NAMIBIA LAW JOURNAL

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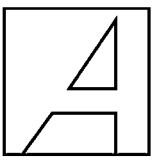

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GUIDE TO CONTRIBUTORS

The Editorial Board welcomes contributions on all aspects of Namibian law or legal themes of relevance to the Namibian legal fraternity.

Contributions can be sent electronically to namibialawjournal@gmail.com or to The Editor, PO Box 27146, Windhoek. Submission by e-mail is preferred.

Submissions are to comply with the following requirements:

- All contributions are to be in English.
- Submissions need to be original, unpublished work. The Editorial Board may under exceptional circumstances accept an article that has already been published elsewhere, provided that the author provides the Board with a letter from the publisher permitting the publication and reverting the copyright to the Namibia Law Journal Trust (NLJT).
- All authors whose contributions are to be published in the Namibia Law Journal (NLJ) by the submission thereof ipso facto waive copyright as author in favour of the NLJT.
- Electronically sent contributions should be submitted in the form of an attachment in any version of MS Word.
- The Editorial Board accepts articles, shorter notes on any relevant legal issue, and case comments.
- Articles should normally be between 6,000 and 12,000 words, while notes and case comments can be anything from 3,000 to 5,000 words.
- The NLJ house style is available on the NLJ website at www.namibialawjournal.org.
- Once a contribution has been accepted for publication, authors need to cooperate with the language editor and comply with his/her deadlines.

The Editorial Board will submit all articles to referees who will determine the desirability of publication. Articles will be submitted to referees without disclosing the name of the author. The review process usually takes about six weeks. Authors will be informed of the result of the review. The closing date for submissions for the July 2011 edition is 15 March 2011.

Authors of new publications are encouraged to submit them for review, but are not entitled to solicit reviews from reviewers of their choice or to influence the decision of the Editorial Board on whom to approach for such a review.

INTRODUCTION

Nico Horn*

This is already the fifth issue of the Namibia Law Journal (NLJ) – an accomplishment that even the most optimistic among us would not have put money on three years ago.

However, the time has come for us to move to the next level. Contact with other journals in the region is of utmost importance in developing ours. For that, the NLJ cannot rely on the University of Namibia's Law Faculty alone, since finance for academic purposes is seldom available. The next challenge will be to start generating our own funds. And while we are extremely indebted to our gracious donor, the Konrad Adenauer Foundation, the uncertain international financial situation has an impact on donor money that we cannot ignore.

One of the prerequisites for a self-sustainable journal is accreditation by one of the acknowledged accrediting bodies in South Africa or further afield. At the moment, there are still a few stumbling blocks in this regard. The disproportionate number of contributions by a handful of staff at the UNAM Law Faculty needs to be addressed. It is not a problem that UNAM always produces one of the three articles, but it does not help when only three or four faculty members are always publishing. With the growth of the Faculty, we will hopefully see papers from at least ten of the UNAM academics.

While international participation undoubtedly adds value to the NLJ and continues to grow, it cannot compensate for the absence of articles by Namibian legal practitioners. Consequently, there is an unmet need for articles related to the burning issues of the legal profession in Namibia. May the Namibian practitioners really start writing in 2011!

As regards the Articles section in this issue, we are privileged to publish an excellent submission by UNAM staff members Sam Amoo and Michael Conteh, who combine two controversial issues: women's property rights and women living with HIV and AIDS.

The second submission is by several academics and practitioners from Namibia, South Africa and Germany. The article compares the monitoring and enforcement of financial reporting standards in South Africa and Germany. Although the article deals with our neighbour and Germany, it is highly relevant in the light of the new Namibian legislation, which is similar to the South African Act.

The third article deals with another controversial issue: magistrates' discretion in meting out sentences under the Combating of Rape Act, 2000 (No. 8 of

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2000). The author, Laila Hassan, is a University of Oxford graduate and trainee solicitor in the United Kingdom. She wrote the article whilst undergoing an internship at the Legal Assistance Centre.

In the Notes, Manfred Hinz looks at the role of the law in protecting traditional knowledge, while Andrea Schmeichel, a PhD student at Bremen University in Germany, discusses the need for regulation in supporting renewable energy sources in Germany. Manfred Hinz provides a short introduction to her article, explaining its relevance for Namibia.

In the Case Notes chapter, Karin Klazen's regular contributions turn their attention in this issue to the defamation case between the Trustco Group International Ltd and Matheus Kristof Shikongo, while Nico Horn discusses the constitutional significance of an election case in the Supreme Court, namely Rally for Democracy and Progress & Others v Electoral Commission of Namibia & Others in a Judgment Note.

The NLJ has also made an effort to review the flood of Namibian legal literature published over the past three years. In this issue's Book Review section, two new books are discussed, namely Constitutional democracy in Namibia: A critical analysis after two decades, edited by Anton Bösl, Nico Horn and André du Pisani; and Customary law ascertained. Volume 1. The customary law of the Owambo, Kavango and Caprivi communities of Namibia, edited by Manfred Hinz, and assisted by Emilia Namwoonde.

While the Editorial Board ensures that high standards are maintained in the regular publishing of the NLJ, the next step will be to tackle the challenge of accreditation.

One of the founding Trustees of the Namibia Law Journal Trust, Karel Danhauser, recently passed away. Our prayers go to his family. He will be sorely missed by the Board of Trustees.

We dedicate this edition of the NLJ to his memory.

Nico Horn
Editor-in-Chief

ARTICLES

Women's property rights in Namibia and HIV and AIDS: Myth or reality?

Sam K Amoo* and Michael Conteh**

Introduction

The colonial policy of apartheid and, more especially, that of 'bantustanisation',[1] which generally deprived a certain sector of the South West African/Namibian community of their basic fundamental rights, were legitimised not only by the imposed political and social systems, but also by the legal system – including legislation and some principles of Roman–Dutch common law. In terms of property rights, the black population was denied any claim to certain property rights such as freehold title as a result of the Bantustan policy. The policies of the financial institutions requiring collateral as a prerequisite for granting loans totally disqualified the black population from qualifying for the wherewithal and the empowerment necessary for the acquisition of property, particularly immovable property.

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1 In 1962, the South African Government appointed a Commission of Inquiry to make "recommendations on a comprehensive five-year plan for the accelerated development of the various non-white groups of South-West Africa". This Commission was commonly known as the *Odendaal Commission*. The recommendations made by the Commission in its 1964 report had little to do with promoting the welfare of black Namibians. One infamous recommendation in the report was that Namibia should be fragmented into a series of economically unviable self-governing and ethnically determined homelands or Bantustans for Africans, which would, of necessity, remain perpetually dependent on the 'white' areas, and, through them, on South Africa. The Odendaal Plan was implemented by two pieces of legislation: the Development of Self-government for Native Nations in South-West Africa Act, 1968 (No. 54 of 1968) and the South-West Africa Affairs Act, 1969 (No. 25 of 1969). The effect of the implementation of the Plan was to entrench both territorial apartheid in Namibia and the distribution of land along racial lines. See Duggal, NK. 1986. *Namibia: Perspectives for national reconstruction and development*. Lusaka: United Nations Institute for Namibia, pp 37–41.

The situation was even more pathetic in the case of women. Not only were women in general subjected to the application of some of the discriminatory principles of Roman–Dutch common law relating to matrimonial property rights (in the case of women who were subjected to the general law), but the property rights of black women in particular were governed by the customary law of their tribal communities as a result of the Bantustan policy. In terms of property rights, therefore, it was not only black women who did not have full legal rights to property and the means to acquire it, but also white women, whose property rights were governed by the general law that recognised the superior titles of men to property.

In the context of the HIV and AIDS pandemic, gender inequality is a social factor that has significantly contributed to the spread of the virus since unequal power relations between men and women put women at a greater risk of infection. Given this reality, a national policy on HIV and AIDS was adopted in 2007. The policy addresses issues of gender inequality in terms of the burden of care placed on women and girls by the pandemic, the cultural acceptance of intergenerational sex, especially of older men with young girls, and gender-based violence in general. In recent years, the impact of structural factors such as gender inequality on the severity and spread of HIV has been noted with increasing alarm. Namibia's Vision 2030 highlights HIV and AIDS as being one of the most serious threats facing the country's long-term development. The pandemic is affecting health, livelihoods, economic perspectives, demographic futures and many individual lives in Namibia. HIV has reduced life expectancy in the country significantly, and has left many families economically vulnerable.[2] Women are also diagnosed at a younger age than men, given the median age of HIV diagnosis is 30 for women and 35 for men. The percentage of young women living with HIV is 29%, compared with only 8% for young men.[3]

Background to women's property rights and HIV and AIDS in Namibia

In Namibia there are 13 different ethnic groups, all of which demonstrate gender inequality in the form of patriarchy to a greater or lesser extent. *Patriarchy* is a dynamic system of male dominance over a woman that manifests itself in, inter alia, male dominance over women's economic and social lives. As a system, patriarchy depends upon differential access to power and resources and has different implications for women in each community. In traditional African communities, women had de facto social power and exerted pressure

2 Office of the President. 2003. *Namibia Vision 2030: Policy framework for long-term national development.* Office of the President: Windhoek.

3 MHSS/Ministry of Health and Social Services. National Strategic Plan on HIV/AIDS. Medium-term Plan (MTP III) 2004–2009. Windhoek: MHSS.

on men both as mothers and wives.[4] In some cultures, such as among the Nama and Kavango communities, women were traditional leaders and chiefs. Women in many traditional communities had access to property and were highly valued as agricultural producers. Within the Owambo communities, the economy was based on a mixed agricultural-pastoral system. High social value was attached to men's products such as cattle because of the latter's ritual significance.[5]

At the time of Independence in 1990, the government of the day was confronted with the problem of adopting policies that would address the general policies of discrimination that had affected not only the black population, but also all disadvantaged groups; in the case of property rights, all women in Namibia had been affected. In this regard, institutionalised and legally enforceable discriminatory policies constituted the genesis of gender inequality in pre-Independence Namibia; but there is also ample evidence that cultural and customary practices reinforced state-sanctioned gender inequality.

Currently, there is still a confusing web of civil and customary laws, some of which still cause gender-based discrimination. There are several government initiatives such as the Customary Law Bill, which will, among other things, recognise customary marriages and harmonise civil and customary laws. Indeed, law reform, law enforcement and judicial responses to violations of human rights do not yet guarantee women and men equitable protection in Namibia. A case in point is the Married Persons Equality Act, 1996 (No. 1 of 1996). At Independence, Roman–Dutch law allowed a husband to acquire power over his wife as well as property within the marriage, even if the wife had acquired such property prior to marriage. The new Act specifies equality of persons within marriage, and does away with the legal definition of the man as the head of the household. The Act also provides women who are married in community of property equal access to bank loans, and stipulates that immovable property should be registered in both spouses' names. However, the Act only covers couples married under civil but not customary law, although one-third of all marriages in the country are under customary law.[6]

The supreme piece of legislation in Namibia promoting gender equality has been the Constitution of the Republic of Namibia, adopted by the Constituent Assembly in February 1990. Article 144 of the Constitution incorporates all international instruments that Namibia has ratified into Namibia's legislative sphere. Therefore, the discussion now takes into consideration the relevant

4 LeBeau, D, E Iipinge & M Conteh. 2005. *Women's property and inheritance rights in Namibia: Gender Training and Research Program*. Windhoek: Pollination Publishers/ University of Namibia.

5 La Font, S & D Hubbard (Eds). 2007. *Unravelling taboos: Gender and sexuality in Namibia*. Windhoek: Legal Assistance Centre.

6 LAC/Legal Assistance Centre. [n.d.]. Guide to the Married Persons Equality Act. Windhoek: Legal Assistance Centre, Windhoek

Articles of the Namibian Constitution; the International Covenant on Civil and Political Rights (ICCPR) ratified by Namibia on 28 February 1995; the International Covenant on Economic, Social and Cultural Rights (ICESCR), also ratified on that date; and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which was ratified on 23 November 1992.

In terms of the ICCPR, everyone has the right everywhere to be recognised as a person before the law.[7] Furthermore, it grants equality to all persons before the law, and entitles them to equal protection under the law without any discrimination. Thus, the law prohibits any discrimination and guarantees all persons equal and effective protection against discrimination on any ground, including race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[8]

The ICESCR confers that, in terms of equal rights, the States Parties to the Covenant undertake to guarantee that the rights enunciated in it will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,[9] and that they undertake to ensure the equal rights of men and women to the enjoyment of all economic, social and cultural rights set forth in the Covenant.[10]

The Government of the Republic of Namibia has further committed itself to the policy of non-discrimination as enshrined under Article 10 of the Namibian Constitution, and this underlies its National Policy on Land – which covers property rights. The opening paragraph of the White Paper on the National Land Policy reaffirms the government's commitment as follows:

> Access to and tenure of land were among the most important concerns of the Namibian people in their struggle for independence. Since 1990, and following the 1991 National Conference on Land Reform, and the Consultative Conference on Communal Land Administration, 1996, Namibia's democratically elected Government has maintained and developed its commitment to redressing the injustices of the past in a spirit of national reconciliation and to promoting sustainable economic development. The wise and fair allocation, administration and use of the nation's urban and rural land resources are essential if these goals are to be met.

The government's position postulated in this policy is not only a political commitment but also a moral and legal/constitutional obligation.[11] Article

7 Article 16.
8 Article 26.
9 Article 2(2).
10 Article 3.
11 Article 95 of the Constitution has been declared obligatory for the government.

95 of the Constitution, which deals with the promotion of the welfare of the people under the ambit of the principles of state policy, makes the following declaration:

> The State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following:
> (a) enactment of legislation to ensure equality of opportunity for women, to enable them to participate fully in all spheres of Namibian society; in particular, the Government shall ensure the implementation of the principle of non-discrimination in remuneration of men and women; further, the Government shall seek, through appropriate legislation, to provide maternity and related benefits for women; …
> (e) ensurance that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law; … .

These principles have been upheld in the case of *The Government of The Republic, The Director of Legal Aid and The Prosecutor General v Geoffrey Kupuzo Mwilima and Others*[12] as an "expression by the State of its willingness" to provide those services and that "they are not enforceable in any court of law". In terms of access to property and the provision of the necessary framework, legal or otherwise, for the attainment of these rights by the erstwhile disadvantaged members of the community, especially women, this may not be a justiciable right; but the provision does impose a standing obligation on the government to be seen to be measuring up to its commitment. Furthermore, under the Constitutional provisions on apartheid and Affirmative Action,[13] the government is enjoined to pass legislation to empower women to – needless to say – have access to property.

Since Independence, Namibia has promulgated legislation aimed at redressing the injustices of the colonial legacy, including the discriminatory laws and practices relating to property rights – especially the rights of women. Apart from the Constitutions of the former Soviet Union and the other communist states in the former Eastern Bloc, which made the provision of housing a constitutional obligation of government, not many constitutions in the world make the provision of housing to its citizens the constitutional obligation of the state and, therefore, a justiciable right of the individual. Although the Namibian Government may not be under such an obligation, it nonetheless has the political duty to provide – within its available means – adequate and affordable housing for members of society in lower income groups. It is recognised that since government's resources are limited and Namibia has a mixed economy, the private sector must of necessity play an important role in the provision of the wherewithal – credit facilities – for the acquisition of property. However, it is the function of government to ensure that the policies of the private sector are not discriminatory – especially as regards the treatment of women – and

12 Supreme Court of Namibia Case No. SA 29/2001.
13 See Article 23, Namibian Constitution.

that credit facilities are reasonably accessible to women. Therefore, this paper aims to find out the following:

(i) Whether the legislation promulgated by Parliament has adequately redressed the injustices of the past with respect to women's rights to property
(ii) Related to (i) above, whether the general rule inhibits women from enjoying the same rights as men in terms of rights to property
(iii) Whether the facilities provided by both the public and private sectors are equally accessible to both men and women in their own rights
(iv) Whether the promulgation of the Communal Land Reform Act, 2002 (No. 5 of 2002) redresses the inherent inequities of the communal land tenure systems with respect to the rights of women, given the 'inarticulate premise', patriarchal biases, and predispositions of the male-dominated traditional leadership
(v) Whether Proclamation 15 of 1925 should be amended, especially in section 18(2), for cognisance to be taken of the type of marital regime for the purposes of determining widows' rights in cases of succession to immovable property, and
(vi) Possible national and international solutions.

Ownership of property and inheritance rights

The issue of women's property and inheritance rights has been at the forefront of many recent discussions and advocacy programmes in Namibia. In some communities, the customary norms whereby male relatives take all property upon the death of a husband, as well the customary practice of demanding all property from a failed marriage, have begun to be questioned. In Namibia, the disinheritance of widows whose husbands have died of AIDS-related causes is a common characteristic. The AIDS pandemic has been brought to the vanguard by the realities of gender-based inequalities stemming from discriminatory property and inheritance laws and practices. In a situation where the widow – during her husband's lifetime – had no right to own property, she becomes a victim of continued discrimination upon his death. It is envisaged that the new Bill on inheritance issues will address this problem.

Half of the land in Namibia is communal land held under customary tenure. In the communal lands, both men and women retain usufructuary rights to the land, which cannot be transferred in any manner. In reality, however, one finds that the right of occupation and use is often transferred to a man who is regarded as the head of the household. In practice, this has led to the vulnerability and victimisation of women despite the existence of legislation that guarantees them inheritance rights, e.g. the Married Persons Equality Act and the Communal Land Reform Act.[14]

14 LeBeau, Debie & M Conteh (Eds). 2004. *Structural conditions for the progression of the HIV/AIDS pandemic in Namibia*. Windhoek: Pollination Publishers/University of Namibia.

A major legislative development for rural women was the Communal Land Reform Act. In terms of the Act, men and women are equally eligible for individual rights to communal land, and the treatment of widows and widowers is identical. The new law has altered practices in certain areas where a widow was dispossessed of the communal occupation fee. It is noteworthy that the law, which provides a procedure for official recognition of traditional authorities, requires that they "promote affirmative action amongst the members of the community", particularly "by promoting women to positions of leadership". Even though the Act contains no specific monitoring or enforcement mechanism, it provides a basis for encouraging greater participation by women in traditional leadership roles.

There was a complex background to this law. In 1992, Parliament passed a resolution requesting traditional leaders to allow widows to remain on their land; and, in 1993, Traditional Authorities in the north-central Regions revised their customary laws to help secure land tenure for widows. The Act gives women further protection by ensuring that a widow has the right to remain on communal land allocated to her husband after his death – even if she remarries. One recent study concluded that the customary land rights of widows appear to be much more secure now than at Independence.[15] Although evictions of widows still occur, informants were unanimous in their assessment that this happens infrequently – although the practice of 'property-grabbing' still leaves many widows without the necessary means to cultivate their land, and sometimes even without adequate shelter. This is a problem which must still be tackled.[16]

Currently, there has been government intervention on behalf of widows who find themselves evicted from marital property. The interventions base their argument on such practices being a violation of a woman's constitutional rights of property ownership and that they pander to gender discrimination, which contravenes Article 10 of the Namibian Constitution. The government is currently drafting a Succession Bill that will harmonise methods of inheritance and property regimes for all Namibians.

The links between gender inequality and HIV and AIDS

The biannual sero survey conducted amongst pregnant women represents the sexually active population. The survey is done anonymously during routine antenatal care visits, which means that the results cannot be linked to anyone. Monitoring HIV infections in Namibia is particularly important in informing policymakers about the challenges and needs facing a large proportion of

15 Werner, W. 2008. *Protection for widows in Namibia's Communal Land Reform Act: Is it working?.* Windhoek: Legal Assistance Centre.

16 (ibid.).

the country's population. Results from the 2008 sero- prevalence data have determined the overall HIV prevalence in the country to be 17.8%, a slight decline from the 2006 prevalence of 19.9%. The prevalence rate is the same in rural and urban areas. The prevalence increased from 1992 (4.2%) to 2002 (22%), and then stabilised at 22% before the decline to the current rate. The highest age-specific prevalence rate is observed among those aged between 30 and 34.[17]

In a bid to attack the spread of the virus, government launched a series of plans, namely –

- the National AIDS Control Programme (1990)
- the First Medium-term Plan (1992–1998), initiated in 1992
- the Second Medium-term Plan (1999–2004), launched in1999, and
- the Third Medium-term Plan (2004–2009), launched in 2004.

It is estimated that about 200,000 people live with HIV in Namibia. Some 60% of these are women.[18] Women are more prone to become infected with HIV than men, which is in part the result of having a larger mucosal surface area than men and on account of the pooling of semen during sexual intercourse. However, this does not fully explain the predominance of infections among women. Some of the most significant factors that shape the spread of HIV in Namibia include high mobility, cross-border travel, the high prevalence of sexually transmitted infections, widespread alcohol and substance abuse, poverty, gender inequalities, disintegration of families, and ignorance.

