one party to pay the costs incurred by the other.[12] The case of *Angelo Mondlane v SADC Secretariat*[13] was one such occasion, where the exceptional circumstances that emerged from the particular facts persuaded the Tribunal to award costs in favour of the applicant. The facts of the *Mondlane* case are discussed later herein.

The scope of the Tribunal's jurisdiction is delineated in Article 15 of the SADC Protocol. Natural or juristic persons have the relevant locus standi[14] to bring a matter before the Tribunal where there is a violation of SADC law by a member state. Notably, there is no requirement for such person to be a citizen of a member state.[15] Where member states have disputes with SADC or any of its institutions, the Tribunal exercises exclusive jurisdiction over these disputes.[16] Similarly, the Tribunal has exclusive jurisdiction over labour disputes vis-à-vis employees of SADC.[17] A ruling which bears the Tribunal's ex cathedra pronouncement in respect of rules and requirements pertaining to its jurisdiction was recently delivered, and it is to this that we now turn.

8 Article 15, SADC Protocol.
9 Tribunal Registry. [n.d.].
10 (ibid.).
11 Rule 78.
12 Tribunal Registry. [n.d.].
13 Case No. SADC (T) 07/2009 (judgment delivered on 5 February 2010); hereafter referred to as the *Mondlane* case.
14 Standing.
15 Tribunal Registry. [n.d.].
16 Article 17, SADC Protocol.
17 Article 19, SADC Protocol.

Recent cases

Bookie Monica Kethusegile-Juru v The Southern African Development Community Parliamentary Forum[18]

On 5 February 2010, the SADC Tribunal delivered judgment in the *Bookie* case in respect of certain preliminary objections which were raised by the respondent in relation to the application. The dispute between the parties concerned the termination of the applicant's contract of employment: the applicant alleged that her contract was unlawfully and unprocedurally terminated by the respondent.

One of the objections to the application was that the Tribunal did not have the requisite jurisdiction to entertain the matter as it only held power to interpret the SADC Treaty, Protocols, subsidiary instruments, and acts of the institutions of the Community.[19] The critical issue before the Tribunal was whether the respondent – the SADC Parliamentary Forum – was in fact a SADC institution in terms of Article 14(b) of the SADC Protocol and, if so, whether it had committed an act which gave rise to the dispute before the Tribunal.[20]

The Tribunal's first port of call in addressing the abovementioned objection was Article 14(b) of the SADC Protocol, which states the following:

> The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and this Protocol which relate to…the interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and *acts of the institutions of the Community* … [Emphasis added]

Referring to a Summit held in September 1997 in the Republic of Malawi, where the establishment of the SADC Parliamentary Forum as an autonomous SADC institution was approved in accordance with Article 9(2) of the SADC Treaty, the Tribunal ruled that "there [could] be no doubt"[21] of the respondent's status as an institution of SADC. The Members further accepted that the applicant's allegation against the respondent had to do with, or related to, a condition of her employment. Furthermore, given that the Tribunal exercised exclusive jurisdiction over all disputes between the Community and its staff relating to their conditions of employment,[22] the Members opined that the question as to whether the respondent had committed an act which gave rise to the dispute before it had to be resolved in the affirmative.[23]

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18 Case No. SADC (T) 02/2009; hereafter referred to as the *Bookie* case.
19 (ibid.:2).
20 (ibid.:3).
21 (ibid.).
22 Article 19, SADC Protocol.
23 *Bookie* case, p 3.

Another of the respondent's objections concerned the fact that the same matter was pending before the District Labour Court for the District of Windhoek, which is a court of competent jurisdiction to adjudicate on employment matters.[1] The Tribunal noted its acquiescence with the rule of international law which prevented persons from abusing remedies through concurrent proceedings, but simultaneously displayed its flexibility in respect of this rule by stating that "the Tribunal [was] better placed to exercise jurisdiction than any other court or tribunal by reason that it [had] exclusive jurisdiction to do so".[2] It was, therefore, not strictly necessary for the applicant in casu to have exhausted all local remedies before approaching the Tribunal.

Ultimately, all preliminary objections were dismissed, and the Tribunal held that the matter was properly before it.