More than 25 years into the AIDs pandemic, gender inequality and unequal power relations between women and men continue to be the major drivers of HIV transmission. *Gender* – defined as an array of societal beliefs, norms, customs and practices that define masculine and feminine attributes and behaviour – plays an integral part in determining an individual's vulnerability to infection; his/her ability to access care, support or treatment; and his/her ability to cope when affected or infected. Gender inequality and harmful gender norms are not only associated with the spread of HIV, but also with its consequences.

Women and girls bear a disproportionate burden of responsibility for families affected by AIDS, and women who disclose their HIV-positive status have often faced greater stigma and suffered more extreme negative reactions than men. Gender norms and expectations also influence male sexuality, risk-taking, and their vulnerability to HIV.

17 MHSS/Ministry of Health and Social Services. 2009. *Report of the 2008 National HIV Sentinel Survey*. Windhoek: MHSS.

18 MHSS/Ministry of Health and Social Services. 2008. "Report on the estimation and projection of the impact of HIV/AIDS in Namibia and the response needed". Unpublished.

Property rights in Namibia and the enabling legal regime

Land classification and land tenure in independent Namibia

In order to fully appreciate the nature of problems connected with women's property rights in Namibia, it is necessary to trace the genesis of property rights in the country and the enabling legal regime. This is important because the historical classification of land, together with the enabling legal regime that legitimised the land tenure systems and titles attached to a particular land classification, is the origin of the imbalance in land distribution and ownership in present-day Namibia. Before the Independence Constitution came into force, land in Namibia was classified as *state* or *crown land*, *communal land*, and *private land*. These classifications have largely been maintained under the Constitution, as follows:[19]

- Article 10020 and Schedule 5(1)21 of the Constitution maintain the status of crown or state land
- Article 16(1) affirms the fundamental right to acquire, own and dispose of all forms of immovable and movable property, i.e. it maintains the status of private property, and
- by virtue of section 11(2)(c) of the Interpretation of Laws Proclamation 38 of 1920, Article 102(5) of the Constitution, and the promulgation of the Communal Land Reform Act, it can be concluded authoritatively that the status of communal land has also been maintained.

Consequently, land in Namibia may be classified as *state land*, *private land* and *communal land*. The applicable law governing the first two categories is the general law of Namibia, while the provisions of the Communal Land Reform Act and customary law govern land tenure systems in the communal areas, subject to the internal conflict rules.

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19 See also Amoo, SK. 2001. "Towards comprehensive land tenure systems in Namibia". *South African Journal on Human Rights,* 17:87–108.

20 Article 100 provides that "[l]and, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned".

21 Schedule 5(1) provides that "[a]ll property of which the ownership or control immediately prior to the date of Independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1980), or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of Independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia".

Private land/commercial farms

The primary legal regime governing property rights in Namibia is Article 16 of the Constitution. The Article provides for the right to property as one of the fundamental rights of the individual under the enshrined provisions of the Constitution. It provides that –

> [a]ll persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

This Article comes under the entrenched provisions of the Constitution, and can only be derogated from in a state of emergency.[22] Commercial farms in Namibia are held under private title acquired and legitimised under the provisions of Article 16.

Accessibility of commercial farms to Namibian women

The Namibian courts have upheld the principles of Article 10 of the Constitution[23] as one of the binding principles in the country's judicial and legislative processes, especially in view of the injustices of its colonial past and, therefore, as a matter of principle; and in the spirit of the strict application and implementation of the law and of government policies relating to the property rights of the previously disadvantaged members of the community in particular, these rights have to be accessible to all members of society – i.e. including women. It is one of the objectives of this paper to ascertain the myths and realities of this desired position.

Before Independence in 1990, land set aside for private ownership was for the most part owned by white settlers. At Independence, it was recorded that this constituted about 75% of the commercially viable farming land, while a paltry 25% of such land was held by the indigenous people in the communal areas.[24] Since then, some indigenous people, comprising mainly civil servants and members of the private sector, have moved to the urban centres, but the majority of the indigenous Namibians continue to reside in the communal areas.

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22 Articles 24(1) and (3) of the Namibian Constitution.

23 Article 10 of the Constitution states the following:
"(1) All persons shall be equal before the law.
(2) No person may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status".

24 See Amoo (2001:96).

In the context of the ownership of commercial farms, however, the position of inequitable distribution of land and imbalances in land distribution remains, and most Africans – and particularly women – remain disadvantaged. This is compounded by the fact that most commercial farmers are men. Women do not have direct access or control over the commercial farms owned by men. Most women who interact with the dynamics of commercial farming are either housewives or workers.

The Namibian Government, in its attempt to correct these imbalances and empower previously disadvantaged Africans, including women, promulgated the Agricultural (Commercial) Land Reform Act, 1995 (No. 6 of 1995). Under the authority of this Act, the government has used the policy of 'willing buyer, willing seller' to purchase some commercial farms for resettlement and farming purposes. To date, the government has settled about 1,512 families on commercial farms, at an average of 6 people per family, giving a grand total of 9,072 resettled persons. A total of 4,617 people have been resettled on communal farms, at an average of 6 people per family, giving a grand total of 28,380 persons resettled on the latter farms. Of the total of both categories of resettled persons, 48% are women.

Rights before marriage

In terms of the general law, all single or unmarried women in Namibia have the right to own any property, including commercial land, subject to the laws relating to capacity. This is in terms of the law, but the questions of accessibility to credit facilities and other mechanisms of empowerment provided by both the public and private sectors will have to be addressed separately elsewhere.

Rights during marriage

There are two types of marriage in Namibia: those under civil law, and those under customary law. To a great extent, marriage as an institution in Namibia is one of the factors that govern the proprietary rights of women and have contributed to some of the discriminatory laws and practices that prevent women from obtaining access to property.

Civil law marriages

Until 1996, the proprietary consequences of marriage in Namibia were governed by Roman–Dutch common law, which provided that all marriages were automatically in community of property unless, at the time of the marriage, the parties entered into an antenuptial contract, creating a property regime that was out of community of property. In terms of common-law principles relating to marriages in community of property, both spouses' property – wherever situated, present and future, movable and immovable, including debts – is merged into a joint estate in which the spouses hold equal and indivisible

shares, regardless of their contributions.[25] The joint estate automatically falls under the administration of the husband by virtue of his marital power. As administrator of the estate, the husband has power to alienate, encumber, or otherwise deal with the property as he sees fit. More importantly, in terms of proprietary rights, the wife cannot contract or register property in her name without the consent of the husband.[26]

These two types of marital property regimes under civil law are still recognised in Namibia, but the common law principles relating to the marital power of the husband were substantially modified by the Married Persons Equality Act. Section 2 of the Act abolishes the husband's marital power acquired under common law, and removes the restrictions which the marital power placed on the wife's legal capacity to contract and litigate, including, but not limited to, the restrictions on her capacity to register immovable property in her name.[27] Thus, during marriage, a married woman has the capacity to register any immovable property in her name. However, if the property forms part of a joint estate, she will need the consent of her husband if she wants to alienate, mortgage, burden with servitude, or confer any other real right in any immovable property forming part of the joint estate.[28]

With regard to the marital proprietary rights of indigenous African Namibians, the applicability of Roman–Dutch common law rules relating to marriage in or out of community of property depended on the geographical location of the place that the marriage was contracted. The Native Administration Proclamation 15 of 1925, part of which is still in force in Namibia today, makes a different rule for all civil marriages between "natives" north of the former so-called Police Zone[29] 1 August 1950. These marriages are automatically out of community of property, unless a declaration establishing another property regime is made to the marriage officer one month before the marriage takes place.

Customary law marriages

Marriages contracted under customary law are regulated by the customary law of a particular traditional community. The proprietary rights of women married under a particular customary law are governed solely by that law.

25 Voet 32.2.85.

26 See generally Hosten, W. 1997. *Introduction to South African law and legal theory*. Durban: Butterworths.

27 (ibid.:section 3(a)(i)).

28 Section 7(1)(a).

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

Although some communities allot women land, in practice, communal land is usually allocated to a man. This has led to the problem in some communities of a widow's late husband's extended family stripping the widow of her household goods and her right to reside in or on their late husband's property. This exacerbates women's vulnerability to HIV and AIDS and creates an overdependence dependence on men.

Rights after divorce

The property rights of spouses at divorce will be determined by the marital regime under which the marriage was contracted, i.e. whether the parties were married in or out of community of property, in which case the Roman–Dutch common law principles will apply. If they were married in community of property, they share their property equally; if they were married out of community of property, each takes the share that belongs to him or her. However, this is subject to the facts of each case with regard to the conduct of the parties because, under current Namibian law, the property rights of spouses after the dissolution of their marriage by divorce are governed by the fault principle. It is worthwhile mentioning that, in the case of a marriage contracted by African persons, the proprietary rights of the spouses will be governed by the relevant provisions of Proclamation 15 of 1928, which state, inter alia, that –

> … such marriage shall not produce the legal consequences of marriage in community of property between the spouses. There is a proviso to the extent that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate or marriage officer that it is their intention and desire that community of property and of profit and loss result from their marriage, and thereupon, such community shall result from their marriage.

In *Teofilus Mofaka*,[30] the respondent sued the appellant for a divorce and alleged in her particulars of claim that the parties had been married on 1 September 1995, at Onawa, Ovamboland,[31] and that the marriage was in community of property. The Supreme Court, in its judgment, inter alia affirmed the finding of the judge a quo that section 17(6) of the Native Administration Proclamation No. 15 of 1928 applied to the marriage of the parties and that it was out of community of property unless declared or agreed otherwise.

The common law principles which govern maintenance, the distribution of the matrimonial estate and custody of children of the marriage have very scant parallels in customary law. In most cases, the husband obtains the majority

30 Supreme Court of Namibia, Case No. SA 2/2002.

31 Ohangwena Region.

of the marital assets and, because of the application of the consequences of *lobola*,[32] he has custody of the children.

With most communities in Namibia during customary divorce heard at a customary court, the wife receives little or none of the marital property, with the possible exception of cooking utensils or small household items – even if the husband is at fault in the divorce. However, among Lozi communities, a wife may receive a small amount of communal property if she can prove that her husband was at fault for the break-up of the marriage. Among traditional communities in the Kavango Region, the person found to be at fault for the divorce has to pay a 'divorce fine'. However, given the fact that –

- customary courts are only held by men – some of whom are related to a man being accused of wrongdoing, and
- in many customary courts, women are not allowed to attend and may not even be allowed to speak,

women frequently do not get a fair hearing. Among Nama traditional communities, the division of property is probably the most equitable because all divorce is done in civil court. In the past, the husband got all of the livestock in a divorce, but now the livestock is shared between husband and wife.

In most Namibian communities, *lobola* is not required to be returned unless the wife is found to be at fault for the divorce or if, for example, she has not yet had a child by her husband. In most Namibian communities, once *lobola* has been paid, it is not returned. In Herero society, if the couple gets divorced, the extended family of the person at fault for causing the divorce are required to pay the offended party's extended family a 'gift' for the divorce. This is considered more as a 'divorce fine' than as paying back *lobola*.

Many people recognise that the division of property in a divorce under civil law depends on whether the couple is married in or out of community of property. In the Khomas Region, and among Nama communities, the general consensus is that civil law not only makes provision for property to be shared equally, but also is more likely to protect women's rights to property in divorce proceedings. In traditional communities living in the Kavango and Omusati Regions, customary law property is reportedly divided according to who owns the property and, as previously mentioned, the husband is considered the owner of most marital property. Under civil law, of course, if the couple is married in community of property, the property is divided equally. In all of Namibia's 13 Regions, the vast majority of those interviewed said that those with higher education and those that were urbanised were less likely to follow customary rules when it came to dividing property upon divorce. Several people specifically mentioned that the more educated and/or urban the woman, the more likely she would want divorce proceedings to take place in a civil court. These women reportedly felt they would be awarded more of

32 The so-called bride price.

the marital assets than in a customary divorce. Thus, although urban and rural people are interlinked, and although most urban and educated people have their roots in the rural areas, the latter subgroup will primarily access the legal system that gives them the greatest advantage when it comes to divorce.

Spousal inheritance rights

The practices of widow (levirate) and widower (sororate) inheritance are still common among the Herero, Lozi, Owambo and, to a lesser extent, Kavango communities.[33] Under these customary laws, when a man dies, one of his male relatives – usually the deceased husband's brother, nephew or uncle – 'inherits' the deceased's widow. The husband's extended family decides who will 'inherit' the widow and sends the man to take over the deceased's household. If the widow does not wish to be inherited, she has to leave the household and all of its property and return to her natal extended family. In most cases, the widow is expected to have sexual relations with the man who inherits her, unless she is elderly, in which case the couple will simply live together.

In Herero, Lozi, Owambo and, to a lesser extent, Kavango traditional customs, a widower is 'inherited' by one of his deceased wife's female relatives – usually her younger sister, cousin or niece. Again, the widower is expected to have sexual relations with his new wife. Notably, widowers are said to have more latitude in deciding whether or not they wish to be inherited. In most of the communities under consideration, people say that the practice of spousal inheritance has only changed slightly due to the advent of AIDS; but members of communities in the Kavango Region report that the practice of widow inheritance has all but disappeared, while the practice of widower inheritance has been greatly reduced.[34]

Rights upon the death of one's spouse

The proprietary rights of either surviving spouse will be determined by the testate status of the deceased spouse, whether s/he died testate or intestate.

If the spouse died testate, then the provisions of the Wills Act, 1953 (No. 7 of 1953), will apply. In the case of intestate succession, there is no uniform legislation applying to both whites and blacks. The Intestate Succession Ordinance 12 of 1946, as amended by the Intestate Succession Amendment Act, 1982 (No. 15 of 1982), applies to whites, and the provisions of Proclamation 15 of 1928 apply to blacks.[35]

33 LeBeau et al. (2005).

34 LeBeau & Conteh (2004).

35 See also *Teofilus Mofoka v Josefina Nangula Mofuka*, Supreme Court of Namibia, Case No. SA 2/2002.

In terms of the Intestate Succession Ordinance, the surviving spouse of any person who dies either wholly or partly intestate is declared to be an intestate heir of the deceased spouse, according to the following provisions:

> (a) [I]f the spouses were married in community of property and if the deceased spouse leaves any descendant who is entitled to succeed ab intestato, the surviving spouse shall succeed to the extent of a child's share or to so much as together with the surviving spouse's share in the joint estate, does not exceed fifty thousand rand[36] in value (whichever is the greater. [I]f the spouses were married out of community of property and if the deceased spouse leaves any descendant who is entitled to succeed ab intestatio, the surviving spouse shall succeed to the extent of a child's share or to so much as does not exceed fifty thousand rand in value (whichever is the greater); and
>
> (b) [I]f the spouses were married either in or out of community of property, and the deceased spouse leaves no descendant who is entitled to succeed ab intestato, but leaves a parent or a brother or a sister (whether of full or half blood) who is entitled to succeed, the surviving spouse shall succeed to the extent of a half share or to so much as does not exceed fifty thousand rand in value (whichever is the greater);
>
> (c) [I]n any case not covered by paragraph (a), (b), or (c) the surviving spouse shall be the sole intestate heir.

With regard to marriages contracted between two blacks, the proprietary rights of the surviving spouse are governed by section 18(1) and (2) Intestate Succession Ordinance, which provides as follows:

> 18 (1) All movable property belonging to a Native and allotted by him or accruing under native law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under native law and custom.
>
> (2) All other property of whatsoever kind belonging to a Native shall be capable of being devised by will. Any such property not so devised shall devolve and be administered according to native law and custom.

The customary rules on intestate inheritance differ from one traditional community to another. For example, inheritance is determined by whether such communities follow a matrilineal or patrilineal system. With regard to immovable property, therefore, it follows that the rights of a widow in a traditional marriage will be determined by the relevant customary law. The provisions of this Native Administration Proclamation have been challenged as unconstitutional and discriminatory.

36 This would be an equal Namibia Dollar amount today.

Rights to private land freehold titles

As mentioned earlier, Article 16 of the Constitution guarantees everyone the right to private ownership of land. This provision means that all Namibians, irrespective of gender or race, are constitutionally entitled to own property with freehold titles. Freehold titles over land in urban centres can be acquired through alienation of land hitherto vested in local authorities under the Local Authorities Act, 1992 (No. 23 of 1992),[37] or through private treaties between individuals.

Rights under customary law

Communal land: Nature of customary land tenure

Article 66 of the Constitution recognises the general application of customary law as a source of law in Namibia subject to the proviso that it remain valid to the extent to which it does not conflict with the Constitution or any other statutory law.

The proprietary rights of women governed by customary law will be discussed within the general context of customary land tenure systems that operate within the communal areas. The relevant legal regime consists of the particular customary law of a traditional community and the provisions of the Communal Land Reform Act.[38]

The primary purpose of the Communal Land Reform Act is to make the process of land allocation and land administration fair and transparent, and to enhance security of tenure in the communal areas by giving statutory recognition to existing land rights and by creating new rights. It vests ownership of the communal lands in the state and creates two rights that may be allocated in respect of communal land: customary land rights, and rights of leasehold. The Act thus reaffirms customary rights of usufruct granted to occupiers of communal land, and confers statutory recognition on this tenure system. The Act does not grant full rights of ownership to holders of customary rights of usufruct, but it does specify the duration of the customary land rights and makes provision for registration. The Act has one position relating to the allocation of land to a surviving spouse in the event of the death of the holder of the right.[39]

In terms of the provisions of the Act, therefore, a woman's proprietary rights to communal land under the various statutory titles are guaranteed by legislation. However, the Act fails to recognise the realities of the patriarchal nature of the

37 See sections 3(3)(a), 3(5)(b) and 30(1)(t), Local Authorities Act.
38 See generally Amoo (2001:103–108).
39 See section 26, Communal Land Reform Act.

traditional society and how this influences the allocation of land by traditional authorities and Land Boards. It also fails to recognise the leadership role that a boy/man plays in the family and, therefore, the preferential/legitimate choice that is accorded him rather than the girl/woman in family relations – including their applicability in land allocation.

In most communal areas in Namibia, traditional leaders such as headmen, chiefs, indunas and kings control communal land, although communal land is owned by the state. With the possible exception of the Nama, these traditional leaders are mostly men. Land in the communal areas is distributed by traditional leaders – who are generally male – to the males in the community. Thus, those who use land are not necessarily the same as those who control land. The Nama communities are an exception: most feel that both men and women use land, although men control land. Le Beau et al. (2005) noted that In the Khomas Region, people say that, due to private land ownership, the person who controls, uses and owns land is one and the same. Otherwise, Herero, Kavango, Lozi and Owambo community members note that traditional leaders and heads of households – identified as men – control land, while women are the primary users of it.

All communal land is owned by the state. Most people agree that there is no such document as a 'permit' to own communal land. Therefore, communal land cannot be used as collateral for procuring bank loans. However, various community members[40] say it is neither advisable nor desirable for non-owners to control land because they sometimes do not have the best interest of the land at heart and, therefore, overgraze it or destroy it in other ways. These sources also say that the nature of communal land ownership per se causes poor land management because the people using the land do not own it and, therefore, are not concerned with land degradation.[41]

Several customary practices in Namibia discriminate against women in that women are denied access to property accumulated during marriage. This lack of access to property, including a lack of access to land, serves to reinforce women's subordination to men. Women are trapped in a cycle of poverty due to this lack of control over property, which also leads to a lack of economic independence. Most people[42] note that women are entitled to use most types of property. However, it is also stated that married women are obliged to get their husband's permission to use property. Property that women are most often said to be able to use with impunity includes personal items such as their clothes and shoes, as well as household and kitchen items such as cooking pots and dishes. In most communities under study,[43] unmarried women had

40 LeBeau et al. (2005).
41 (ibid.).
42 (ibid.).
43 (ibid.).

more rights to use property than married women because the latter had to ask their husband's permission first. Unmarried women in the study often had own homes and could do as they pleased with their property.[44] Although it was pointed out that, in traditional societies, unmarried women were not allowed to live alone; the respondents felt that contemporary women in most Namibian communities were better off if they did not marry because they had greater freedom in the use of property.

In most traditional households in Namibia, once a woman marries, her husband takes over control of the marital property – sometimes even including her own separate property contribution. Women's rights to own property in all the Namibian communities under study[45] were more significantly limited than the property which they were allowed to use. Some key informants and community members recognised the widespread discrimination against women in regard to what property they were customarily allowed to own, and some even expressed the feeling that, in today's lifestyle – referring to modernisation and the impact of global culture – women should have a greater ability to own certain types of property, such as money, houses and cars. However, most people in the study held the 'traditional' attitude that land, homesteads, livestock and large moveable property such as cars and tractors should remain in the hands of men, and that men should, in general, continue to dominate property ownership.

As regards property women are permitted to use without restriction, unmarried women were said to be able to own more types of property than married women.[46] As with property use and ownership, women are limited in the types of property they can dispose of, and married women cannot dispose of any communal property without their husbands' consent.

There are significantly differing opinions within and between communities as to whether or not children born outside of marriage should inherit from their fathers. In the Khomas Region, respondents felt it was the mother's responsibility to find out if her children had inherited any property.[47] Others believed children had no right to inherit any property at all. In general, respondents in Nama communities said that children born outside marriage had a right to inherit from their father's estate. In Owambo and Herero communities, interviewees felt that children born outside marriage had no right to their father's estate, although, in Herero communities, the father's family could 'purchase' the right for his children to inherit by paying the mother's extended family one head of cattle. In Kavango and Lozi communities, children born outside marriage could inherit from their father if they had already been recognised as being his

44 (ibid.).
45 (ibid.).
46 (ibid.).
47 (ibid.).

children.[48] However, it should be noted that, in the case of *Lotta Frans v Inge Pasche & Others*,[49] the High Court of the Republic of Namibia ruled that the principle that illegitimate children could not inherit was unconstitutional.

Access to credit

As indicated earlier, the mere provision of legal rights to property is not enough. For one to fully realise the right to property one must be empowered or have access to the wherewithal that will make the realisation of such legal rights possible. In other words, the individual – or, in this context, women – must have access to credit. The Namibian Government's First National Development Plan (NDP1) describes the country's financial sector as small and dualistic. It states that –

> … as is the case in many developing countries, there is on the one hand, a well-developed financial system, mainly serving the urban centers [sic], while on the other hand large portions of rural areas are left with little or no access to financial services.

It has been observed that, because there is a concentration of women in rural areas, the uneven distribution of credit institutions in the country is a major barrier for rural women to access credit. Formal sources of credit in Namibia include five commercial banks, two building societies, seven parastatals, the Build Together Programme administered by the Ministry of Regional and Local Government, Housing and Rural Development, non-governmental organisations (NGOs) such as Urban Trust Namibia, and a number of credit unions and rural savings schemes. Although not a source of credit, the Department of Women Affairs within the Ministry of Gender Equality and Child Welfare provides financial support to a few income-generating projects owned and operated by women.

Although there is, in theory, no discrimination against women by commercial banks and all customers are supposed to be treated equally, women tend to have more difficulty acquiring loans due to a lack of collateral and an established credit record. There are no statistics on loans by these institutions which distinguish between customers on the grounds of their sex, so loan prevalence rates as regards women cannot be determined. However, in the past, women married in community of property were required to have the consent of their husbands to enter into contracts and obtain loans due to the husband's marital power over his wife. This situation changed with the abolition of marital power when the Married Persons Equality Act was passed on 21 May 1996.

48 (ibid.).

49 2007 (2) NR520 (HC) at 528–529. See also section 16(2) of the Children's Status Act, 2006 (No. 6 of 2006).

Commercial institutions such as banks do not have any programmes directed specifically at women. They also have no significant programmes or activities in the field of microeconomic enterprise development. Interviews with bank officials revealed they did not feel that they discriminated against women when extending credit. However, Standard Bank officials said that women could get loans if they had repaid their previous loans on time. The City Savings and Investment Bank loaned money for informal investment if an applicant met a list of criteria, including proof of regular income. The Commercial Bank only gave loans to invest in the formal sector. All of these various criteria, although not specifically directed at women, form an effective barrier to women's access to credit – despite women tending to have better repayment records on home mortgage loans than men.[50]

The figures released by Agribank to the Parliamentary Standing Committee on Economics, Natural Resources and Public Administration indicate that, during the 2003/4 financial year, a total 553 farmers were granted loans.

The NHE's statistics on housing occupancy cited here were taken from a sample of six of their projects in Windhoek and elsewhere supported by the German Development Fund in 2003/4:

- 123 houses, Goreangab, Windhoek: 51/123 = 41.46% women
- 95 houses, Freedom Square, Windhoek: 51/95 = 53.68% women
- 99 core houses, Twahaagana, Walvis Bay: 23/99=23.23% women
- 203 houses, Kuisebmund, Walvis Bay: 63/203 = 31.03% women
- 80 houses, Swakopmund, 30/80 = 37.5% women.

Namibia has inherited a history of several forms of structural socio-economic inequalities resulting from colonialism and South African apartheid. This historical imbalance had a gender dimension, which impacted negatively not only on the rights of women to property, but also to other related social areas. The AIDS pandemic has added its toll to the impact of discrimination that women in Namibia face with regard to property rights in particular, but also as regards access to credit, unemployment, and certain customary practices.

As a matter of general legal principle, the clauses in the Namibian Constitution that relate to respect for human dignity and equality and freedom from discrimination extend to all persons – including persons living with HIV and AIDS and those who are HIV-positive. However, there are still some legal and cultural norms and practices that do not accord with the letter and spirit of the noble ideals of the Constitution.

50 Iipinge, Eunice & Debie LeBeau. 2005. *Beyond inequalities: Women in Namibia*. Windhoek: Southern African Research and Documentation Centre & University of Namibia.

In the area of property rights, it has been mentioned earlier that the mere provision of the right to acquire property without the requisite workable and enforceable empowerment strategies and policies by government and the private sector will reduce the ideals of the Constitution to a mere charade or façade. It will be worthwhile, therefore, to look at the practices of the financial sector in relation to HIV and AIDS.

The financial sector comprises mainly insurance companies and commercial banks. In the context of property rights of women living with AIDS and those who are HIV-positive, the policies and practice of the financial sector play a very crucial role in determining the realisation of the rights of women to property.

Insurance provides financial security against unforeseen and unpredictable events such as death and disability. It is, therefore, regarded as the key long-term investment made by working individuals. More importantly, it is also used as collateral in obtaining mortgage bonds for the purpose of owning property, particularly a home.

There are essentially four types of insurance cover that present difficulties for people living with HIV and AIDS. These are as follows:

- **Life assurance:** This is where the insurer, in exchange for a premium, agrees to pay a benefit to the insured on the occurrence of a life event like the latter's death. Funeral insurance valued at amounts greater than N$10,000 fall into this category.
- **Assistance insurance:** This is similar to life cover except that the benefits payable are valued at less than N$10,000.
- **Disability insurance:** This usually forms part of life cover. The benefit payable is twofold. Should the insured be unable to pay his/her premiums for a certain period because of ill health (temporary disability), the company waives payment of premiums for that period. Should the insured be permanently disabled, a benefit is paid out either once or periodically.
- **Health insurance:** This covers hospitalisation, major surgery, emergency transportation to hospital, etc. Health insurance is not the same as medical aid cover.

A common factor with all four types of insurance is that the insured's life/health is the basis for cover. More specifically, in the context of a woman living with HIV or AIDS wishing to gain access to obtaining a home loan, the current policies and practice of the insurance industry and commercial banks are closely interrelated. Policy and practice in terms of profit-making may make good business sense and be justifiable, but in terms of protecting the interests of women affected by HIV and AIDS, they leave much to be desired. Current practice will require legislative intervention or review by the insurance industry itself.

To obtain a home loan from a bank, one needs to provide some sort of security or collateral. Usually this is done by ceding a life insurance policy to the bank. For people living with HIV, this is not an option: they are denied life assurance because of their HIV status.

Notwithstanding the above, insurance contracts today contain clauses which exempt or exclude the liability of cover in the event of death, the liability of settling a home loan in the event of the insured's death if the insured was infected with HIV at the time of death or where, in the opinion of the insurance company, the claim is occasioned by HIV infection. The inherent and apparent injustices of these policies are evident in the subjectivity of the absolute discretion given to the insurance industry in determining the cause of death as related to HIV and AIDS, irrespective of the direct cause of death.

Women living with HIV and AIDS are disadvantaged by this practice in the insurance industry. In the first place, it is common knowledge that Namibia is a patriarchal society, and that most households in Namibia are headed by men. The census indicators for both 1991 and 2001 are that 55% of households are headed by males, and 45% by females. Furthermore, a property which is not covered by a life policy is subject to foreclosure – irrespective of a widow's wish to continue paying the instalments of the insurance premiums under the bond entered into between the husband and the insurance company. In the case of a single mother living with HIV or AIDS, she is either denied access to credit facilities altogether or has to pay a higher insurance premium. Some insurance companies have, on account of pressure from activists, revised their policies to include coverage for people living with HIV and AIDS. However, there is no indication that banking policy has changed with respect to access to mortgages or home loans for those living with HIV and AIDS.

Evidence from various sources suggests that a lack of access to property, whether as a result of accepted commercial practice not directly prohibited by law or as customary practice, has an impact on lowering women's social status vis-à-vis men. Hence, women find themselves at risk of being exploited by men. As LeBeau puts it, –[51]

> … consequences of gender inequality and patriarchy, such as gender-based violence, women in poverty and women's lack of access to social and economic resources, place them at particular risk of HIV infection. Barcelona is not the only forum on HIV/AIDS where gender inequality and patriarchy have been linked to women's risk of HIV infection. At the *Durban National Treatment Conference on HIV/AIDS,* COSATU General Secretary, Zwelinzima Vai, stated that, ["]Quite clearly as long as we still have a patriarchal society that undermines gender equality we are far from defeating HIV/AIDS["]. Statistics bear testimony to this unequal relationship between men and women. Indeed the Namibia UNDP report (2001:35) concludes that[,] in Namibia, the major area where differences

51 LeBeau et al. (2005).

between women and men come to the fore is that of access to resources and decision-making.

Conclusion

This paper is an attempt to highlight some of the salient aspects of property rights in Namibia and the impact of gender inequality on women's vulnerability to HIV infection, as well as to ascertain from the preponderance of current enabling laws and practices whether the proprietary rights of women in Namibia are a myth or a reality.

The Government of the Republic of Namibia inherited a land tenure system that was discriminatory: against blacks in general and women in particular. Women's property rights were governed by both the general law and, in the case of black women, customary law. One of the challenges faced by women in contemporary Namibian society is their unequal access vis-à-vis men to property and inheritance rights, which in turn limits a woman's ability to strive for gender equality, whether in the personal or social sphere of her life. The lack of ability to transact in respect of property through use, ownership and disposition, limits women's economic choices and causes them to be economically dependent on men, which in turn makes women more vulnerable to HIV and AIDS. The practice of widow inheritance is degrading to women and makes them vulnerable to physical abuse at the hands of the inheriting husband, exposes both men and women to the risk of HIV infection, and no longer serves the purpose of protecting young widows and children. A similar problem can be seen in widower inheritance whereby the new spouse, often younger than the widower, is exposed to violence and HIV infection. Spousal inheritance should be discouraged through information campaigns and possibly addressed through legislative reform.

In the rural areas, women's lack of access to communal land in their own right is a significant cultural impediment to greater gender equality because women are dependent on men to access their main means of production.

Any reforms in property regimes should also encourage a greater range in the type of property women can customarily own (such as goats and some cattle) as well as more comprehensive rights to controlling the property which they do own. Of concern is that, if civil law were changed in respect of dividing a joint estate equally between the spouses, it would preclude extended family members from inheriting all joint assets, although they could, theoretically, inherit the deceased's spouse's portion of the joint assets. There is also scope for adapting the accrual concept of sharing the gain from the marriage. Law reform should envisage a more equitable distribution of property during divorce or upon death. These laws should specifically protect vulnerable groups such as rural women and orphans.

Moreover, the constitutional principle of equality needs to be applied to customary law on inheritance. Customary inheritance rules need to be reformed so that, for example, simply being born a woman in a Herero community does not mean she has fewer rights to property than being born a woman in a Nama community – or than being born a man. Law reform should insist that boy and girl children are treated equally with respect to intestate inheritance under customary law. The principle of primogeniture (inheritance by the oldest male child) was once the norm in Western civil law settings around the world, but over the years this principle has been discarded in favour of equality between the sexes. A similar evolution is needed in the African customary law context. Law reforms on inheritance, which are constitutionally required to remove sex discrimination, need to be officially formulated and then widely discussed and debated, so that changes in this highly personal and traditional area can be acceptable and workable in practice. It is clear that, in this area, much groundwork will be needed before rights given in theory can be asserted in practice.

Sentencing under the Combating of Rape Act, 2000: The misapplication of judicial discretion

Laila Hassan*

Introduction

Since the Combating of Rape Act, 2000 (No. 8 of 2000) came into force, judicial attention has focused on the implementation of minimum sentences introduced under the Act, and in what circumstances judges may find "substantial and compelling" circumstances permitting deviation from those prescribed minimums.[1] However, an examination of how the courts have exercised their remaining discretion reveals inconsistent and problematic approaches to sentencing offenders who commit crimes under section 2(1). This paper will address four issues, namely, considering –

- whether factors invoking a minimum sentence have a further aggravating quality,
- whether the absence of section 3 circumstances should be considered mitigating,
- what effect the accused's intoxication should have on the appropriate sentence, and
- how the courts should treat the personal circumstances of the accused and the existence of a relationship between the accused and the complainant.

All of these factors fall within the ambit of judicial discretion in sentencing rape offenders, and all are areas where courts are failing to demonstrate a clear and consistent approach that correctly balances the 'triad' of sentencing considerations: the personal circumstances of the accused, the crime, and the interests of society.[2]

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1 See e.g. *S v Lopez* 2003 NR 162 (HC), S v Hoaseb 2006 (1) NR 317 (HC), *S v Limbare* 2006 (2) NR 505 (HC) and *S v Libongani* (CA 8/2006) [2009] NAHC 73 (2 June 2009).

2 See e.g. *S v Shigwedha* (CC 12/ 2008) [2009] NAHC 33 (13 March 2009) per Liebenberg J at para. 3, *S v Musisuwa* (CC 21/2008) [2009] NAHC 66 (3 June 2009) at para. 2, *S v Tjiho* 1991 NR 361 (HC) at 365B–E and *S v Van Wyk* 1993 NR 426 (SC) at 448B–C. Despite this judicial attention, an LAC study found that "the courts are often looking to the minimum sentences as being fixed sentences instead of base level sentences – especially when it comes to the heavier minimums of 10 and 15 years"; Legal Assistance Centre/LAC. 2006. *Rape in Namibia: An assessment of*

Considering whether factors invoking a minimum sentence have a further aggravating quality

In a number of cases where a minimum sentence has been applied under the provisions of the Act, the courts have not considered whether the factor which led to the imposition of the minimum sentence has a further aggravating quality. For example, in *S v Bezuidenhout*,[3] the minimum sentence of 45 years' imprisonment provided for in section 3(1)(a)(iii)(f) of the Act was relevant because the accused was a second-time rape offender who used a knife in the commission of the crime. After holding that no substantial and compelling circumstances existed to justify a departure from the minimum sentence, Damaseb JP continued as follows:[4]

> The accused is now 33 years old. He is unemployed and has 2 children. The best part of his productive life has been spent in prison. He has been in prison now for about 3 years awaiting his trial. I cannot ignore that fact and I take it into account in the sentence I impose. He will be a very old man by the time he has served the minimum sentence required by law. I do not therefore propose to impose a heavier sentence than what the law requires.

Whilst a 45-year prison sentence is undoubtedly a long time, the judge's sole consideration in declining to impose a longer sentence was the personal circumstances of the accused. However, there is a significant amount of judicial authority for the proposition that the 'triad' of the personal circumstances of the offender, the crime, and the interests of society are all relevant factors for consideration with regard to sentencing.[5] I respectfully contend that the judge misdirected himself in *Bezuidenhout* by failing to consider either the circumstances of the crime or the interests of society.[6] If Damaseb JP had

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the operation of the Combating of Rape Act 8 of 2000. Windhoek: Gender Research and Advocacy Project, Legal Assistance Centre, p 453. Also available online at http://www.lac.org.na/projects/grap/Pdf/rapefull.pdf; last accessed 19 November 2010.

3 2006 (2) NR 613 (HC).

4 (ibid.:para. 7).

5 See e.g. *S v Shigwedha* (CC 12/2008) [2009] NAHC 33 (13 March 2009) per Liebenberg J at para. 3. The judge continued by saying that "regard must also be had to the objectives of punishment[,] namely prevention, deterrence, rehabilitation and retribution[,] and the Court must endeavour to strike a balance between these factors". See also *S v Musisuwa* (CC 21/2008) [2009] NAHC 66 (3 June 2009) at para. 2, *S v Tjiho* 1991 NR 361 (HC) at 365B–E, and *S v Van Wyk* 1993 NR 426 (SC) at 448B–C.

6 There is support for the view that failing to consider all three elements of the triad is a misdirection by the trial judge. For example, in *S v Libongani* ((CA 8/2006) [2009] NAHC 73 (2 June 2009)), where Parker J stated: "I do not think the learned magistrate was entitled to take into account only the factor that he considered to be in favour of the respondent and sit back. Accordingly, in my view, the learned

directed his mind to these factors, he would have noted that a knife was used in the commission of the offence. This is a serious weapon with the potential to inflict significant injuries upon the victim. Moreover, the victim's knowledge that the accused had a knife may have made her more afraid and less able to fight back against her assailant, compared with a situation where a less lethal weapon were used. This is not simply an academic point. A Legal Assistance Centre (LAC) study found that belts, stones, sticks, brooms and forks are among the many weapons used in the commission of rape.[7] The use of a knife is clearly more dangerous than a fork, but using either of these weapons would attract the minimum sentence of 45 years in the case of a second-time offender. For that reason, the High Court should have considered whether the use of a knife was aggravating beyond the point of triggering the minimum sentence in question. The judge did not necessarily err in finding a 45-year sentence to be appropriate: it is entirely possible that, having considered all of the aggravating and mitigating factors, Damaseb JP could legitimately have reached the conclusion that 45 years was a sufficient sentence. But before reaching such a conclusion, the judge should have considered all of the relevant factors, including the qualifying circumstance which led to the imposition of the relevant statutory minimum sentence.[8]

The Act is more correctly viewed as the starting rather than the end point in relation to sentencing individuals for offences committed under its section

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magistrate could not have reasonably assessed the ultimate cumulative impact of the factors traditionally and rightly taken into account when sentencing offenders".

7 LAC (2006:199).

8 Similarly, in *Nango v S* ((CA 171/03, CA 171/03) [2005] NAHC 10 (8 June 2005)), where the High Court was asked to review the conviction and sentence imposed by the trial magistrate, Maritz J did not consider whether the trial court was correct in its decision to sentence the accused to the statutory minimum. This should have been considered: aside from the fact that the complainant had been threatened with a weapon, that force had been used against her, and that she had been dragged from her home at night, the victim was merely 10 years old when the offence took place. Even though the complainant's age was the basis for the 15-year minimum sentence, this does not justify the court failing to consider whether it was a further aggravating factor that she was just 10 years old, rather than merely being under the triggering age of 13 and, therefore, even more vulnerable. The High Court does not mention whether the trial judge considered the 'triad' of considerations before sentencing the accused to the statutory minimum. However, it would be extremely unlikely that a proper balancing of the personal circumstances of the accused could mitigate substantially from the weight of the aggravating factors. Particularly persuasive on this issue is Liebenberg J, who, in *S v Shigwedha,* held that "The crime of rape is mostly committed with the purpose to satisfy the sexual urge of the offender – which accused admitted in the court a quo – and it seems to me that it can only in the most exceptional circumstances contain mitigating factors which could explain the commission of the crime and diminish the moral blameworthiness of the offender" (CC 12/2008) [2009] NAHC 33 (13 March 2009) at para. 11.

2(1). For example, in *S v Limbare*,[9] the High Court held that –[10]

> … it is important to stress that the minimum sentencing provisions contained in s.3 of Act 8 of 2000 limit, but do not take away, the trial court's discretion to impose a proper sentence based on all the circumstances of the case. The Act does not require sentencing according to a formula in which the discretion of the sentencing officer has no role to play. In other words, it is not a matter of placing the particular offence of rape in a certain category according to its circumstances and then to impose the minimum prescribed sentence as if it follows automatically and without any further consideration of what a proper sentence would be.