At the time of writing this report, the parties were set to return to the Tribunal later in 2010 for the hearing and determination of the main application.

Angelo Mondlane v SADC Secretariat[3]

In November 2005, the parties entered into a contract of employment whereby the applicant was employed by the respondent in the position of Head of Policy and Strategic Planning. The applicant commenced work on 1 January 2006.

During the period 2006–2008, a job evaluation exercise was carried out within the respondent, the purpose of which was to determine a new organisational structure, job specifications, descriptions and grading.[4] In the course of this exercise, a skills audit of the respondent's existing staff was conducted in order to facilitate the migration of the existing staff members into the new organisational structure.[5] New posts were created and a change in the categorisation of some of the existing posts within the respondent also occurred.[6]

It was established practice within the respondent that an employee who desired to renew his/her contract of employment was entitled to do so for a second and final term of four years if his/her performance had been satisfactory.[7]

On 12 December 2008, the Executive Secretary[8] informed the applicant by letter (which was titled "Migration into the new SADC Secretariat Structure")

1 (ibid.:2).
2 (ibid.:4).
3 Case No. SADC (T) 07/2009.
4 (ibid.:6).
5 (ibid.).
6 (ibid.).
7 (ibid.:3).
8 Defined in the SADC Treaty as the Chief Executive Officer of SADC, appointed under Article 10(7) of the Treaty.

that, as a result of the skills audit in terms of which he had achieved an 80% proficiency evaluation score, he had been appointed Director: Policy and Planning, and that all benefits and conditions of his existing contract remained unchanged. Earlier that same year, the SADC Council of Ministers[9] had approved a report compiled by the Executive Secretary on the implementation of the job evaluation exercise and outcome of the skills audit.

Problems arose in February 2009 when the Council resolved to appoint the applicant to the position of *Acting* Director of Policy, Planning and Resource Mobilisation[10] – a position the Council regarded as newly created – up to the period ending 31 December 2009. The effect of the resolution was that it ended the applicant's contract of employment on 31 December 2009 without the applicant having been accorded the right of renewal of his contract for a second and final period of four years.[11]

Thus, the dispute between the parties concerned the terms and conditions of the contract of employment: the applicant alleged that the respondent was in breach of the contract through –[12]

- its unlawful and unjustifiable refusal to extend his contract of employment
- its discriminatory and unfair treatment towards him, and
- its unilateral imposition of unfair contractual terms.

The Tribunal considered the following issues[13] to be the most pertinent in its final determination of the matter:

1. Whether the appointment of the applicant by the Executive Secretary in December 2008 was valid, or whether it "was *ultra vires* the powers of the Council to determine the terms and conditions of the respondent's staff"[14]
2. Whether the Council's resolution of February 2009 appointing the applicant as Acting Director: PPRM (the "newly created position") until 31 December 2009 was valid, or whether it constituted an unlawful and unjustified demotion[15]
3. Whether the position of Director: PPRM was indeed a newly created post, or whether it was the same post as that previously held by the applicant
4. Whether or not the contract of employment between the parties was that concluded in November 2005

9 Hereafter referred to as *Council*.
10 Hereafter referred to as *Director: PPRM*.
11 *Mondlane* case, p 5.
12 (ibid.:2).
13 In no particular order of importance.
14 *Mondlane* case, p 5.
15 (ibid.).

5. Whether the applicant was ever appointed in an acting position, and
6. Whether the respondent had breached its contractual obligations towards the applicant.

The Tribunal found it noteworthy that it was only in February 2009 that the position of Director: PPRM was referred to by the Council as a "newly created position of Director" for the first time and, furthermore, that no reasons had been given by the Council for such a decision. Therefore, it was not possible for the Members to understand and test the rationale behind such a conclusion.[16]

The Tribunal ruled that the position of Director; PPRM was not in fact a new *post*, but rather a new *rank* or *position* in the respondent's new organisational structure. This, according to the Tribunal, was also evidenced by the letter from the Executive Secretary to the applicant in December 2008 wherein it was expressly stated that the applicant's appointment was a "migration" from the old structure into the new one, and that his job content, profile and responsibilities as former Head of Policy and Strategic Planning would remain unchanged in his position as Director: PPRM.[17]