Furthermore, in *S v Malgas*,[11] a South African Supreme Court of Appeal case concerning similarly worded legislation in South Africa, Marais JA noted the injustices that may arise if judges are obliged to pass specified sentences "come what may".[12] He was referring to the ability of judges to depart from minimum sentences in substantive and compelling circumstances. However, this argument is also relevant when considering aggravating factors, since it is well established that the appropriateness of a sentence must not only take into consideration the interests of the convicted, but also the circumstances of the crime and the interests of society.[13]

Therefore, the court should be willing to consider whether a factor is aggravating beyond the point of triggering a particular minimum sentence, and should increase the sentence where necessary to avoid injustices. For example, where a weapon is used for the purpose of, or in connection with, the commission of rape in a case falling within the ambit of the Act, section 3(1)(a)(iii)(ff) prescribes a 15-year minimum sentence. Having noted this, the court should consider the difference between a firearm and a makeshift weapon unlikely to have the potential to cause serious harm. It would not be appropriate for the use of an improvised weapon (rather than a knife or gun, for example) to be considered a mitigating factor because section 3(1)(a)(iii)(ff) states that the use of *any* weapon will result in a minimum of 15 years' imprisonment. Therefore, the only appropriate course would be for the use of a firearm or other highly dangerous weapon to be considered particularly aggravating – justifying the imposition of a sentence higher than the 15-year prescribed minimum.

9 (CA 128/05, CA 128/05) [2006] NAHC 24 (16 June 2006).

10 (ibid.:para. 7, per Van Niekerk J). In many other cases, such as *S v Hoaseb* 2006 (1) NR 317 (HC), the High Court has held that the Combating of Rape Act limits, but does not eliminate, judicial discretion when it comes to sentencing.

11 (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001).

12 (ibid.:para. 18, per Marais JA).

13 (ibid.:3).

Similarly, section 3(1)(a)(iii)(ee) states that, if a convicted person is one of a group of two or more persons participating in the commission of the rape, then a minimum sentence of 15 years should be imposed. Once this section is invoked in a particular case, the court should further consider whether 2 or 20 people raped the complainant because these are evidently very different crimes, and judges should, therefore, exercise their discretion to treat these different situations differently.

In *S v Kanyuumbo*,[14] where a 6-year-old girl was raped by a 21-year-old man, the High Court noted that "s3 (1)(a)(iii)(bb)(A) of the Act provides for a sentence of 15 years for an accused having committed a 'sexual act' with the complainant, while she was under 13 and he was 3 years older".[15] The court then went on to hold that "the seriousness of the offence, coupled with the circumstances of the victim of this heinous crime, warrants a sentence in excess of what the legislator provided".[16] Here the relevant circumstances of the victim included "the young age of 6 years and the fact that she is very small".[17] Therefore, the fact that the victim was 6 years old was the basis for the court finding that a minimum sentence of 15 years was applicable. However, the fact that the victim was 6 years old was also relevant as a further aggravating factor that led to the imposition of a sentence higher than the applicable minimum. Indeed, Muller J held that, "the sentence for this type offence [sic] contained in the relevant penalty provision of the Act is only a minimum and to impose that minimum sentence for this accused and this offence, will not do justice".[18] There is nothing in this statement which indicates that only aggravating factors *in addition to* the circumstance which led to the applicability of a minimum sentence are relevant in increasing the sentence beyond the minimum.[19]

Therefore, the existence of circumstances which invoke broadly defined categories of minimum sentences does not end judicial discretion to thereafter consider the effect of those same factors on the appropriate sentence. The Act should be interpreted not only as viewing these factors as triggering minimum sentences, but also as leaving discretion to the court as to whether the circumstance is also an aggravating factor warranting a sentence beyond the relevant minimum.

14 (CC03/2007) [2007] NAHC 34 (26 April 2007).
15 (ibid.:para. 13, per Muller J).
16 (ibid.:para. 13, per Muller J).
17 (ibid.:para. 7, per Muller J).
18 (ibid.:para. 15).
19 Compare this approach to that of the High Court in *S v Nango*, see Footnote 8 above. Whilst in *Nango* the complainant was 10 years old rather than 6 as in *Kanyuumbo*, there is no reason why the court should not have found the young ages of both complainants aggravating, but consider one more aggravating than the other.

Such an interpretation would make sense in light of section 3(2) of the Act, which states that, where substantial and compelling circumstances are present, the court can depart from the minimum sentence that would otherwise be applicable and impose a lesser sentence. This section is not restricted to the existence of factors *excepting* the one which led to the imposition of the minimum sentence, and the legislature cannot be taken to have afforded judges the ability to lower sentences but not to raise them when considering the implications of a particular circumstance. This would seem contrary to the legislature's overall intent when introducing minimum sentences into the Act, namely to ensure that rapists who commit their crimes in particularly heinous circumstances be met with uniformly severe sentences.[20] Judge Van Niekerk took this approach in *S v Kauzuu*[21] when she said –[22]

> … there clearly is a discretion to impose a longer sentence. The Legislature merely wanted to ensure that in certain kinds of cases which are likely to arise the sentence imposed would not be less than the benchmark provided by the Act … The Legislature wisely did not attempt the impossible by legislating for all eventualities and circumstances. If one were to take the provisions of s.3(1)(a)(iii)(cc) as an example: in one case the complainant might be, say, 14, whereas in another she might be days away from turning 18. Although in both cases the matter would fall in the category mentioned in s.3(1)(a)(iii)(cc), there would be grounds, in an appropriate case, to treat the case of the younger complainant as more serious than the other. The Legislature has allowed room for differentiating within the limits of the Act.

Therefore, minimum sentences applicable under the Act are the starting, rather than the end point, in relation to sentencing individuals for offences committed under s.2(1) of the Act. Once the threshold for applying a minimum sentence has been met, it is important that the court continues to exercise its judicial discretion by considering the seriousness of the factor that led to the imposition of the minimum sentence, and then deciding whether that factor also operates as an aggravating factor meriting a longer sentence than the minimum prescribed by the Act. This is important because the categories of factors invoking different minimum sentences under the Act are very broad, whereas the sentences delivered should reflect particular offences committed by particular offenders. The alternative would invariably result in injustices, as it would mean that all offences committed under the Act would result in the automatic application of the prescribed minimum sentences without further consideration by the court. Moreover, since judges must be alive to the

20 The Minister of Justice, when introducing the Bill to Parliament, stated that "these are minimum sentences: there are no maximum sentences for rape and we therefore only draw the bottom line. The courts may still impose more severe sentences and I have no doubt that they will indeed do it under certain circumstances"; Hon. N Tjiriange, Second Reading Speech, National Assembly, 3 June 1999, as cited in LAC (2006:95).

21 2006 (1) NR 225 (HC).

22 (ibid.:230H–I).

possibility of substantial and compelling circumstances meriting the reduction of sentences to a level below the prescribed minimum, it would be illogical if they were not expected to exercise judicial discretion to raise sentences above the prescribed minimum if the circumstance leading to its imposition is particularly aggravating. I submit that Judge Van Niekerk was correct in *Kauzuu* when she held that the legislature had not limited the judiciary's ability to consider a factor aggravating beyond the point which resulted in the imposition of a minimum sentence.[23] Judges should actively consider –

- factors which lead to the imposition of a minimum sentence, and
- whether these factors merit taking further account of their aggravating quality in a given case.

Considering the absence of section 3 circumstances as mitigating

In a number of cases, the Namibian courts have considered the fact that the accused did not use a weapon, or did not inflict serious injuries upon the victim, to be a circumstance in his favour for the purposes of sentencing. These factors are amongst a number of circumstances which, under section 3 of the Act, lead to the imposition of a higher minimum sentence when present on the facts of a case. This implies that the legislature deems these circumstances to be particularly aggravating and serious enough to warrant special treatment. In my view, to treat the absence of these aggravating factors in a case as having a mitigating effect on the sentence constitutes a serious misdirection by the courts. The result is often factually illogical and untenable sentences, negative policy implications, and injustices in sentencing equality between offenders.

The use of a firearm, or any other weapon, for the purpose of, or in connection with, the commission of rape is one of a number of circumstances that invoke a 15-year minimum sentence under section 3(1)(a)(iii)(ff) of the Act. However, in *Kauzuu*,[24] the judge considered the fact that no weapon was involved in the commission of the offence to be a mitigating circumstance. This approach is flawed for a number of reasons. On the facts of the case, this approach was incorrect because the victim was under the age of 18 and was repeatedly raped by her stepfather, who was in a position of trust and authority over her. The victim attempted to report the incidents to her mother but was ignored. There was no evidence on the facts that the accused ever needed to threaten the victim or use weapons in order to succeed in raping her. Therefore, it is unclear why the accused should benefit from the fact that he did not need to use a weapon by a consideration of this as a factor in his favour in determining

23 (ibid.).
24 (ibid.:21).

the appropriate sentence. The approach of the High Court in *S v Shigwedha*[25] is instructive in this regard. In *Shigwedha,* a similar set of facts existed: the accused lived in the same house as the victim, and did not use a weapon in the commission of the rape. However, in reaching his decision in *Shigwedha*, Liebenberg J held as follows:[26]

> Regarding defence counsel's submission that the commission of both crimes did not involve threats or the use of any weapons against the complainant, it must be borne in mind that there was no need for that as the accused was a family member living in the same house[,] enabling him to enter [the] complainant's bedroom at night. Furthermore, besides their relationship, the accused was an adult compared to the complainant being a young child who possibly, for that reason, did not offer any resistance. In the circumstances, I do not think the accused can gain favour with the Court for the reasons advanced on this point.

Whilst there was an age difference of three years between the victims in the *Shigwedha* and *Kauzuu* cases, the victim in the latter case was undoubtedly at the mercy of her stepfather, especially after her attempts to seek help from her mother were denied. The victim in *Kauzuu* was in no position to fight back against her aggressor, who was a grown man in a position of authority over her. The accused evidently did not need to use a weapon against his victim, and it is palpably wrong to find this to be a fact in his favour rather than highlighting the vulnerability of the victim in comparison to him, given their unequal statuses.

This line of reasoning is particularly apposite when applied to the more recent case of *S v N.*[27] There, after determining the appropriate sentence as being 15 years' imprisonment, Muller J turned his attention to arguments from both counsel about whether he should suspend part of that sentence. The judge concluded that two factors led him to believe that part of the sentence should be suspended: the lack of physical injury to the complainant, and the lack of force used against the complainant.[28] Accordingly, he suspended five years of the sentence on the condition that the accused was not found guilty of a section 2(1) offence within the period of suspension.[29] Here again, I respectfully submit that the judge misdirected himself regarding sentencing by finding the absence of aggravating factors persuasive reasons to mitigate the sentence

25 (CC 12/2008) [2009] NAHC 33 (13 March 2009).

26 (ibid.:para. 9).

27 (CC07/2007) [2007] NAHC 29 (16 April 2007). This case did not concern minimum sentences because the accused at the time of committing the offence was 17 years and 10 months old – 2 months shy of being subject to minimum sentencing in terms of section 3(3) of the Act. Accordingly, it would seem that the application of the minimum sentences in the Act was not the cause of the flawed reasoning on this issue.

28 (ibid.:para. 13).

29 (ibid.:para. 14).

or to reduce the effective term of imprisonment under that sentence. On the facts of this case, that decision appears to be patently wrong: the complainant was just 4 years old at the time of the rape – clearly the use of force was not necessary. This is in stark contrast to Liebenberg J's judgment in *Shigwedha* above, where the court held it was not mitigating that the accused did not use force in order to rape the complainant because he did not need to. It seems incorrect and unjust then that another accused should benefit from a shorter effective term of imprisonment for refraining from engaging in behaviour that he need not have engaged in to fully realise his criminal intent.

The same flawed approach was taken in the pre-Combating of Rape Act case of *S v Rudath*,[30] in which the accused appealed against a 17-year sentence after being convicted for abducting and brutally raping the complainant, and compelling two young boys at gunpoint to rape the complainant as well. The High Court found that the trial magistrate failed to account for certain mitigating factors, such as the fact that –

> … the revolver was not used as part of any threat made against the complainant and that there is no evidence of any real physical injuries sustained by her as a result of her treatment at the hands of the appellant.

It is my argument that it is not logical, relevant or appropriate for judges to use the approach of considering the absence of a separate and unrelated factor to be mitigating. There are four main reasons for this.

Firstly, the effect of a mitigating factor is to tend towards a reduction in a sentence. Accordingly, if not using a weapon[31] is accepted as a mitigating factor, as in *Kauzuu*, the accused is being rewarded with a lesser sentence because he refrained from committing a worse crime than he theoretically could have done.

The approach of the courts on this point in criminal matters more generally has been divided. Some courts have refused to reward the convicted in this way. In *S v Paiya*,[32] for example, the accused appealed against an 18-month prison sentence for assault with intent to cause grievous bodily harm on the basis that the sentence was too harsh because the accused used his bare hands to assault his wife and not a weapon. The High Court dismissed this argument, as follows:[33]

30 (CA 109/98) [1999] NAHC 13 (21 September 1999). Significantly, the fact that this case predates the Combating of Rape Act further suggests that the introduction of this complex legislation has not been the source of the confused reasoning in the case law on this point.

31 Or the absence of any of the other section 3 circumstances.

32 (CA 37/2009) [2010] NAHC 56 (28 July 2010).

33 (ibid.:para. 44, per Ueitele AJ).

> The sentence imposed by the magistrate is certainly robust but bearing in mind that:
> - the appellant and the complainant were in a special relationship;
> - the assaults on the complainant caused her a swollen and blue eye, [and] damaged the nerve at the end of the complainant's right eye;
> - the assault on the complainant will require her to undergo an operation;
> - the assault on the complainant caused her bruises on the inside and outside of her right thigh and that her right hand is painful;
> - the assault was perpetrated in the presence of the complainant's minor daughter of 4 years, and the assault took the form of strangulation,
>
> we can find no reason to interfere with the sentence imposed by the Court a quo.

In other words, rather than considering it mitigating that the accused *could have* caused more harm, or used a weapon to cause harm but refrained from doing so, the court focussed on what the accused *actually* did.

Conversely, other courts have considered aggravating factors *not* present on the facts to be a factor in the accused's favour. For example, in *S v Kastoor*,[34] the accused appealed against a 12-year sentence imposed for armed robbery; the High Court found it mitigating that "no actual violence was used".[35] Similarly, in *S v Kashamane*,[36] Parker J upheld a conviction of assault with intent to cause grievous bodily harm, holding that –[37]

> … the appellant armed with a kitchen knife waited for the complainant to arrive in the house because he bore him a grudge (in connection with the motor vehicle), intending to stab him with the knife, and he did stab him with the knife after he had parked the vehicle in the house.

The judge continued by accepting the submission of counsel for the accused that the lack of serious injury to the complainant was a mitigating factor which the trial judge had failed to consider.[38]

Therefore, sentencing in criminal cases outside the sphere of the Act also suffers from differing approaches on whether the absence of aggravating factors should be considered mitigating.[39] This is a very unfortunate position.

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34 (CA 149/2005) [2006] NAHC 63 (27 September 2006).

35 (ibid.:para. 15, per Damaseb JP).

36 (CA 42/2005) [2006] NAHC 40 (14 August 2006).

37 (ibid.:para. 15, per Parker J).

38 (ibid.:para. 27). In the same paragraph, the judge noted that the court a quo was unable to identify the severity of the injuries inflicted upon the complainant due to a lack of evidence presented at trial but the "benefit of a doubt favours [counsel for the accused's] submission that the wound suffered by the complainant was not serious".

39 One potential reason for this could be that the same judges who refrain from considering the absence of aggravating factors as mitigating in the context of cases prosecuted under the Combating of Rape Act are the same judges who refrain from

Traditional conceptions of the rule of law have included fair trial and punishment as prerequisites for its attainment.[40] An accused is not fairly punished if the contemplation of the punishment he[41] – receives is undertaken on a different basis from other accused persons punished for the same crime.[42] Indeed, this inconsistent approach to sentencing appears to violate the rule of law requirement identified by John Rawls that similar cases be treated similarly.[43] The concept of "justice as regularity"[44] incorporates both the notion that judges should justify the distinctions they make between cases by reference to relevant legal rules and principles, and that there is a need for consistency in the interpretation of such rules. Accordingly, there is a need to resolve the current confusion in the approach taken by the Namibian judiciary as to whether the absence of aggravating factors should be considered mitigating. Although trite, the preferable approach would be for the courts to consider aggravating factors as aggravating and mitigating factors as mitigating, but with the absence of aggravating factors having no effect on the sentence to be imposed. To hold otherwise would reward the offender for refraining from committing a worse crime than he theoretically could have done.

Accordingly, it should not be mitigating that the accused did not engage in particular section 3 circumstances[45] for the purposes of or during the commission of the rape, but that in theory he could have done. Support for this argument can be drawn from *S v Werner*,[46] in which Liebenberg J was presented with the rather astonishing argument that –[47]

> … the accused was unable to "fully" penetrate the complainant because the act was interrupted by the presence of the relative; as a result thereof the complainant did not suffer any serious injuries which again reduces the moral blameworthiness of the accused as the complainant did not suffer any psychological harm.

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doing so in cases involving other crimes, and vice versa.

40 See e.g. Dicey, AV. 1915. *An introduction to the study of the law of the constitution*. Oxford: Oxford University Press.

41 Rape in Namibia is very much a gender-based crime. In every reported rape case to reach the Namibian High Court and above for the past 20 years, the accused has been male. For these reasons, *he* and not *s/he* is used in this text for simplicity and consistency.

42 This also raises issues of whether the trial can be deemed 'fair' for the purposes of Article 12 of the Namibian Constitution.

43 Rawls, John. 1999. *A theory of justice* (Second Edition). Cambridge, MA: Harvard University Press, pp 52, 210.

44 (ibid.:207).

45 That is, those circumstances that result in the application of 10-year-, 15-year-, and 45- year-minimum sentences under the Act.

46 (CC 22/08) [2009] NAHC 38 (31 March 2009).

47 This submission by counsel was summarised by the judge at para. 17 of his judgment.

In dismissing this as a mitigating factor, the judge held that the court should not place undue weight on "what injuries the accused *could have* inflicted on the person of the complainant instead of the injuries *actually* sustained by her" [Emphasis added]. Consideration of what actually happened, based on the proven facts – rather than on what the accused could have done – is a far better approach.

With respect, the above criticism can also be levied against the approach of the High Court in *Rudath*[48] regarding the absence of serious physical injuries: if the fact that the complainant did not sustain physical injuries is accepted as mitigating, the accused is being rewarded for not hurting the victim as much as he could have done. On the facts of *Rudath,* this seems to be a particularly distorted approach because the court also held it to be aggravating that the complainant was so traumatised by the crime that she attempted suicide.[49] Therefore, the High Court penalised the accused by recognising the infliction of serious psychological trauma as an aggravating factor, but rewarded him for not inflicting serious physical injuries as well. This mitigating factor necessarily had the effect of partially offsetting the extension of the sentence merited by the aggravating factor. Of course, balancing aggravating and mitigating factors is the correct method when considering whether to extend or reduce a sentence. However, in this case, the infliction of one type of harm on the victim was considered aggravating whilst the absence of another type of harm was mitigating, meaning the accused was rewarded and penalised for the harm he had caused. This cannot be a sensible approach.

A second problem with consideration of the absence of section 3 factors as mitigating is that the courts have not provided reasoned arguments for their approach. For example, in *Kauzuu,* Van Niekerk J considered the case of *S v Shapumba*,[50] in which "the two main grounds on which the Court relied to reduce the effective period of imprisonment were the absence of violence or weapons during the rape and the fact that the appellant was a first offender".[51] Judge Van Niekerk found that despite *Shapumba* having been decided before the promulgation of the Act, "the judgement is useful when considering the approach to sentence in a rape case".[52] No further mention is made of this

48 Discussed at Footnote 36 above.

49 (CA 109.98) [1999] NAHC 13 (21 September 1999). This case was sourced on the Southern African Legal Information Institute (SAFLII) is unpaginated. The case may be found at http://www.saflii.org/na/cases/NAHC/1999/13.html; last accessed 18 November 2010.

50 1999 NR 342 (SC). This case was decided before the enactment of the Combating of Rape Act, further showing that courts have misdirected themselves in this way for an extensive period of time. Thus, minimum sentences and the Act more generally are not in some way muddying the waters through complicated legislative provisions causing confusion amongst the judiciary.

51 2006 (1) NR 225 (HC) at 232C, per Van Niekerk J.

52 (ibid.).

issue until the judge later holds it to be a mitigating factor that "no weapons were involved".[53] I assert that this decision is fundamentally flawed. The Act allows the court to consider aggravating and mitigating factors after a minimum sentence has been applied, so long as the eventual sentence is not lower than the prescribed minimum in the absence of substantial and compelling circumstances. However, undertaking this balancing process in the absence of consideration of the Act runs the risk of judges setting sentences that go against the spirit of the legislation. Moreover, it is an illogical approach since not using a weapon is being considered twice: once to avoid the higher minimum and a second time to justify imposing a lesser sentence than the other circumstances of the case would dictate.

A third criticism is that, by considering the absence of a factor as mitigating, the court is singling it out as being something particularly relevant – despite it actually not being pertinent to the case at hand. For example, in *Kauzuu,* in considering the absence of the use of a weapon as mitigating, the High Court drew particular attention to this section 3 circumstance over and above the others. This raises the question of why the court would arbitrarily choose to focus on just one section 3 circumstance. The legislation does not single this factor out, so if consideration of the absence of one particular section 3 circumstance as mitigating is permitted, the judge could just as easily have held that because gang rape or the rape of a child under the age of 13 were not involved, these factors should likewise be considered as mitigating. Both of these circumstances are similarly considered by the legislature to be worthy of 15-year minimum sentences[54] and they are unfortunately not uncommon in Namibian rape cases.[55] Therefore, if the absence of a weapon is mitigating in every rape case where it is not present, surely the absence of gang rape, the rape of a child under the age of 13, or any other section 3 circumstances must similarly be mitigating. To arbitrarily choose a single factor not present in the case to be mitigating appears to defy reason, but this is unfortunately a recurring problem in Namibian courts.

Fourthly, the effect of treating an aggravating factor[56] as aggravating, as well as the absence of an aggravating factor as mitigating, upsets the fairness

53 (ibid.:233C, per Van Niekerk J).

54 Section 3(1)(a)(iii)(ee).

55 An LAC study found that 28% of complainants in the police docket sample of 409 rape cases were under the age of 14. It is even more ludicrous to suggest that it should be mitigating that the accused chose to rape an adult when he theoretically could have raped a child. The same study found that 11% of rape cases involved multiple perpetrators. Court registers (relating only to those accused *charged* with rape) showed that multiple perpetrators were involved in 9% of cases (LAC 2006:164, 173).

56 Meaning a factor that, under section 3 of the Act, results in the applicability of a minimum sentence in the absence of substantial and compelling reasons why this should not be so.

of sentences delivered across the board. An example may be useful here. Suppose Accused A and Accused B are both charged with rape. All other factors being the same in both cases, Accused A committed rape using a weapon to threaten the complainant, but Accused B did not. At the sentencing hearing, the court considers it aggravating that Accused A used a weapon and finds it appropriate to increase the sentence by two years. Meanwhile the court considers it mitigating that Accused B did not use a weapon and reduces his sentence by one year. The result is that the system penalises Accused A by one year. This is because, while the court considered that the aggravating nature of using a weapon merited the awarding of two years' further imprisonment, Accused A in effect is serving a three-year-longer sentence than Accused B. Of course, it is unlikely that two cases will ever be exactly alike save for one factor. Moreover, the process of balancing multiple aggravating and mitigating factors is not as simple as extending the sentence by a year for one reason and reducing it by a year for another. But this simplified model of how the courts arrive at a sentence does demonstrate the inherent flaw in the way judges are exercising their remaining discretion after the application of a minimum sentence.

Therefore, the absence of a section 3 circumstance should never be treated as a mitigating factor as part of the balancing of aggravating and mitigating factors after the imposition of a minimum sentence. Nor should the *absence* of one section 3 circumstance contribute towards a finding that substantial and compelling circumstances exist to justify departure from a minimum sentence otherwise applicable because of the *presence* of a second section 3 circumstance. Whilst judges are permitted to consider any 'normal' mitigating circumstances,[57] such treatment of the absence of section 3 circumstances is not consistent with a normal analysis of mitigating circumstances, as outlined above.

Alternatively, if this argument is rejected and courts continue to treat the absence of section 3 circumstances as mitigating factors after the imposition of a minimum sentence,[58] a further level of complexity would need to be introduced. This is because it is against the *express* intention of the Act if the court were to use the absence of a section 3 circumstance to justify a finding of substantial and compelling circumstances to lower the sentence below the minimum that would apply by virtue of a second section 3 circumstance. So, for example, if a weapon is *not* used in the commission of a rape, that consideration should not form part of the substantial and compelling reasons

57 This is true even for factors leading to a finding of "substantial and compelling" circumstances justifying departure from the prescribed minimum sentence under section 3(2) of the Act; see e.g. S v Limbare (CA 128/05) [2006] NAHC 24 (16 June 2006) para. 9, per Van Niekerk J.

58 For example, in deciding whether to impose a 16- or 17-year sentence where a 15-year statutory minimum applies.

justifying lowering a sentence below the minimum that applies because the complainant is under the age of 13. The reason for this is that all the arguments made above – to assert that considering the absence of section 3 circumstances as mitigating is illogical and unfair – apply; so the judiciary would be undermining the Act in applying this flawed reasoning. After all, the Act seeks to ensure prescribed minimum sentences apply for offenders who commit rape in circumstances the legislature has deemed to be particularly serious, such as when the complainant is under the age of 13. Accordingly, if the absence of the use of a section 3 circumstance is treated as a relevant consideration in determining the appropriate sentence above the level required by legislation, then a distinction needs to be drawn between factors that can be considered in sentencing *above* the minimum, and factors that can be considered as part of substantial and compelling circumstances for *departing from* the minimum. This would result in a confusing and overly complicated process – and provides a further reason why such a distinction should not be drawn. Thus, the absence of section 3 circumstances in a given case is never an appropriate consideration in mitigation of an offence falling within the ambit of the Act.

Considering the effect of the accused's intoxication on the appropriate sentence

The Namibian courts have adopted a very inconsistent approach when sentencing offenders who claim to have been intoxicated at the time of committing rape offences. Some courts have simply accepted that the offender may have been induced to commit the crime because of alcohol consumption, while others have required evidence that the intoxication had an effect upon the offender's decision to commit the offence. One judge has even called for legislation that would expressly permit judges to consider intoxication as an aggravating factor. This level of inconsistency in the courts' treatment of the effects of intoxication is both alarming and also an undesirable practice**.**

At the more lenient end of a broad spectrum of the courts' treatment of intoxicated offenders is *S v Rukero*,[59] in which the accused was found guilty of raping a 3-year-old girl and indecently assaulting her 13-year-old sister. Counsel for the accused submitted in mitigation that the accused was drunk at the material time. Silungwe J responded to this argument by holding that –

> … the Court's finding on the matter, which is in line with your own testimony, is that although you had been drinking, you were not so drunk as not to know what you were doing. Nevertheless, the Court will take into account the fact that you

59 (CC 10/2000) [2000] NAHC 12 (2 May 2000). This case was sourced on SAFLII and is unpaginated. The case may be found at http://www.saflii.org/na/cases/NAHC/2000/12.html; last accessed 19 November 2010.

> had been drinking. There is no evidence to show that your drinking may have aroused your sexual urges, but this is a possibility.

It is my view that this approach is flawed. To qualify for mitigation on the grounds of drunkenness, the accused should be required to prove that his intoxication had an appreciable effect on his commission of the crime. After the prosecution has successfully met the burden of proving guilt beyond reasonable doubt, it is wrong for the court to accept as mitigating – without requiring any proof whatsoever – the mere possibility that the consumption of alcohol induced the accused to commit the crime in question.

In *S v Rudath*,[60] a similarly incorrect approach, in my view, was taken to the question of the accused's intoxication. In this case, the accused appealed against a 17-year sentence imposed by the trial judge after the accused had been found guilty of abducting and brutally raping the victim and compelling (at gunpoint) a 12-year-old boy and an 18-year-old boy to rape her. The High Court found that the trial magistrate had failed to account for certain mitigating factors, such as the fact that the accused was "heavily under the influence of liquor at all relevant times during the incident". The court considered the opinion of Holmes JA in *S v Ndlovu (2)*[61] who said that intoxication –[62]

> … is one of humanity's age-old frailties, which may, depending on the circumstances, reduce the moral blameworthiness of a crime, and may even evoke a touch of compassion through the perceptive understanding that man, seeking solace or pleasure in liquor, may easily over-indulge and thereby do the things which sober he would not do. On the other hand intoxication may, again depending on the circumstances, aggravate the aspect of blameworthiness ... as, for example, when a man deliberately fortifies himself with liquor to enable him insensitively to carry out a fell design.

The court subsequently proceeded to misapply that judgment when it found the accused's intoxication to be mitigating because "there is no indication on record that the complainant's abduction and rape were planned or that liquor was consumed to bolster the appellant's resolve with such purposes in mind". It is my submission that this reasoning is flawed. While the deliberate consumption of alcohol to steel oneself for the purposes of committing a crime may be aggravating, the consumption of alcohol without that prior criminal intent should not necessarily be considered mitigating. Holmes JA actually stated that the moral blameworthiness of a crime *may* be reduced "depending on the circumstances" because the overindulgence may lead to the accused commissioning acts "which sober he would not do". That does not appear to have been true of the accused in *Rudath* since the court held that he –

60 (ibid.:48).
61 1965 (4) SA 692 (AD).
62 At 695C–D.

> … did not show any remorse. He sat smiling when the complainant tearfully related to the court particulars of her terrible experience at his hands. On one occasion he had to be admonished by the magistrate and on another the complainant had to remark on his demeanour in court. Even his legal representative, it appears, had to ask for an adjournment to counsel the appellant about the callous impression caused by his conduct.

As such, it certainly could not have appeared to the court that the accused sorely regretted actions which were caused by his intoxication. Therefore, it is far from clear why the fact that the accused *happened* to be intoxicated when committing the crimes should be considered a circumstance in his favour. The effect of this approach would appear to be that an accused who does not consume alcohol before committing such crimes is in a worse position at sentencing than an accused who has consumed alcohol, even if no evidence can be adduced to show that the alcohol had an appreciable effect on his committing the crimes in question.

A far better approach is that of Liebenberg J in *S v Werner*,[63] where the judge held that –[64]

> … it is simply insufficient to allege that the accused's judgment was impaired by his consumption of liquor and expect of the Court to accept that as a mitigating factor. In order to do so, reliable evidence should be put before the Court.

In *S v Shigwedha*,[65] the same judge took a similarly common-sense approach when presented with submissions on behalf of the accused that "the consumption of alcohol tends to influence the powers of restraint to commit crime".[66] Rather than simply accepting this premise as being true, he responded to this argument by considering the effect of the alleged intoxication upon the commission of the crime on the facts of the case.[67]

In *S v Mukuwe*,[68] Liebenberg J again dismissed the submission of counsel for the accused in mitigation of sentence that the accused had been intoxicated, and held that –[69]

> [t]here is, on the contrary, sufficient ground to find that, although the accused had been consuming alcohol earlier to the point where he appeared to be drunk … he was thereafter sober enough to have full sexual intercourse with [the complainant].

63 (CC 22/08) [2009] NAHC 38 (31 March 2009).
64 (ibid.:para. 16).
65 (CC 12/2008) [2009] NAHC 33 (13 March 2009).
66 (ibid.:para. 6).
67 (ibid.:para. 7.
68 (CC 08/2009) [2010] NAHC 66 (12 August 2010).
69 (ibid.:para. 7).

I have argued that Liebenberg J has adopted a more common-sense approach to the issue of when the accused's intoxication should have a mitigating effect on the sentence at hand. He does, however, appear to assume that the offender's intoxication should have a mitigating effect on his sentence for rape when that intoxication has impaired his judgment.[70]

By contrast, in *S v Davids*,[71] a case involving a traffic offence, O'Linn J held that –[72]

> … it appears to me to be a travesty of justice that a person can voluntarily indulge in intoxicating liquor and/or drugs with a narcotic effect and then commit what would otherwise have been a serious crime … and then go scot-free because he was so drunk that he lacked the required criminal capacity and/or mens rea and/or the ability to perform a voluntary act … It also amounts to this – the more you drink, the better your chances of being acquitted.

Although this case concerned the accused's intoxication as a defence to a criminal charge under the common law, the judge's reasoning also applies to the effect of intoxication on the accused's sentence. If the intoxication of the accused when committing the crime mitigates from the court's perception of its severity and, therefore, the sentence the court imposes, then the accused is benefitting from becoming so irresponsibly intoxicated that he committed the offence. The result is palpably wrong and amounts to this: the more you drink, the more likely the ensuing intoxication will impair your judgment, the more likely the court is to find the intoxication a circumstance in your favour, and the more likely it is that this will offset aggravating factors or result in a lower sentence being awarded. O'Linn J's view is, therefore, inconsistent with Holmes JA's sentiment that intoxication may "reduce the moral blameworthiness of a crime". That is because O'Linn J, quite correctly, emphasises the voluntary nature of that initial indulgence: to voluntarily become so intoxicated as to commit a crime involves a level of irresponsibility which the law should penalise, not reward. Indeed, the judge continued by stating that "the time is overdue for our criminal law to be supplemented as in South Africa and the United Kingdom with a statutory offence similar to that in s.1 and s.2 of the Criminal Law Amendment Act 1 of 1988 (RSA)".[73] The effect of section 2 of the Criminal Law Amendment Act is to expressly permit judges to consider it aggravating that the accused committed an offence whilst intoxicated when the court is determining the appropriate sentence to be imposed for that offence.[74] While such legislative intervention may be beneficial to the extent

70 See e.g. (CC 22/08) [2009] NAHC 38 (31 March 2009) at para. 16.

71 1991 NR 255 (HC).

72 (ibid.:259F–H).

73 1991 NR 255 (HC) at 259H.

74 Section 2 of South Africa's Criminal Law Amendment Act, 1988 (No. 1 of 1988) reads as follows:

that it would explicitly set out for the judiciary the preferred approach on the question of intoxication, it is not clear that such an amendment is necessary in order for the courts to consider the intoxication of the offender to be an aggravating factor.[75]

Therefore, I would assert that the inconsistent and often contradictory approaches of the Namibian courts with regard to sentencing when the offender claims to have been intoxicated is far from ideal. While the approach of judges such as Liebenberg J is positive insofar as determining when the offender's intoxication should count in his favour (on the assumption that it should ever count in the offender's favour), it is unclear how an offender could adduce evidence that he raped the complainant *because* he was intoxicated.[76] In the absence of compelling evidence, this fact should not be assumed in the offender's favour. This is because the courts should avoid rewarding the offender by recognising as a mitigating factor a situation where the offender becomes so irresponsibly intoxicated that he commits the very serious crime of rape, especially when the offender cannot prove that the intoxication was the cause of his embarking on such conduct**.** It would be far more preferable for the court to adopt an approach of considering the offender's intoxication as aggravating or as having a neutral effect on the sentence, depending on the circumstances, rather than potentially reducing it.

Considering the personal circumstances of the accused and the existence of a relationship between the accused and the complainant

The personal circumstances of the offender are a key consideration when determining the appropriate sentence in a particular case.[77] They are important since they enable the judiciary to tailor the sentence accordingly, in line with the

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"Commission of offence while faculties were impaired may be an aggravating circumstance.

Whenever it is proved that the faculties of a person convicted of any offence were impaired by the consumption or use of a substance when he committed that offence, the court may, in determining an appropriate sentence to be imposed upon him in respect of that offence, regard as an aggravating circumstance the fact that his faculties were thus impaired".

75 Holmes JA, in holding that, "On the other hand intoxication may, again depending on the circumstances, aggravate the aspect of blameworthiness ... as, for example, when a man deliberately fortifies himself with liquor to enable him insensitively to carry out a fell design", assumes that the courts are at liberty to consider this factor to be aggravating.

76 It is also worth noting that if the accused was so intoxicated that he did not know what he was doing at all, this would prevent a finding of guilt in the first place: see *S v Chretien* (1981) (1) SA 1097 (A) at 1106B–H.

77 The others being the crime and the interests of society; see Footnote 6 above.

objects of "prevention, deterrence, rehabilitation and retribution".[78] However, the courts should consider what effect, if any, should be attributed to age, employment, marital status and other personal circumstances individually, before considering their cumulative effect. Furthermore, reasons should be provided explaining why each factor has that bearing on the appropriate sentence. This ensures that the judge directs his mind to the issue of why a factor should be aggravating or mitigating**,** as opposed to assuming that the personal circumstances must necessarily have a certain impact on the sentence. This is particularly important in sentencing rape offenders since one of the personal circumstances of the offender may be the existence of a relationship with the complainant. As explained below, the court should never assume this is appropriate for inclusion among mitigating factors when sentencing the offender: the legislature explicitly prohibits the existence of a marriage or relationship to be a defence under the Combating of Rape Act, indicating that it views rape within a relationship to be as serious as rape in any other circumstances.

The problem of grouping the personal circumstances of the accused and considering them together is evident in the High Court case of *S v Lopez.*[79] *In Lopez,* the victim was kidnapped by her estranged husband, who had sexual intercourse with her whilst she was unlawfully detained. On appeal, Hannah J upheld the conviction[80] before considering the accused's appeal against sentence. Under the Act, rape in these circumstances warrants a minimum sentence of ten years' imprisonment[81] unless substantial and compelling circumstances exist which justify the imposition of a lesser sentence.[82] On this point, Hannah J held as follows:[83]

> The appellant was in his mid-thirties at the time the offence was committed and was a first offender. He has been married to the complainant for about three years and they have a young daughter. He was a self-employed mechanic. *Those are his personal circumstances* and although *constituting mitigating factors*, cannot, in my view, standing alone, qualify as substantial and compelling reasons so as to justify the imposition of a lesser sentence than that prescribed as a minimum. [Emphasis added]

Here, the judge was focusing on the question of whether substantial and compelling circumstances existed in the case to reduce the minimum sentence

78 *S v Shigwedha* (CC 12/2008) [2009] NAHC 33 (13 March 2009) per Liebenberg J at para. 3.

79 2003 NR 162.

80 The conviction was upheld on the basis that the combined reading of section 2(1)(a) and section 2(2)(1)(e) of the Act meant that sexual intercourse with someone who was being unlawfully detained was defined as *rape* under the Act.

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

82 (ibid.:section 3(2)).

83 (ibid.:79 at 174D–E).

that would otherwise apply, but in commenting as he did, Hannah J assumed that the personal circumstances of the accused were mitigating factors without providing any justification for the basis of his reasoning.

As noted earlier, the 'triad' of factors that the court must consider in relation to sentencing are the personal circumstances of the offender, the crime, and the interests of society.[84] However, consideration of the factors in this triad does not require an assumption that the personal circumstances of the accused are mitigating factors in the case at hand.[85]

Of course, in many cases, the accused's personal circumstances will be mitigating. For example, in *S v Keshikule*,[86] Liebenberg J, when considering the personal circumstances of the accused in a rape case, held that –[87]

> … the young age of the accused weighs very heavy with the Court especially when taking into account that he was only 15 years of age when he committed the crime. Until then he had not displayed any behavioural problems or misconduct, despite his upbringing and background being far from ideal … [I] t seems to me that the accused[,] already at a very young age, was left to fend for himself and had to go without the guidance and emotional support of his parents and siblings. Therefore, [the social worker]'s evaluation of the accused having been quite vulnerable at the time of committing the offence of rape is not without merit.

The difference between Liebenberg J's treatment of the personal circumstances of the accused and Hannah J's approach in *Lopez* is that, in *Keshikule*, Liebenberg J gave a reasoned and substantiated explanation of why each personal circumstance of the accused deemed relevant to sentencing had a particular bearing on the appropriate sentence. Unfortunately, the same approach was not adopted in *Lopez*. Perhaps the High Court thought the reasons were self-explanatory. While in many instances that may be so, in *Lopez* there is reason to be critical of the assumptions made by the judge.

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84 See e.g. *S v Shigwedha* (CC 12/2008) [2009] NAHC 33 (13 March 2009) per Liebenberg J at para. 3. The judge continued by saying that "regard must also be had to the objectives of punishment[,] namely prevention, deterrence, rehabilitation and retribution and the Court must endeavour to strike a balance between these factors". See also *S v Musisuwa* (CC 21/2008) [2009] NAHC 66 (3 June 2009) per Shivute AJ at para. 2.

85 In *S v Shigwedha* (CC 12/2008) [2009] NAHC 33 (13 March 2009), Liebenberg J held that "each case has to be considered on its own facts and with regard to sentence, effect must be given therein to the particular personal circumstances of the accused". This should be distinguished from affording the status of mitigating circumstances uniformly to the personal circumstances of the accused without setting out the reasons for doing so.

86 (CC 16/2008) [2009] NAHC 59 (27 May 2009).

87 At para. 5, per Liebenberg J.

One obvious problem with treating personal circumstances as mitigating in *Lopez* is that the circumstances listed include the marriage between the accused and the rape victim ("he has been married to the complainant for about three years"[88]). In effect, the High Court treated the existence of the marriage between the complainant and offender as a circumstance counting in the offender's favour, and as reducing the severity of the crime committed. This appears to be in direct contradiction to the approach of the Act which clearly states, as the learned judge himself recognised, that "the fact that he was married to the complainant constitutes no defence: s.2(3) of the Act".[89] In drafting the Act, the legislature explicitly provided for the situation at hand: namely the rape of one spouse by another, and deemed that crime to be no less significant an offence than if the rape were perpetrated by another person. Therefore, despite clear legislative intention to the contrary, the High Court in *Lopez* held that the existence of a marital relationship between the offender and his victim made the offence less serious.