In fortification of its determination that no new post had been created, the Tribunal noted that the applicant was offered the post of Director: PPRM primarily as a result of the outcome of the skills audit in which he had obtained an 80% proficiency evaluation score. The Members opined that the Executive Secretary would surely not have appointed the applicant had he[18] held any reservations about the job responsibilities of the new rank or position of Director not being identical to those of Head of Policy and Strategic Planning.[19] As a consequence hereof, it was ruled that the appointment of the applicant by the Executive Secretary was legally in order, the more so as the latter's report had in fact earlier been approved by Council. Furthermore, there was no doubt that the Executive Secretary had appointed the applicant under the terms and conditions of service determined by the Council.[20]

The Tribunal accordingly ruled that the applicant had never been appointed as Acting Director: PPRM, and that Council's resolution purporting to appoint the applicant as such until 31 December 2009 was not legally in order in the circumstances.[21]

Having determined that the applicant had been lawfully appointed, the Tribunal held that he was not only entitled to a renewal of his contract of employment, but that, in light of his track record and diligent performance, the applicant

16 (ibid.:10).
17 (ibid.).
18 The Executive Secretary.
19 *Mondlane* case, p 11.
20 (ibid.).
21 (ibid.:12).

also held a reasonable and legitimate expectation that his contract would be renewed for a second and final four-year period, commencing 1 January 2010.[22]

It was consequently declared that the relevant contract of employment between the applicant and the respondent was in fact the one entered into in November 2005, as amended by the Executive Secretary's letter dated 12 December 2008, and that, through its unlawful conduct, the respondent had indeed acted in breach of its contract of employment with the applicant.[23]

On the issue of costs, the Tribunal highlighted the "intolerable prejudice, trouble and annoyance"[24] which the applicant, who was a top official of the respondent, had suffered as a result of being offered employment as Director in 2008 only to be informed in 2009 that his appointment was in terms strictly of an acting capacity. This, in effect, equated to the applicant's demotion and a denial of his eligibility to obtain a final four-year contract of employment with the respondent, notwithstanding the reasonable and legitimate expectation for a renewal of such contract. It was for these reasons that the Tribunal considered the circumstances to be exceptional, warranting a costs award to the applicant under 78(2) of the rules of procedure.[25]

Closing remarks

By and large, the SADC Tribunal has fared satisfactorily in terms of its rate of progress since its inception. Of the dozen cases filed with it from 2007 to the date of writing this report,[26] three judgments have been delivered, 4 cases are awaiting trial, 2 have been withdrawn, 1 has been discontinued, and 2 are still in the written procedure stage. [27]

Notwithstanding its development, arguably one of the biggest challenges threatening the efficacy of the Tribunal is member states' non-compliance with its decisions. A case in point is *Mike Campbell (PVT) Ltd & Others v Government of Zimbabwe*.[28] Campbell approached the SADC Tribunal in October 2007, challenging Zimbabwe's acquisition of land reform, and sought an interim interdict from the Tribunal. An order restraining Zimbabwe and in favour of the applicants was granted in December 2007.[29]

22 (ibid.).
23 (ibid.).
24 (ibid.:13).
25 (ibid.).
26 As at the date of writing this report, i.e. March 2010.
27 *SADC Tribunal Review*, February 2010(1):19.
28 SADC T 2/07; SADC T 11/08; SADC T 3/09; hereafter referred to as the *Campbell* case.
29 *SADC Tribunal Review*, February 2010(1):21.

In March 2008, other parties applied to intervene as applicants in the *Campbell* case, and in June 2008, Mike Campbell and 78 others filed an urgent application with the Tribunal for contempt of court, alleging that Zimbabwe had failed to comply with the Tribunal's orders.[30] The Tribunal found Zimbabwe in contempt, and decided to report the matter to the SADC Summit in terms of Article 32(5) of the Tribunal Protocol.