This decision is significant for two reasons. Firstly, it highlights the need for judges to give reasons for considering factors to be aggravating or mitigating in relation to the sentences they impose. These reasons aid the understanding and appreciation of a judgment for students, academics, legal professionals and other members of the judiciary. But a clear listing of reasons in respect of each factor also ensures that the judge in question directs his mind to the issue of why a particular factor should be aggravating or mitigating, as opposed to broadly grouping factors together on the assumption that they must have a certain impact on the sentence.

Secondly, whilst in this case the High Court found that the personal circumstances considered to be mitigating factors cannot, "standing alone, qualify as substantial and compelling reasons so as to justify the imposition of a lesser sentence than that prescribed as a minimum",[90] the learned judge did find that the "cumulative effect of all the circumstances just mentioned satisfies me that a sentence of ten years' imprisonment would be unjust".[91] The court considered that there were substantial and compelling circumstances to justify departure from the prescribed minimum, and the personal circumstances of the accused, including the fact that the accused and his victim were spouses, were amongst the mitigating factors which led to that conclusion. The judge also considered that, "further, it must be accepted that the complainant, as the appellant's wife of some years[,] was no stranger to having sexual intercourse with him".[92] The use of "further" here suggests that the judge considered this to also be a mitigating factor leading to the conclusion that substantial

88 2003 NR 162 at 174D–E.
89 (ibid.:171A–B).
90 (ibid.:174D–E).
91 (ibid.:174H–I).
92 (ibid.:174G).

and compelling circumstances existed to justify departure from the minimum sentence prescribed by the Act.

I submit that this is a misapplication of the Act. The court has taken the marriage subsisting between the complainant and accused – which the legislature specifically provided should not be available as a defence,[93] clearly intending the courts to deal as harshly with offenders who rape their spouses as any other offender – and used it as a contributing factor for the decision that the crime committed should not attract the minimum sentence prescribed by the Act. However, there is no justification for the judge's assumption that rape is a lesser crime when committed by someone with whom the victim has had previous sexual encounters.[94] An LAC report emphasised that "brutal rapes can and do occur between people who have willingly had sexual relations in the past, because of anger or jealousy or other factors".[95] Furthermore, Schwikkard, who has persuasively criticised the general rule that existed prior to the Act which permitted evidence of prior sexual history, says the evidence obtained pursuant to this rule is "irrelevant", and at most establishes "a general propensity to sexual intercourse".[96] She goes on to say that –[97]

> … evidence of this nature is held to be inadmissible in other cases, and there are no grounds for admitting it where the case is of a sexual nature. The admissibility of this evidence deters victims from reporting the offence.

Although the judge's comment in *Lopez* that the complainant was "no stranger to having sexual intercourse with him" was made during sentencing rather than during the trial to determine the accused's guilt, Schwikkard's criticism is still relevant: the fact that the complainant previously had consensual sex with the offender is irrelevant to the present crime. Moreover, considering the

93 Section 2(3) of the Act says "no marriage or other relationship shall constitute a defence to a charge of rape under this Act".

94 As the LAC report (2006) suggests, the judge's approach implies that "it is more traumatising to be raped by a stranger than a man once loved and trusted". By contrast, the LAC study finding that "shockingly, about one-fourth (25%) of the rapes in the sample involved relatives, spouses or partners – including ex-spouses and ex-partners" led the authors to conclude that "rape constitutes a serious form of domestic violence" (ibid.:187, 181). The existence of a prior relationship could, therefore, be considered an aggravating – rather than a mitigating – factor because of the breach of trust involved.

95 The report states the following (ibid.:111): "The fact is that the previous sexual activity of the complainant cannot possibly tell the court whether or not there was force or coercion in the incident at hand".

96 Schwikkard, Pamela J. 2009. "The evidence of sexual complaints and the demise of the 2004 Criminal Procedure Act". *Namibia Law Journal*, 1(1):22.

97 (ibid.). See also LAC (2006:111–115).

complainant's previous sexual conduct also goes against the intention of the legislature to move –[98]

> … the emphasis away from "absence of consent" to the "presence of coercive circumstances", thus making it clear that the court should focus on what happened in the case at hand, and not on the previous sexual conduct of the complainant.

This analysis of *Lopez* highlights the fact that courts should not consider the personal circumstances of the accused to be a blanket mitigating factor. Rather, they should address each circumstance in turn, and provide reasons if and why each factor should have a mitigating effect on the sentence in the case before considering the cumulative effect of the factors. Furthermore, considering the existence of a marriage between the accused and the complainant as mitigating is a misapplication of the Act: it directly contradicts not only the intention of the legislature in providing that marriage is no defence in rape cases, but also the removal of the consent-based approach from the law on rape. Furthermore, there is no tenable basis for finding that rape committed by a person who has previously had consensual sexual encounters with the complainant is a less serious offence than rape by a stranger.

Conclusion

An examination of how the courts have exercised their remaining discretion after applying the minimum sentences under the Combating of Rape Act reveals an inconsistent and problematic approach to the sentencing of offenders. The application of a minimum sentence under the Act needs to be uniformly viewed as a starting and as an end point: the courts have to address the 'triad' of sentencing factors and determine whether a higher sentence should be imposed, or indeed if there are substantial and compelling reasons to award a sentence below the statutory minimum. In balancing the aggravating and mitigating factors, courts should consider whether a circumstance which invoked a minimum sentence also has a further aggravating affect. In addition, judges should exclude from consideration the absence of section 3 circumstances as mitigating factors, or else the result will be factually illogical and untenable sentences, and injustices in sentencing equality between respective offenders. Moreover, offenders should not benefit from their intoxication being considered a mitigating factor, especially where they cannot adduce evidence to prove that the intoxication affected their blameworthiness. The court also needs to assess the effect that each personal circumstance has on the appropriate sentence, and should refrain from making assumptions about the existence of a relationship between the accused and the complainant, particularly where this flies in the face of clear legislative intent.

98 LAC (2006:111).

The current inconsistency in the judiciary's approach in all four of the areas delineated in this discussion has resulted in illogical sentences which go against the spirit of the Act. In all these areas, the offender has benefited from the misapplication of judicial discretion since the errors in reasoning have favoured the mitigating and diminished the aggravating factors. Given the prevalence of rape and sexually motivated crime in Namibia, a strong, clear and consistent response is needed that offers justice in the interests of both complainants and offenders. The Act has gone a long way towards achieving this goal and the judiciary now needs to re-examine the exercise of its discretion to fully realise this ambition.

Monitoring and enforcement of financial reporting standards in South Africa and Germany: A comparative assessment[1]

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Abstract

This article scrutinises the procedures set out in South Africa and in Germany to monitor and enforce companies' compliance with financial reporting standards.

It concludes that (1) the South African system subjects a wider range of companies to investigative scrutiny than the German system does; (2) whereas South Africa operates a straightforward one-stage system which is dominated by administrative law (investigations by the Companies and Intellectual Property Commission and a compliance notice procedure), Germany operates a two-stage procedure consisting of a consensual investigation at the first stage (governed by private law only), and, where applicable, a compulsory investigation at the second stage (governed by administrative law); (3) the German system relies on mere adverse publicity, while the South African system enforces rectification of non-compliant financial statements; (4) the German system provides for an internal administrative review, while the South African system grants a judicial administrative review. Both systems allow a subsequent full appeal to the court.

Introduction

In South Africa, a new enforcement procedure as regards compliance with financial reporting standards (hereinafter *FRSs*) is about to be introduced by virtue of the Companies Act, 2008 (No. 71 of 2008; hereinafter *the new Companies Act*).[2] Its cornerstone is the Companies and Intellectual Property

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2 As per section 225 of the new Companies Act, the earliest date at which this

Commission (hereinafter *the Commission*) and the compliance notice procedure, as well as the review of compliance notices by the Companies Tribunal.

In Germany, in order to monitor and enforce compliance with accounting practices – in particular, as regards consolidated financial statements, compliance with the European Union's International Accounting Standards – a new *Enforcement-Verfahren* ("enforcement procedure") was introduced in 2004.[3] This *Enforcement-Verfahren* consists of two stages. The first is performed by the *Deutsche Prüfstelle für Rechnungswesen* (DPR, "Financial Reporting Enforcement Panel").[4] The DPR is to a large extent modelled on the English Financial Reporting Review Panel.[5] In the second stage, the powerful *Bundesanstalt für Finanzdienstleistungsaufsicht* (BaFin, "Federal Financial Supervisory Authority")[6] in Frankfurt steps in.

The *Enforcement-Verfahren* is a hybrid procedure. Its first stage is governed entirely by unenforceable private law, while its second stage is governed by enforceable administrative law. The *Enforcement-Verfahren* is designed to cope with the vast majority of investigations in the course of the first stage. BaFin's involvement is intended to be only residual.

The Commission has its legal basis in Part A of Chapter 8[7] as well as Parts D and E of Chapter 7[8] of the new Companies Act. Procedural aspects of complaints to and investigations by the Commission as well as of adjudications by the Companies Tribunal are dealt with by the Draft Companies Regulations 2010 (Chapter 7).[9] The DPR has its legal basis in the German Commercial Code (notably section 342b),[10] whereas BaFin has its legal basis in section 37n onwards of the German Securities Trading Act.[11]

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legislation could have taken effect was 9 April 2010. At the time of writing this article (15 September 2010), it did not seem likely that it would become effective before the end of the third quarter of 2010.

3 See Grossfeld, B & C Luttermann. 2005. *Bilanzrecht* (Fourth Edition). Heidelberg: CF Müller, margin numbers 1794–1796.

4 (ibid.:margin numbers 146–147); see www.frep.info; last accessed 1 August 2010.

5 Gelnhausen, HF & H Hönsch. 2005. "Das Enforcement-Verfahren für Jahres- und Konzernabschlüsse". *Die Aktiengesellschaft (AG)*, 13–14:512.

6 See www.bafin.de; last accessed 1 August 2010.

7 Sections 185–192.

8 Sections 168–179.

9 Draft Companies Regulations 134–154. See General Notice 1664 in *Government Gazette* 32832 of 22 December 2009.

10 *Handelsgesetzbuch* (HGB) of 10 May 1897 as amended by the Act of 31 July 2009.

11 *Wertpapierhaftungsgesetz* (WpHG) of 9 September 1998, as amended by the Act of 5 January 2007.

While the process of globally harmonising and converging FRSs has progressed tremendously over the past decade,[12] the harmonisation of the pertinent enforcement procedures, oddly, has not.[13] Even the European Union (EU) which, by law, standardised FRSs for its member states in 2002 by adopting the International Accounting Standards Board's International Financial Reporting Standards (IFRSs) as EU law has thus far not managed to enact an EU enforcement procedure.

The need for a comparative perspective on enforcement procedures thus persists.[14] Germany is widely believed to have designed a progressive and modern monitoring and enforcement procedure. It has now been tried and tested for more than five years. Hence, the *Enforcement-Verfahren* seems to be a good point of reference for a critical evaluation of the new South African monitoring and enforcement procedure.

This article pursues the following objectives:

- To illustrate differences between the South African and German systems of monitoring and enforcement of FRSs
- To draw attention to certain deficiencies in the new Companies Act as regards its provisions on the administrative review of the Commission's decisions by the Companies Tribunal, and
- To point out the extent to which the new South African compliance notice procedure is governed by the Promotion of Administrative Justice Act15 (PAJA).

Who investigates and enforces compliance with FRSs?

South Africa

Under the new Companies Act,[16] the chief institution responsible for investigating alleged non-compliance with FRSs as well as for their subsequent enforcement is the Commission. In contrast, the Financial Reporting Standards Council (FRSC)[17] plays no role in either investigating non-compliance or enforcing compliance with FRSs.[18] Its primary purpose

12 Sacho, ZY & FGI Oberholster. 2008. "Factors impacting on the future of the IASB". *Meditari Accountancy Research*, 16(1):117.

13 (ibid.:130).

14 See DPR/Deutsche Prüfstelle für Rechnungswesen. 2009. *Annual Activity Report*. Available at http://www.frep.info/docs/jahresberichte/2009/2009_tb_pruefstelle.pdf [2010; last accessed 15 September 2010.

15 No. 3 of 2000.

16 No. 71 of 2008.

17 Sections 203–204.

18 See Schmidt, R, P Sutherland, CJ van Schalkwyk & T Lowe. 2010. "The Financial

is to be an advisory forum[19] to the Minister of Trade and Industry and, as such, it only has non-binding drafting powers as regards FRSs. These drafting powers extend to improvements to existing FRSs as well as to the adaptation of international reporting standards to South African needs. As emanates from the Draft Companies Regulations,[20] the FRSC's advisory role with regard to the International Accounting Standards Board's IFRSs consists in approving them for use in South Africa before the Minister subsequently decides on enacting them as Regulations. The Commission and the FRSC interact in so far as the Commission makes recommendations to the FRSC for amendments to FRSs.[21]

A complaint can be brought before the Commission alleging that a person has "acted in a manner inconsistent with *this Act*".[22] The term "*this Act*" is defined in section 1 as including regulations. The future South African FRSs will be promulgated as regulations.[23] A complaint of alleged non-compliance by a company with FRSs can, thus, be brought before the Commission.

Any person, natural or juristic, can file a complaint.[24] The Draft Companies Regulations set out detailed procedures as to Commission complaints.[25] Although it is possible to withdraw a complaint, it is left to the Commission's discretion to continue its investigation after such withdrawal.[26] A complaint may also be initiated by the Commission itself on its own motion.[27]

A complaint may only be initiated by, or made to, the Commission within three years after the event that gives rise to the complaint occurs,[28] i.e. within three years after the publication by the company of the non-compliant financial statements.

While section 168(2) is silent on this issue, investigations by the Commission are not solely indication-based. The Draft Companies Regulations[29] provide

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Reporting Standards Council and its role in terms of the Companies Act 61 of 1973 and the Companies Act 71 of 2008". *Tydskrif Vir Regswetenskap*, 35(2):28–48.

19 See section 204(b) ("advise the Minister") and section 204(c) ("consult with the Minister"); see also the Explanatory Memorandum to Companies Bill B61D–2008, item 3 ("advisory committee").

20 Draft Companies Regulation 28(1).

21 Section 187(3)(b).

22 Section 168(1)(b), read with Draft Companies Regulations 136(d)(i) and 139(1); emphasis added.

23 Section 29(4)–(5), read with section 223.

24 Section 168(1).

25 Draft Companies Regulations 139–146.

26 Draft Companies Regulation 140.

27 Section 168(2), read with Draft Companies Regulation 136(d)(ii).

28 Section 219(1).

29 Draft Companies Regulation 32(5).

for investigations based on sampling as well. The population for this sampling is, however, limited to a subset of companies: the sample is drawn from the financial accountability supplements[30] filed with the Commission and, thus, captures only companies which are not required by law[31] to have their annual financial statements audited.[32]

The Commission is a statutorily established juristic person,[33] referred to by the Act as a *regulatory agency*.[34] The Act emphasises that the Commission is independent.[35] This independence has its limits, however, since the Minister has the power to direct the Commission to initiate an investigation.[36]

Germany

The DPR is a private body, in the form of a registered association (*eingetragener Verein*) with juristic personality.

There are three types of DPR enforcement investigations – or *examinations*, as they are referred to by the DPR:[37]

- Random sample investigations
- Investigations requested by BaFin, and
- Indication-based investigations, in circumstances where there are specific indications of non-compliance with financial reporting requirements.

As per its annual activity report, the DPR has a target corridor of 110–140 sampling investigations per year in order to ensure a cycle of investigating all publicly traded companies (approximately 1,000) every 8 to 10 years.[38] Thus,

30 Draft Companies Regulation 32(4), read with Draft Companies Regulations 32(3)(b)(ii) and 32(3)(c).

31 See section 30(2) and section 30(7)(a), read with Draft Companies Regulation 29.

32 Namely companies in terms of Draft Companies Regulations 32(3)(b)(ii) and 32(3)(c).

33 Section 185(1).

34 See the heading of Chapter 8 in the new Companies Act ("Regulatory Agencies and Administration of the Act").

35 Secion 185(2)(b).

36 Sections 168(3), 187(2)(d) and 190(2)(b), read with Draft Companies Regulation 136(d)(iii).

37 See DPR/Deutsche Prüfstelle für Rechnungswesen. 2005. *Code of Procedure of the FREP*. Available at http://www.frep.info/pruefverfahren/verfahrensregelungen_en.php; last accessed 1 August 2010.

38 See DPR (2009). In 2009, 118 companies were investigated, of which 103 were sampling investigations and 15 were indication-based investigations. Accounting errors were found in 23 cases. See also "Germany" below, under the heading "What are the consequences, if accounting errors (non-compliance with FRSs) are detected?".

the population from which the sample is drawn differs considerably from the population from which the South African Commission draws its samples.[39]

In contrast to the DPR, BaFin is not a private body. It is an independent institution with juristic personality which is part of the federal public administration, but is positioned outside the federal administrative hierarchy. BaFin's primary objective is to guarantee the functioning, stability and integrity of the German financial system. BaFin has the power to instruct the DPR to initiate an investigation[40] as well as the power to define the scope of such an investigation.[41] Furthermore, it has the power to initiate its own investigation of a company.[42]

Who is investigated and is subject to the enforcement procedure?

South Africa

In terms of the new Companies Act, any company that provides financial statements, i.e. not only those listed on the Johannesburg Stock Exchange (JSE), has to comply with FRSs.[43] The Act provides that the Minister may prescribe different standards for each of the various categories of companies.[44]

As emanates from section 219(1)(a) of the new Companies Act, only financial statements that were issued during the preceding three years are subject to scrutiny.

Furthermore, listed companies are subject to separate enforcement procedures under the JSE Limited's Listings Requirements.[45] From the Draft Companies

39 See also "South Africa" above, under the heading "Who investigates and enforces compliance with FRSs?".

40 This rarely happens; for example, it did not happen once in 2009.

41 Section 342(b)(2) No. 2, HGB, read with section 37p(2) WpHG.

42 See "Germany", under "Investigation procedure" below. BaFin completed 36 such stage 2 investigations in 2009, 35 of which detected accounting errors; see DPR (2009).

43 Section 29(1)(a).

44 Section 29(5)(c), read with section 8.

45 See Johannesburg Stock Exchange. 2010. *JSE Limited Listings Requirements as at 17 February 2010* (Second Edition, Service Issue 13). Johannesburg: JSE. As per Listings Requirement (hereinafter "LR") 3.1, listed companies are required to comply with the Listings Requirements. As regards a company's annual financial statements, the LRs prescribe minimum standards, in particular compliance with IFRSs (defined as the International Accounting Standards Board's IFRSs); see LR 8.62(b). Procedures for non-compliance are set out in LRs 3.23ff. These procedures range from an initial letter of reminder, an annotation attached to the company's

Regulations it clearly emanates[46] that, as regards public companies listed on the JSE, in the case of any conflict of the applicable JSE Limited Listings Requirements with IFRSs,[47] the latter will prevail.

Germany

In Germany, any company of any country whose debt and equity instruments are admitted to trade on the *Regulierter Markt* ("Regulated Market")[48] of one of the German Stock Exchanges, notably the *Frankfurter Wertpapierbörse* (FWB, "Frankfurt Stock Exchange"/FSE)[49] is subject to the *Enforcement-Verfahren*.

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listing (namely "RE" in order to indicate to the market that the company has failed to submit its annual financial statements in time), and the release by the JSE of an announcement over SENS (the JSE's News Service) informing the shareholders of the company's non-compliance, to the suspension and eventual termination of the listing.

46 Draft Companies Regulation 28(2).

47 Draft Companies Regulation 28(2) refers to "IFRS" as defined in Draft Companies Regulation 28(1). These are the IFRSs as adopted by the International Accounting Standards Board and as approved by the FRSC (see "South Africa" above, under "Who investigates and enforces compliance with FRSs?"). Only once they have subsequently been enacted by the Minister as a regulation (sections 29(4)–(5), read with section 223) do they become "Financial Reporting Standards" as defined in section 1 of the new Companies Act.