In November 2008, the Tribunal delivered its main judgment in the *Campbell* case and ruled that Zimbabwe's land acquisition was discriminatory, violated the right of access to courts, and generally violated principles of international law.[31] Notwithstanding this judgment, in June 2009, the Tribunal saw yet another urgent application from the applicants. This time they alleged that Zimbabwe had wantonly refused to abide by any of the Tribunal's decisions.[32] Zimbabwe was again found to be in contempt and was reported to the Summit in terms of the Tribunal's Protocol.

In response to the Tribunal's referrals to the Summit, the Zimbabwean Minister of Justice, Patrick Chinamasa, in a letter to the Registrar of the Tribunal (which echoed the views of Zimbabwean lawyers and, more importantly, the Zimbabwean President), argued that since Zimbabwe had not ratified the Protocol on the Tribunal, the latter had no basis upon which to exercise jurisdiction over Zimbabwe.[33] The Minister advised that Zimbabwe would, therefore, not respond to any action or suit pending before the Tribunal.

To date, the Summit has not settled this matter.

The SADC Protocol states that the decisions of the Tribunal are binding upon the parties to the dispute, and enforceable within the member states concerned. It further states that if the Tribunal establishes the existence of any failure by a member state to comply with its decision, it is obliged to report such finding to the Summit for the latter to take appropriate action against the recalcitrant party.[34] However, what precisely constitutes "appropriate action" is not defined anywhere in the SADC Protocol or SADC Treaty. Whether remedial action should take the form of sanctions against the defaulting member state or whether such member state should be 'black-listed' for non-compliance has at this juncture still not been decided and the solution remains unclear.

In a recent attempt[35] to evaluate the effectiveness and legal competence of the SADC Tribunal, a host of its member states gathered in Namibia to attend a two-day symposium on the administration of justice in southern Africa. A

30 (ibid.).
31 (ibid.:22).
32 (ibid.).
33 (ibid.).
34 Tribunal Registry. [n.d.] and Article 32, SADC Protocol.
35 February 2010.

myriad of topics were canvassed and considered by the attending delegates, including the issue surrounding the enforceability of the Tribunal's decisions. In respect of this specific issue, no definite solutions or 'plans of action' could be decided upon during the two-day conference. However, the outcome of the lengthy deliberations was the establishment of a network/coalition of legal professionals with the aim of advocating for an effective SADC Tribunal. Whether or not the newly formed network/coalition will successfully implement or propose conflict resolution mechanisms or, alternatively, determine feasible action against defaulting member states remains to be seen.

But the regional economic communities are hopeful!

BOOK REVIEW

Children's rights in Namibia; Oliver C Ruppel (Ed.), Windhoek, Macmillan Education Namibia, 2009, 435 pages

Norman Tjombe*

A review of only the first half of *Children's rights in Namibia* was undertaken owing to the volume of the publication.

This collection is anchored in a Namibian conception of *children's rights and the law*, and reflects contemporary discourses taking place in the country as well as the region on the children's rights sphere. The majority of contributors are Namibian and adopt an individual approach to their topic, which reflects their first-hand experience. The book focuses on child rights issues which have particular resonance in the country and the chapters span themes which are both broad and narrow, containing subject matter which is both theoretical and demonstrated by practice. The book profiles recent developments and experiences in furthering children's legal rights in the Namibian context. The book is organised in a coherent fashion, clearly written and well documented, and would serve as a useful introduction to the subject and reference work for scholars and practitioners. It lays out well-reasoned and interesting interpretations of various concepts and principles that can act as an advisable point of departure for further academic analysis and high-level policy discussions.

"The protection of children's rights in Namibia: Law and policy" by Lotta N Ambunda and Willard T Mugadza is the first article in the book. The writers use largely academic prose and rely on secondary sources of information for the desk study. The stated aim "to determine the extent to which children's rights are legally protected ...."[1] was decidedly achieved to a large extent. However, court cases which could have given a clear reflection on how the country is implementing its obligations at international, regional and national level were not adequately critiqued in a way that would demonstrate the extent of non-compliance or otherwise. The writers, who do not seem to have published much as yet, correctly observe some of the legislative omissions that have a negative bearing on the advancement of the rights of children. The article chronicles some of the legal instruments at various levels that the country has to implement, which is necessary. On the other hand, not enough time was reserved for the implementation part – which is the second portion of their stated aim in the article. For instance, their failure to mention the challenges

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1 At page 7.

that are faced by several children, especially orphans and other vulnerable children, in accessing education and social grants, among other services, as a result of the rigid provisions of Births, Marriages and Deaths Registration Act[2] is surprising. Despite this, the authors have made a significant contribution to the discourse on children's rights by their article, which is extensive in scope.