48 Until 1 November 2007, the present-day *Regulierter Markt* was made up of two different market segments, namely the first-tier *Amtlicher Handel* ("Official List", whose counterpart was the JSE's Main Board Listing) and the second-tier *Geregelter Markt*. Regarding these two previous market segments, see Schmidt, R & P Kloppers. 2003. "The Official List of Frankfurt Stock Exchange and Main Board Listing on the Johannesburg Stock Exchange compared". *South African Mercantile Law Journal*, 15(2):174. With the establishment of the *Regulierter Markt*, the *Geregelter Markt* and the *Amtlicher Handel* were merged and the listing requirements and post-listing obligations of the *Amtlicher Handel* are now applicable to all companies admitted to the *Regulierter Markt*. The newly created *Regulierter Markt* was segmented, in turn, into the residual *General Standard* and the (higher) *Prime Standard*. Inclusion in the Prime Standard is a presupposition for being eligible to be included in the DAX. The Prime Standard imposes considerably stricter post-listing disclosure obligations on companies than the General Standard does; see Regulations 65–70 of the *FWB Börsenordnung* ("FSE Regulations"). Notably, according to Regulation 65 of the FSE Regulations, companies listed on the Prime Standard have to submit to the FSE financial statements which comply with the EU's International Accounting Standards (EU–IASs). Regarding the FSE Regulations as at 8 March 2010, see FSE/Frankfurt Stock Exchange. 2010. *Börsenordnung für die Frankfurter Wertpapierbörse*. Available at http://deutsche-boerse.com/dbag/dispatch/de/kir/gdb_navigation/info_center/25_FWB_Information/20_FWB_Rules_Regulations?teaser=Regelwerk; last accessed 15 June 2010.

49 There are several German stock exchanges. Among them, the role of the FSE is pre-eminent. In 2009, more than 80% per cent (by turnover) of all securities deals on German exchanges were carried out on the FSE. See www.deutsche-boerse.com;

As at 15 June 2010, there were 970 such companies. At present, no South African or Namibian company is listed on this market segment of any of the German stock exchanges. Two South African companies[50] currently trade on the second-tier *Freiverkehr* ("Open Market") of German stock exchanges. The bulk of all foreign companies trading on German exchanges are found in this segment. The regulation of the *Freiverkehr* is comparatively light.[51] Notably, companies trading on the *Freiverkehr* are not subjected to the *Enforcement-Verfahren* and the DPR's investigations.

Only the most recent set of financial statements is subject to the *Enforcement-Verfahren*.[52] Furthermore, companies listed on the *Regulierter Markt* of the FSE are subject to a separate enforcement procedure under the FSE Regulations (*Frankfurter Wertpapierbörse Börsenordnung*).[53]

Can a company refuse to be investigated?

South Africa

Under the new Companies Act, a company cannot refuse to be investigated. The Act does not even require the Commission to notify the affected company of its decision to investigate or of the initiation of an investigation. Thus, in practice, the earliest point in time at which a company will become aware of an investigation having been launched is when the Commission's inspectors or investigators contact it requesting documentation.

Germany

Since an investigation by the DPR is entirely consensual, the DPR can only investigate a company's financial statements if the company concerned agrees. If the company refuses to cooperate, the DPR has no further powers and its investigation will, thus, not take place. The second stage of the *Enforcement-Verfahren* will kick in at this point: the matter will simply be handed over to BaFin, which then decides on whether it will launch an investigation itself. This

last accessed 1 April 2010. To keep matters simple, only the FSE is mentioned in this article.

50 Harmony Gold Mining Ltd (www.harmony.co.za; last accessed 1 January 2010) and Highveld Steel and Vanadium Corporation (www.highveldsteel.co.za; last accessed 1 January 2010).

51 See Schmidt & Kloppers (2003:174).

52 Section 342(b)(2) of the HGB.

53 As regards a company's annual financial statements, Regulations 62(1) and 70(2) of the *FWB Börsenordnung* set out procedures for non-compliance. These procedures are to be followed if the company does not comply with EU–IASs. Ultimately, the *FWB Börsenordnung* provides for the FSE's management to terminate a company's listing.

time, the company has no choice: it has no right to refuse to be investigated by BaFin. BaFin can enforce any investigation.

Do the Commission, the DPR and BaFin, respectively, perform administrative actions?

South Africa

If the Commission's activities are *administrative actions*, then the principles of just administrative action as set out in the PAJA apply. Furthermore, the new Companies Act makes it clear that, if there is an irreconcilable inconsistency between a provision of the new Companies Act and a provision of the PAJA, the PAJA will prevail.[54] No similar provision was included in the old Companies Act.[55]

As per section 1 of the PAJA, *administrative action* is defined as –

> … any decision taken ... by ... (a) an organ of state, when ... exercising a public power or performing a public function in terms of any legislation; or (b) [by] a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect ... .

This definition further lists a catalogue of exclusions (in particular executive, legislative and judicial functions) which are, however, not relevant for current purposes. An *organ of state* is defined in section 239 of the Constitution of the Republic of South Africa[56] as –

> ... any ... administration in the national ... sphere of government; or (b) any other functionary or institution ... exercising a public power or performing a public function in terms of any legislation ... .

In terms of the PAJA's definition of *administrative action*, the Commission makes "decision[s]". For instance, in terms of section 169 of the new Companies Act, the Commission decides whether or not to investigate a company; in terms of section 170, it decides whether to excuse someone as a respondent in a complaint, whether to issue a compliance order, whether to refer complaints to the Tribunal, whether to issue a notice of non-referral, and whether to publish an inspector's report.

54 Section 5(4)(b)(dd).

55 No. 61 of 1973.

56 Constitution of the Republic of South Africa, 1996, as amended by the Constitution Fifteenth Amendment Act of 2008.

Section 185(1) of the new Companies Act explicitly refers to the Commission as an "organ of state". When tested against the definition of *organ of state* in the higher-ranking section 239 of the Constitution, the following emerges: the Commission is easily encompassed by the broad phrase "any other functionary or institution". Furthermore, it is engaged in the service of the public, namely the monitoring of and investigating compliance with FRSs,[57] and thus performs a "public function". Since it performs this function in terms of the Companies Act, it also meets the requirement "in terms of any legislation". The Commission is, thus, an *organ of state* as defined in section 239 of the Constitution.

As to whether the Commission's decisions "adversely affect[...] the rights of any person", two groups of persons may potentially be affected: the allegedly non-compliant company on the one hand, and the complainant on the other. Yet this begs the question as to which of their rights could possibly be "affect[ed]", namely determined or taken away.

One such right could be the right to just – lawful and procedurally fair – administrative action in terms of section 33 of the Constitution. Both the complainant and, by virtue of section 8(4) of the Constitution, also a juristic person such as a company have this right. This was the approach adopted by Schutz JA in *Transnet Ltd v Goodman Brothers (Pty) Ltd*.[58] Hoexter[59] as well as Currie and Klaaren,[60] however, reject this approach, and submit that the PAJA conditions the holding of the rights it grants on an adverse effect to a right outside of those rights provided by the PAJA. Taking a broader notion of "rights", as suggested by the decisions *Bullock v Provincial Government, North West Province*[61] and *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*,[62] a company could probably be said to have a "right[…]" – in terms of a "legally recognised interest" – in its own share price, which could be affected if the company is being investigated as a consequence of the Commission's decision to do so.

As regards the complainant, finding an affected "right[…]" ("interest") is more difficult. Surely, the complainant's right to a complaint in terms of section 168 of the new Companies Act is not affected, since s/he can in fact complain – even if the Commission subsequently decides not to investigate that complaint.[63] Could a complainant have the right to the effect that the new

57 Section 187(2)(b) and (e).
58 2001 1 SA 853 (SCA) paras 11–12.
59 Hoexter, C. 2007. *Administrative law in South Africa*. Durban: LexisNexis, p 202.
60 Currie, I & J Klaaren. 2001. *The Promotion of Administrative Justice Act benchbook.* Claremont: Silver Ink, p 81.
61 2004 (5) SA 262 (SCA) para. 19.
62 1999 2 SA (CC) para. 31.
63 Section 169(1)(a), read with Draft Companies Regulation 139(2).

Companies Act (in particular section 29(1)(a)) is complied with? Given that non-compliance with FRSs constitutes "act[ing] in a manner inconsistent with this [Companies] Act" in terms of the first alternative of 168(1)(b), such a right might be conceivable. This interpretation can, however, only be reconciled with difficulty with the second alternative of section 168(1)(b), which explicitly speaks of "the complainant's rights under this Act" and seems to distinguish these from the scenario envisaged by the first alternative of 168(1)(b).

Thus, while a complainant, if s/he is a member of the general public, might have trouble substantiating that his/her rights are affected by the Commission's decision, this is in fact not required by the PAJA's definition of *administrative action*. The definition merely speaks of the rights of "any" person. Hence, it is sufficient if the complainant submits that someone else's rights are affected. The problem arising for the complainant then, however, is whether s/he has locus standi at all to do so. This issue of standing is entirely separate from the substance of a case. It is a question to be decided in limine before the merits of the case are considered. The traditional common-law rules of standing were quite restrictive and posed a major obstacle as regards access to the courts. In particular, they did not allow an action in the interest of the public (actio popularis, "public interest action"). Section 157 of the new Companies Act, however, contains rules of extended standing, and section 157(1)(d) even allows an action in the public interest.

Apart from members of the general public, other categories of complainants can more easily substantiate a "right[…]" (or "interest"). These are, in particular, the company's shareholders, its directors, and its competitors. It is noteworthy that the term *right* is not restricted to constitutional rights, but can mean statutory and private-law rights, such as contractual and delictual rights, as well.[64] Shares of the company in the hands of the shareholders are the shareholders' assets. As assets, they constitute "property" in terms of section 25 of the Constitution, and this right might be affected by the Commission's or Companies Tribunal's decision if the share price drops as a consequence of such decision.

The company's directors might face contractual or delictual liability as a consequence of the Commission's or Tribunal's decision that the company has not complied with FRSs. Thus, the directors' rights or legally recognised interests are affected as well.

A company's competitor might also claim to be negatively affected by a Commission or Tribunal decision which is favourable to the company investigated, and might invoke section 9 (the equality clause) of the Constitution.

64 Currie & Klaaren (2001:80).

Thus, the rights of the company, as well as the rights of certain categories of possible complainants can be affected by the Commission's decisions. In contrast, the rights of a member of the general public will probably not be affected.

These decisions affect the investigated company "adversely" since the Commission's decision to investigate places a burden on the company to produce documents, and the decision to issue a compliance notice burdens the company with the obligation to rectify its financial statements. As regards the complainant, a notice of non-investigation[65] "adversely" affects him/her, since the matter may need to be taken to court.

Furthermore, the Commission's decisions need to have a "direct, external legal effect" in order for *administrative action* to have taken place. This part of the definition of *administrative action* has caused much controversy. The phrase "direct, external legal effect" was copied by the PAJA directly from German administrative legislation.[66] In the Constitutional Court's decision on *Minister of Health v New Clicks SA (Pty) Ltd*,[67] Chaskalson CJ pointed out that –

> … certain of its [the PAJA's] provisions have been borrowed from German ... law. PAJA must, however, be interpreted by our Courts in the context of our law and not in the context of the legal systems from which provisions may have been borrowed.

In the South African context, according to De Ville[68] the phrase *legal effect* means that the decision has to have "a discernable effect on an individual", which is an even broader meaning than the original German meaning of "legally binding". According to Hoexter,[69] the phrase *direct effect* refers to "immediacy" or "finality", and is able to capture the common-law idea that administrative action needs to be ripe before it can be reviewed.[70] In German law, the term *external effect* is –[71]

65 Section 169(1)(a), read with Draft Companies Regulation 139(2).

66 Section 35 of the *Verwaltungsverfahrensgesetz* (Administrative Procedure Act) of 25 May 1976, as amended by the Act of 14 August 2009. See Pfaff, R & H Schneider. 2001. "The Promotion of Administrative Justice Act from a German perspective". *South African Journal on Human Rights*, 17(1):70; Burns, Y & M Beukes. 2006. *Administrative law under the 1996 Constitution* (Third Edition). Durban: LexisNexis, p 147; Hoexter (2007:204) and Currie, I. 2007. *The Promotion of Administrative Justice Act – A commentary* (Second Edition). Tokai: Silver Ink, p 84.

67 2006 (2) SA 311 (CC) para. 142.

68 De Ville, J. 2005. *Judicial review of administrative action in South Africa* (Revised First Edition). Durban: LexisNexis, p 55.

69 Hoexter (2007:205).

70 (ibid.:206, 519).

71 Pfaff & Schneider (2001:73).

> … aimed at excluding administrative measures that are taken within the sphere of public administration. This means that only administrative action that affects a person different from the authority that has engaged in the action can be said to have external effect.

Thus, the measure has to affect outsiders and should not be a purely internal matter of departmental administration. Hoexter[72] is of the opinion that the word *external* adds nothing in the South African administrative law context. Instead, she argues that distinguishing between internal and external acts is "a non-issue at [South African] common law". De Ville supports this view.[73] Burns and Beukes submit that the entire phrase *direct, external legal effect* limits the scope of the constitutionally guaranteed right to just administrative action and, therefore, question whether this phrase is indeed constitutional at all.[74] Thus, there seems to be a consensus emerging among South African academics that the requirement of "external effect" is – contrary to its original German meaning as expressed by Pfaff and Schneider – rather to be read down or even to be ignored. The case law is not settled as yet in this regard: *SAPU v National Commissioner of the SAPS*[75] reasoned broadly in the line of the German meaning of the requirement, while *Nxele v Chief Deputy Commissioner, Corporate Services, Department of Correctional Services*[76] read the requirement down.

Certainly, the Commission's decisions to issue a compliance notice, issue a notice of non-referral, or excuse someone as a respondent in a complaint do determine rights in a legally binding way[77] and, thus, all have a "legal effect". Furthermore, all of these decisions are final (ripe) and, thus, have a "direct effect". All of these decisions also affect persons outside the administration (the complainant and the company, respectively) and, thus, have an "external effect" – assuming that this requirement is relevant at all in the South African context.

At the stage of the Commission's initial decision to investigate a particular company (as opposed to the Commission's action taken as a result of its decision to investigate, for example, appointing and instructing an inspector, or the conduct of the investigation itself), it would be difficult to prove any "direct effect". The mere decision to investigate does not yet have any immediate effect on the company; thus, one would have to say that this decision is not yet ripe for review. Furthermore, given that the new Companies Act does not provide for notification of the relevant company regarding the Commission's intention to investigate or any publication of this intention, an "external effect"

72 Hoexter (2007:206).
73 De Ville (2005:58).
74 Burns & Beukes (2006:149).
75 2005 (26) ILJ 2403 (LC) para. 57.
76 2006 (10) BLLR 960 (LC) para. 74.
77 See section 171(2) and (5), and section 170(1)(c).

of the mere decision to investigate would also be hard to find. Yet this begs the question as to what the earliest point is at which an "external effect" may arise. The inspector's investigative activities will form the basis for his/her report, and the report will in turn be the basis of the Commission's decision. Hence, the inspector's investigative activities already have the capacity to affect the investigated company's rights, since they lay the foundation for the Commission's subsequent decision, which could have grave consequences for the company. It is submitted, therefore, that *administrative action* occurs at the earlier of either the beginning of the inspector's investigative activities or the point at which the company's actual or prospective business partners become aware of the planned investigation of the company. The recent decision in *Oosthuizen's Transport v MEC, Road Traffic Matters*[78] supports this view.

In summary, with the exception of the Commission's initial decision to investigate a company, its actions constitute *administrative action* in terms of section 1 of the PAJA, and the provisions of the PAJA are applicable to such actions. The new Companies Act and the PAJA apply concurrently, therefore.[79] In the event of an irreconcilable inconsistency between their respective provisions, the provision of the PAJA prevails over that of the new Companies Act.[80]

Germany

From a South African perspective and South Africa's definition of *administrative action* in section 1 of the PAJA, BaFin's activities would undoubtedly be classified as *administrative action*. Given the considerable degree of similarity between South African and German administrative law, in particular as regards the definition of *administrative action*, it is not surprising that this is so, namely that BaFin's activities constitute administrative actions: BaFin is part of the federal public administration, and it performs a public function (monitoring and enforcement of compliance with IFRSs) in terms of national legislation (the German WpHG). Thus, it is governed by administrative law, and its actions vis-à-vis an investigated company are, thus, *administrative actions*. German administrative law applies and, thus, so do the principles of administrative procedural fairness.

As regards the DPR's activities from a South African perspective, again in terms of section 1 of the PAJA, the DPR makes a "decision[…]" (namely the decision to initiate investigations); it "perform[s] a public function" (namely monitoring compliance with IFRSs and performing enforcement investigations), and it does so "in terms of an empowering provision" (namely section 342(b) of the

78 2008 (2) SA 570 (T) 579D–E.
79 Section 5(4)(a) of the new Companies Act.
80 Section 5(4)(b)(i)(dd).

HGB). Providing information and documentation imposes a burden on the investigated company; thus, provided the company has agreed beforehand to be investigated, the DPR's decision to investigate it "adversely affects" it. Whether any "rights" of the company are affected seems to be more difficult to establish. The company's right to undisturbed trading or its right not to have its share price affected by a compulsory publication of a detected accounting error in its financial statements might, however, suffice.

Finally, the DPR's decision has to have a "direct, external legal effect" on the company. The effect is indeed "external", since the company is an entity outside the public administration. The effect is also "direct", since there is no statutory review procedure regarding the DPR's decision to investigate. The effect is, however, not "legal": the rights and duties of the company to be investigated are not determined by the DPR's actions (its request to investigate); such company can simply refuse to be investigated.

The fact that the DPR is a private body which exercises a public function further raises the issue as to whether such bodies are subject to the principles of just administrative action.[81] South African courts have on several occasions dealt with the issue regarding whether private bodies are in fact able to exercise public functions.[82] They have also discussed whether such bodies are subject to the principles of just administrative action. These cases usually involved Rugby or Cricket Boards – most famously in *Hansie Cronjé v United Cricket Board of South Africa*.[83] However, most of these cases were characterised by the fact that the affected private individual or company was a member of, or had contractual relationships with, the private body in question, and the private-law constitutions of the respective private bodies gave it coercive and disciplinary powers over the private individual or corporate member, thereby creating a relationship of inequality. This relationship is different from the one between the DPR and the company to be investigated. Firstly, the company is not a member of the DPR. Secondly, the company can simply say "No" to an intended investigation, whereafter the DPR itself has no further powers. There is, thus, no relationship of inequality. From the perspective of South African administrative law, therefore, the DPR's activities would probably not be regarded as *administrative action*. The position is, according to overwhelming opinion, the same in Germany. It also clearly emanates from the Explanatory Memorandum to section 342(b) of the HGB.[84] Therefore, the DPR is not an administrator and does not perform administrative actions. In other words,

81 Burns & Beukes (2006:140).

82 For example, *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 433 (W).

83 2001 (4) SA 1361 (T).

84 Wojcik, K-P. 2008. *Die internationalen Rechnungslegungsstandards IAS/IFRS als europäisches Recht*. Doctoral thesis (University of Cologne). Berlin: Duncker & Humblot, p 327.

German administrative law and principles of administrative procedural fairness do not apply to its actions. This is a marked difference between investigations performed by the DPR and those undertaken by BaFin.

Investigation procedure

South Africa

If the Commission decides to investigate a matter, it may designate or appoint an "inspector" or "investigator".[85]

Both the terms *inspector* and *investigator* are legally defined in section 1 of the new Companies Act. These definitions simply refer to section 209. However, section 209(1) and (2) deal explicitly with inspectors only. Section 209(3) only speaks broadly of a contracted or appointed "person". From the reference in the legal definition of *investigator* in section 1 to section 209 as well as from section 209(3) ("a person appointed in terms of this subsection is not an inspector"), it follows that section 209(3) refers to investigators.

As per section 209(1), inspectors are to be employed by the state, and can thus be chosen from among the employees of the Commission. In contrast, investigators are appointed or contracted from outside. The powers of inspectors are wider than those of investigators. As emanates from section 176(1)(a) and (3) ("inspector or ... investigator"), both are empowered to question persons who have been summoned before them by the Commission. However, only an inspector may be granted the additional authority by a court to enter and search a company's premises.[86] The authority to enter and search requires an advance judicial warrant.[87] The broad wording of section 177(1)(b) seems to allow for an inspector to search the premises of the company's auditors as well.

The Commission has the power to issue a summons[88] to the investigated company's board members to appear before such Commission or one of its inspectors for questioning. The wide wording of section 176(1), namely "any person who is believed to be able to furnish any information on the subject of the investigation", seems to be for the summoning of the company's auditor as well as even its majority shareholders. However, the person summoned does not have to give self-incriminating answers.[89]

85 Section 169(1)(c) and 169(2)(a).
86 Section 177(2)(b).
87 Section 177(1).
88 Section 176(1), read with Draft Companies Regulation 143(2).
89 Section 176(4)(a).