"Protection of children's rights under international law from a Namibian perspective" by Oliver C Ruppel is the second article in the book. Ruppel is an accomplished academic and writer with several works to his name. The setting of the article is impressive, with some history and background information which then became neatly meshed into the Namibian context. The amount of research done by the author comes through in the tracing of the Convention on the Rights of the Child (CRC) and other protective legal instruments. The extensive ratification of the CRC by 193 countries shows commendable normative consensus and resolve. But does the process end at ratification? Ruppel did not give enough weight to the Namibian perspective as the examples relating to Namibia were made in passing without a rigorous and thorough analysis. The article does not challenge one's mind or imagination as it is a narration of protection mechanisms for the child at different levels. However, it is a helpful source of information for anyone who is interested in the subject of children's rights.

In the next article, entitled **"A major decision: Considering the age of majority in Namibia"** by Rachel Coomer and Dianne Hubbard, the authors tackle an issue that has always been lingering around without anyone being willing to ask the tough question, namely "Who exactly is a *child*, and what age should a child become a major?" This is an extremely challenging question. The tone and style of the article shows a deep understanding of the complexity of the issue: that it is not only a matter of plucking an age from the air. The reference to "evolving capacities" shows the need for flexibility and for putting the issue into the correct perspective. The authors make reference to other countries to show how each can have its own age of majority, despite the fact that the same countries could still be party to the CRC and members of the African Union, as well as signatories to other international legal instruments. Coomer and Hubbard further use primary sources of information by way of various participants that have contributed to the debate in Namibia. The article is written in a readable, lively and informative way, with extracts of contributions from workshops. In one case, a participant observes the practical dichotomy of being an adult, but still being financially dependent on parents.[3]

In **"Work in progress: The Child Care and Protection Act in Namibia"** by Lena N Kangandjela and Clever Mapaure, the authors give a useful history about children's righst and go into some of the background on the proposed law. The analysis of certain provisions is illuminating as it is accompanied by

2 No. 81 of 1963.

3 Comment from social worker, p 115.

case law and, at times, fittingly comparative cases in South Africa. The authors give the refreshingly splendid suggestion of putting the intended Children's Ombudsperson under[4] the Ombudsman Office created in the Constitution, in order to give it muscle, clout and teeth. The "lifting of the corporate veil" in cases of child trafficking is another imperative concept the authors discuss, since criminals can devise ways to hide behind the corporate persona. I recommend this article to anyone involved in the affairs of children, especially those involved in the drafting of the Bill, because the article raises some pertinent issues and makes sensible suggestions on how to address some of the challenges Namibia faces in regard to children's rights.

"The best interest of the child" by Yvonne Dausab is a relatively short article. The author is not broadly known for writing articles for publications. Dausab brings in the stimulating question of whether the common law concept of *best interest of the child* really serves children, and whether it is cast in stone.[5] However, she does not do justice to answering the question by using South African cases only. In the 2004 *Detmold* case,[6] for example, the High Court of Namibia found that the prohibition in the Children's Act on the adoption of children born to Namibian citizens by non-Namibian citizens was unconstitutional because it could deprive a child of the possibility of being adopted into a secure and stable family that might not otherwise be available to the child. In this case, the best interest of the child was the deciding factor. The same applied in the case of *M v M*,[7] which was a divorce matter decided by Silungwe AJ. The court held that the "child's best interests are of paramount importance". The court held further that, in deciding what was in the best interests of child, it did not look for a "perfect parent", but rather strove to find a parent that was better able to promote and safeguard the minor child's growth, development and welfare. The article strongly conveys that parenting is a gender-neutral function. This is a thought-provoking article as it raises questions as regards issues that are usually taken for granted. Nonetheless, the research was not adequately done.

The authors of **"Children's right to citizenship"**, Faith Chipepera and Katharina G Ruppel-Schlichting, do justice to a relatively new dimension in the human rights and legal discourse. The question whether children have separate rights to nationality/citizenship other than that of their parents is critical. The authors correctly answer the question whether a child of an illegal immigrant is entitled to Namibian citizenship. The well-researched article addresses extensively the issue of dual citizenship in the wake of the *Thloro*[8] judgment. Chipepera and Ruppel-Schlichting appear to favour the child-centred rather than parent-centred approach to issues of citizenship as the

4 At page 129.
5 Page 156.
6 *Detmold v Minister of Health and Social Services* 2004 NR 175.
7 (A 17/2005) [2008] NAHC 153 (23 July 2008).
8 *Thloro v Minister of Home Affairs*, (P) A 159/2000 [2 July 2008].

former promotes the best interest of the child more effectively. The article is an interesting contribution to an often-neglected area of the law.

"Custody and guardianship of children" by Felicity !Owoses-/Goagoses tackles a relatively new law: the Children's Status Act,[9] and in so doing shows foresight. However, the author does not comprehensively analyse the concepts of *custody* and *guardianship*. As the fundamental theoretical frameworks, they were not well developed or integrated into the article as a whole. An international and regional perspective could also have been beneficial, e.g. comparing how countries like South Africa have interpreted terms such as *sole custody* and *sole guardianship*. Other aspects not developed to the extent required by such a new Act are concepts like *parental authority* and *putative father/mother*. The author avoids confronting the possibility of the section which bars a rapist from exercising any rights over the child born out of the crime. This would have been interesting, since part of the author's task is to check whether proposed laws are in line with the Constitution.

"Adoption: Statutory and customary law aspects from a Namibian perspective" by Oliver C Ruppel and Pombili L Shipila is a helpful source of information on the subject. It makes interesting observations about the concept of adoption from a Western point of view compared with an African perspective, where the whole family and even the community is involved. However, without laying any proper foundation for such a conclusion, the authors suggest that foreigners should be resident in Namibia for about three years before they are allowed to adopt, and use the example that obtains in Uganda. This is despite statistics showing that about 80 adoptions a year take place in Namibia, where nearly 250,000 children are orphans. Nonetheless, they make a useful recommendation for the government to be party to the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.[10]

Clever Mapaure's contribution entitled "**Child labour: A universal problem from a Namibian perspective"** is an addition to a number of works being published by this author, who appears to be an avid researcher. He rightly observes the challenge of child labour as being universal, albeit to varying degrees. The author further correctly identifies poverty and other socio-economic problems as the main drivers of child labour. It appears that the article is argued from a normative position that child labour is inherently bad. However, his treatment of the often slippery slope of harmful child labour and social apprenticeship is a joyous contrast to most mass media reporting. In the Namibian context, as in many other African countries, household chores should not be regarded as prohibited child labour. This is why the author cleverly points out that child labour on its own is not prohibited by the Constitution: it is only child labour in certain circumstances that is unconstitutional. The

9 No. 6 of 2006.

10 Page 198.

article also shows the potential of a clash between Western concepts of *child labour* and the way they are construed in Africa. I recommend this article for all practitioners in the field of child labour.

"Realising the right to education for all: School policy on learner pregnancy in Namibia" is by Dianne Hubbard, a well-known writer and publisher of articles and books. This article has facts and figures typical of Hubbard's way of demonstrating points. Despite its central theme of the right to education, the author makes a link between education policy and gender equality on the one hand, and non-discrimination on the other. This is very revealing. Hubbard usefully identifies some of the unintended consequences of a non-supportive punitive approach: baby dumping, infanticide, and illegal and unsafe abortions. Because the learner pregnancy policy is relatively new,[11] I recommend this article for an in-depth understanding of it. The principle of flexibility embedded in the policy is commendable as it serves the interests of the learner-mother, child, and learner-father in one sweep. Hubbard deserves praise for this excellent research.

In its entirety, the publication *Children's rights in Namibia* certainly made a good attempt at addressing the issue of the legal protection of children in Namibia. The challenge is open for a review of the rest of the publication.

11 Approved by Cabinet in October 2009.