The new Companies Act is silent on the investigation procedure to be followed by an inspector or the Commission. This gap is only partly filled by the Draft Companies Regulations.[90] Given that the conduct of an investigation amounts to "administrative action" in terms of section 1 of the PAJA,[91] the principles of just and procedurally fair administrative action as set out in the PAJA apply. It does not matter, therefore, that there is no longer any provision in the new Companies Act equivalent to section 440Z(1)(b)(2) of the old Companies Act,[92] which empowered the former Financial Reporting Investigation Panel to set up its own investigation procedures in line with PAJA requirements.

At the end of his/her investigation, the inspector delivers an investigation report to the Commission.[93]

Germany

For each particular DPR investigation, a member of the DPR is designated as the investigator-in-charge and is responsible for performing all investigative activities.[94] S/he answers to the specific DPR *Kammer* ("chamber") to whom the investigation has been assigned, and is bound by its instructions. The *Kammer* is responsible for the ultimate findings of an investigation. There are several *Kammern* within the DPR in order to cope with the DPR's workload. Each comprises three DPR members, and makes decisions by majority vote. The investigator-in-charge is not part of the *Kammer* to which s/he reports.

Once the company's board has agreed to cooperate in the DPR's investigation, the assigned DPR *Kammer* will set specific focus areas for the investigation based on the documents received from the company. The investigation is, thus, not a full-scale audit. Notably, it is not aimed at the company's internal control system,[95] but is limited to accounting errors only. The company's board members do not have to give self-incriminating answers. The investigator-in-charge performs the investigation according to the set investigation plan and is subject to review by the *Kammer's* designated Quality Control Member (who is not a member of the investigating *Kammer*). Based on the results of the investigation, the *Kammer* decides whether the company's reporting complies with the required standards or whether it contains errors. Thereafter, the *Kammer* notifies both the company and BaFin of the result, and, in the event erroneous accounting was detected, further requests that the company

90 Only Draft Companies Regulation 143 (Commission notice to investigate) and Draft Companies Regulation 144 (Request for additional information) detail certain investigation procedures.

91 See "Germany" above, under the heading "Do the Commission and the DPR and BaFin, respectively, perform administrative action?".

92 No. 61 of 1973.

93 Section 170(1).

94 As per the DPR's Code of Procedure; see DPR (2005).

95 Gelnhausen & Hönsch (2005:513).

state whether or not it agrees with the results. In either case, at that stage, the DPR's competence to decide on the matter comes to an end.

In practice, the DPR works speedily and the DPR's approach is pushy, to say the least. Companies usually get set very tight deadlines from between a few days to a fortnight to respond to the DPR's questions and to submit requested documentation. The DPR usually views delays as a discontinuation of the company's cooperation and the case is then immediately referred to BaFin.

As regards a company's investigation by BaFin itself, BaFin has been granted extensive statutory powers.[96] It may require the members of the company's boards (both the management and supervisory boards[97]) as well as its employees and its external auditors and the company's subsidiaries, if any, to furnish information and documentation to BaFin to the extent required for the purposes of the investigation. These powers include the power to issue summons. This right does not extend to the company's majority shareholders.[98] The company's external auditor has a duty to provide any information BaFin requests from him/her. This duty is, however, limited to facts disclosed to the external auditor within the context of the audit. Notably, it does extend to the auditor's working papers (*Arbeitspapiere*) as well.[99] Again, the parties are not obliged to give self-incriminating answers.[100]

BaFin may commission persons to act as examiners and may use DPR staff to aid in its investigation.

96 Section 37o(4)–(5), WpHG. See Fölsing, P. 2008. "Mitwirkungspflichten des Abschlussprüfers im Rechnungslegungs-Enforcement". *Zeitschrift Unternehmenssteuern und Bilanzen (StuB)*, 10:392.

97 Note that Germany, in contrast to South Africa, operates a two-tier board system, consisting of a *Vorstand* (management board) and an *Aufsichtsrat* (supervisory board).

98 Gelnhausen & Hönsch (2005:520).

99 OLG Frankfurt aM, Decision of 12 February 2007 (2007 *Betriebsberater* 1383) and OLG Frankfurt aM, Decision of 19 November 2007 (2007 *Der Betrieb* 629). See Paal, B. 2007. "Zur Vorlagepflicht von Arbeitspapieren des Abschlussprüfers im Enforcementverfahren". *Betriebsberater* (*BB*) 33:1778; Zülch, H & S Hoffmann. 2010a. "Rechtsprechung zum Rechnungslegungs-Enforcement in Deutschland – Ein erster Überblick". *Deutsches Steuerrecht* (*DStR*), 14:947. Concerns regarding the constitutionality of these two decisions have, however, been voiced by several authors on this subject; see e.g. Fölsing (2008:394). Gelnhausen & Hönsch (2005:523) also firmly reject the view that this duty of the auditor extends to the auditor's working papers as well. Regarding the OLG Frankfurt's unique role as regards the enforcement of IFRSs, see "Germany" under "Administrative review" below.

100 Section 34(4), WpHG, read with section 4(9), WpHG.

Persons obliged to furnish information have to grant BaFin's employees access to their business premises.[101] Entry by BaFin's employees without permission is allowed only in exceptional circumstances, namely to prevent imminent danger to public order, and only if there is evidence indicating that the person required to provide information is contravening the WpHG.[102] The WpHG explicitly states that, under these circumstances, the affected persons' constitutional right to the "inviolability" of their premises in terms of Article 13 of the German Constitution ("Inviolability of a person's home")[103] – which has its equivalent in section 14(a) and (b) ("Privacy") of the South African Constitution – is restricted.[104] This entails the following: firstly, no advance judicial warrant is required for BaFin's employees in order to enter the premises. Instead, BaFin is statutorily authorised to ultimately do so in the course of its enforcement investigation;[105] and secondly, even the external auditor's business premises can be searched.

Neither situation has occurred to date.

What are the consequences if accounting errors (non-compliance with FRSs) are detected?

South Africa

If the investigator's report reveals that there has been non-compliance, the Commission may issue a compliance notice,[106] but only in respect of a matter for which the complainant does not otherwise have a remedy in court.[107] A compliance notice may be issued against individual directors if they were implicated in the non-compliance of the financial statements with FRSs. The notice's minimum content requirements are set out in section 171(4) of the new Companies Act. Such a notice would typically require the non-compliant company to rectify and reissue its financial statements.[108] This applies to sample-based investigations as well.[109]

101 Section 4(4) clause 1, WpHG.
102 Section 4(4) clause 2, WpHG.
103 *Grundgesetz der Bundesrepublik Deutschland* of 23 May 1949 as amended by the Act of 29 July 2009.
104 Section 4(4) clause 3, WpHG.
105 Section 37o(5), WpHG.
106 Section 170(1)(g)(i), read with section 171 and Draft Companies Regulation 146(1).
107 Section 171(1)(b), "unless".
108 Section 171(2)(a) and (e).
109 Draft Companies Regulation 32(5)(b)(i),(6). While the wording of Draft Companies Regulation 32(5)(b)(i) seems to suggest that changes to these companies' accounting policies ("practices") are meant to be prospective only, the reference in Draft Companies Regulation 32(6) to, among others, section 171(4) makes it clear that retrospective change to accounting policies can also be requested.

If the company is listed on the JSE, a copy of the compliance notice will be sent to the JSE, being the *regulatory authority* in terms of section 171(3) of the new Companies Act.

The compliance notice remains in force until one of two things happens: either the Commission issues a compliance certificate confirming that the requirements of the compliance notice have been satisfied by the company,[110] or the company challenges the compliance notice before the Companies Tribunal or a court.[111] If the company fails to do so, the Commission may either apply to a court for an administrative fine[112] or may refer the failure to comply to the National Prosecuting Authority for prosecution as an offence.[113] The processes *prosecution* and *administrative sanction* are mutually exclusive and cannot run concurrently.[114] The new Companies Act further makes it clear that, in the case of a recidivist company that has failed to comply, has been fined, and continues to contravene the Companies Act, the Commission may apply to a court for an order to wind up the company.[115]

It is at the discretion of the Commission to publish the investigation report in its entirety.[116] In any event and irrespective of the outcome of the investigation, it is obliged to send a copy to both the complainant and the investigated company, as well as to any holder of securities in or creditors of that company, and to "any other person implicated in the report".[117]

Germany

If accounting errors are detected as a result of the DPR's investigation and the company concurs with the DPR's findings, BaFin requires the company to publish the error on the Internet in the *Elektronischer Bundesanzeiger* (Electronic Federal Official Gazette).[118] Thus, the non-compliant company suffers adverse publicity. However, neither the DPR nor the BaFin instructs the company to correct the error or tells it how the error should be corrected; nor is the company prevented from commenting publicly on its publicised accounting error. Furthermore, the precise wording of the error publication

110 Section 171(5)(b),(6), read with Draft Companies Regulation 146(2).

111 Section 171(5)(a)(i), read with section 172(1). As regards an application to the Tribunal, the Draft Companies Regulations set out procedural details in Draft Regulations 147–148 and 154–173.

112 Section 171(7)(a), read with section 175 and Draft Companies Regulation 174.

113 Section 171(7)(b).

114 Section 171(7)(b), read with section 214(3).

115 Section 81(1)(f). See also the Explanatory Memorandum to Companies Bill, B61D–2008, item 12 ("Enforcement"), which incorrectly speaks of "dissolving".

116 Section 170(2)(a).

117 Section 170(2)(b).

118 See www.ebundesanzeiger.de; last accessed 1 August 2010.

is not prescribed by BaFin. In practice, 80% of the investigated companies agree with the DPR's error assertion.[119]

If, after the DPR has concluded its investigation and found an error, the company does not concur with the DPR's error assertion, BaFin will initiate its own additional investigation and subsequently confirm or refute the DPR's findings. If this investigation confirms the accounting error, BaFin has it published in the *Elektronischer Bundesanzeiger*.[120]

Administrative review

South Africa

Section 172(1) provides the right to have the Commission's compliance notice reviewed by the Companies Tribunal. In granting this right to review, section 172(1) mirrors the mandatory section 6(1) of the PAJA. In order to exercise this right, the company is required, within 15 business days after receiving the compliance notice, to apply to the Companies Tribunal to review such notice.[121]

Section 172(1) only speaks of a review by the Companies Tribunal, not of an appeal to it. An *appeal* amounts to a re-hearing of the matter, while a *review* comprises only a re-examination of the legality of the administrative action in question, that is, whether it complies with all the requirements for just administrative action as set out in section 6 of the PAJA.

Is the application to the Companies Tribunal in terms of section 172(1) a mere *internal review* or does it amount to a *judicial review*? The term *judicial review* encompasses both a review by a court as well as a review by a tribunal like the Companies Tribunal.[122] The defining characteristic of judicial administrative action, in contrast to a mere internal review, is that its effect is final and binding. The matter is, thus, res iudicata and the rule ne bis in idem applies: the Tribunal may no longer revoke or amend its decision. Instead, its decision can only be altered by a court on review or appeal. This is the situation with the Companies Tribunal: in terms of sections 172(4) and 195(7) of the new Companies Act, the Tribunal's decision is binding on the Commission, and

119 See DPR (2009).

120 As per DPR (2009), accounting errors were found in 23 cases as a result of a DPR investigation; see "Germany" above, under the heading "Who investigates and enforces compliance with FRSs"?. The error ratio was 79% for indication-based investigations and 12% for sampling investigations. Most (nearly half) of the detected errors occurred in applying IFRS 3 and IAS 39.

121 Section 172(1)(a), read with Draft Companies Regulation 147.

122 Section 6(1) of the PAJA.

only subject to any right of "review or appeal" (section 172(4)) or "review" (section 195(7)) by the court.

In order to perform judicial administrative action, a tribunal has to be an independent and impartial decision-maker. For the Companies Tribunal, this is entrenched in section 193(1)(b) and (d) of the new Companies Act.

Can the Commission or the Companies Tribunal withdraw unlawful administrative action? Regrettably, both the PAJA and the new Companies Act entirely omit to lay down any rules for the withdrawal of an unlawful administrative act (such as an unlawful compliance notice, an unlawful compliance certificate, or an unlawful decision by the Companies Tribunal) by the administrator him-/herself. These matters are, thus, left to the common law.[123] For systematic reasons, such rules – being part of the general administrative law – should rather have been incorporated into the PAJA. The advantages of rules like these are obvious:[124] administrators such as the Commission can correct incorrect decisions before an application for review or appeal is lodged by the affected person.

Is the right to have the Companies Tribunal's decisions reviewed by a court (section 172(4), section 195(7)) merely a right to *review* or a right to a *full appeal*? Apart from a review by the Companies Tribunal in terms of section 172(1), section 172(4) and section 195(7) further grant the right to have the Companies Tribunal's decision reviewed by a court. The question arises as to whose right this is: certainly, it is the right of the company that received the compliance notice and that applied to the Companies Tribunal for "review or appeal" (section 172(4)) or "review" (section 195(7)). However, it is unclear whether the Commission can also apply to a court for a review of the Companies Tribunal's decision. On the one hand, the wording of both section 172(4) and section 195(7) – that is, the use of "subject to" – seems to suggest that, as regards the Commission's position, *binding* in terms of these sections does not mean to exclude its right of access to a court. The Explanatory Memorandum to Bill 61D–2008, on the other hand, says that –[125]

> [t]hose decisions of the Tribunal will be binding on the Commission, but not on the other party, which has a constitutional right of access to a court for further review[,]

and thus seems to deny the Commission access to a court.

As to whether this right is merely a right to *review* by a court or – as would be more far-reaching – a right to a *full appeal*, section 172(4) and section 195(7)

123 Hoexter (2007:249).
124 Pfaff & Schneider (2001:85).
125 Memorandum, item 3(b).

seem to conflict. Section 172(4) grants the right to "review or appeal by a court" with regard to a "decision [made] by the Companies Tribunal", while section 195(7) merely grants the right to "review by the court" with regard to a "decision by the Companies Tribunal with respect to a decision, notice [such as a compliance notice] or order by the Commission". A look into the PAJA does not help to resolve this conflict. The PAJA merely regulates the review of administrative action: it does not make any provision for a right to appeal to a court. Section 172(4) is, however, a lex specialis provision dealing only with compliance notices, while section 195 also deals with Tribunal decisions unrelated to compliance notices, e.g. decisions on the registration of company names. It is, therefore, submitted that a full appeal to the court is indeed available to the recipient of a compliance notice, and that his/her rights are not limited merely to review by a court.

Germany

Since the DPR is not an *administrator* in terms of German administrative law, no internal administrative review or appeal is provided for by section 342(b) of the HGB, and the German *Verwaltungsgerichtsordnung* (Administrative Courts Code),[126] which codifies general principles of administrative law, does not apply either.

Oddly, in addition, section 342(b)(6) of the HGB explicitly states that there is no review by or appeal to the (civil) courts either. Thus, if the investigated company, after it has agreed to an investigation by the DPR, disagrees with the result of the investigation, there is no right of access to court. For this reason, section 342(b)(6) of the HGB on its own would undoubtedly not pass constitutional muster in Germany, had it not been for section 37u of the WpHG, which grants full access to the courts at the second stage of the *Enforcement-Verfahren*. The majority of German academic writers on the subject[127] regard section 342(b)(6) of the HGB as being within constitutional boundaries because of the inclusion of section 37u of the WpHG, and because a company's participation in an investigation by the DPR is entirely consensual.

At the second stage of the *Enforcement-Verfahren*, provision has been made for both a *Widerspruchsverfahren* (internal administrative appeal)[128] as well as, after this remedy has been exhausted, for an appeal to court.[129] After the DPR has, as a result of its investigation, found an accounting error, or after BaFin has, as a result of its own investigation, confirmed an accounting error, BaFin issues a unilateral administrative act – of the sort referred to by Burns and

126 *Verwaltungsgerichtsordnung* of 21 January 1960, as amended by the Act of 21 August 2005.

127 See e.g. Wojcik (2008:326).

128 Section 37t, WpHG.

129 Section 37u, WpHG.

Beukes as "administrative dispensation"[130] – to the company. This disposition is declaratory: it merely states that an accounting error (non-compliance with IFRSs) has been detected and names the error. It is this declaratory disposition which is subject to subsequent administrative appeal.[131] This appeal has to be lodged by the company within one month of receiving the administrative disposition. The appeal is peculiar in two respects. Firstly, it has no suspending effect.[132] Secondly, the appeal is to BaFin itself, i.e. to the very administrative entity which issued the dispensation in the first place. This is because BaFin is an independent administrative entity outside of the administrative hierarchy. There is, thus, no superior administrative entity to which the affected company can appeal.

After this administrative appeal has been exhausted, recourse to court is granted in the form of an *Anfechtungsklage* (recissory action).[133] The action has to be initiated by the company within one month after its receipt of BaFin's decision on the internal administrative appeal. This appeal, too, is peculiar in two respects. Firstly, it does not have a suspending effect either.[134] Secondly, this appeal is to the civil court – more specifically, to the Frankfurt *Oberlandesgericht* (OLG, "Higher Regional Court") – and not to the *Verwaltungsgerichte* (administrative courts).[135] This is inconsequential, since BaFin's declaratory disposition constitutes administrative action and, thus, the specialised administrative courts would be competent to hear the appeal, and not the civil courts. As per the Explanatory Memorandum to section 37u of the WpHG, the Frankfurt *Oberlandesgericht* was specifically selected because, due to its proximity to the FSE, the legislator regarded it as being particularly familiar with matters of this kind. In 2009, an action in terms of section 37u of the WpHG was brought before the Frankfurt *Oberlandesgericht* for the first time. In its decision, the court fully confirmed the DPR and BaFin's findings.[136]

Specialised administrative courts like the German *Verwaltungsgerichte* are, thus far, unknown in South Africa. Instead, administrative disputes have always been resolved by civil courts. Burns and Beukes[137] strongly advocate the introduction of administrative courts in South Africa.

130 Burns & Beukes (2006:173).
131 Section 37t, WpHG.
132 Section 37(t)(2), WpHG. See also Pfaff & Schneider (2001:63).
133 Section 37u, WpHG.
134 Section 37u(1), WpHG.
135 Section 37t(2), WpHG, read with section 48(2), WpHG.
136 OLG Frankfurt aM, Decision of 24 November 2009 (2009 *Betriebsberater (BB)* 111). See Gödel, RD. 2010. "Unverzichtbarkeit der Prognoseberichterstattung im (Konzern-) Lagebericht". *Der Betrieb (DB)*, 63:435; and Zülch, H & S Hoffmann. 2010b. "Fehlen eines Prognoseberichts als wesentlicher Fehler der Rechnungslegung". *Steuer- und Bilanzpraxis (StuB)*, 3:87. See also DPR (2009).
137 Burns & Beukes (2006:278).

Conclusions

This article has identified several significant differences between the South African and German monitoring and enforcement procedures. In sum, they are as follows:

(1) In South Africa, *any company* is subject to enforcement as regards compliance with FRSs. In contrast, in Germany, only domestic and foreign companies which are admitted to trade on the *Regulierter Markt* of a German stock exchange are subject to the *Enforcement-Verfahren*. Both in South Africa and Germany, listed companies are further subject to separate monitoring and enforcement procedures under the JSE Limited's Listings Requirements and the FSE Regulations, respectively.

(2) South Africa operates a straightforward one-stage procedure: the investigating body is the Companies and Intellectual Property Commission. Germany operates a *two-stage* procedure: the investigating bodies are the DPR and BaFin. Investigations by the DPR can only be conducted if the company concerned agrees to be investigated. In contrast, investigations by BaFin as well as by the Commission do not require the company's prior consent: they are compulsory. As a rule, BaFin only launches an investigation once a company has refused to be investigated by the DPR.

   (a) The Commission's activities vis-à-vis the investigated company are governed by administrative law. Its actions are "administrative actions" in terms of the PAJA. As per section 5(4) of the new Companies Act, therefore, the new Companies Act and the PAJA concurrently govern the Commission's actions. In the event of inconsistencies between the new Companies Act and the PAJA, however, the provisions of the PAJA prevail.

   In Germany, only BaFin's activities are *governed by administrative law*, and only its actions are "administrative actions" in terms of German administrative law. Because the DPR is not an administrator, German administrative law does not apply to its actions: its activities are governed entirely by private law.

   (b) While the Commission can investigate companies on its own initiative, its usual routine seems to be to initiate *investigations on complaint*. Sampling investigations are confined to a subset of companies.

   The DPR can also initiate investigations on complaint ("indication-based investigations"). This is, however, not the norm. Rather, the DPR focuses on performing – on its own initiative – random investigations ("random sample investigations") and strives to have investigated the population of the approximately 1,000 companies in question within an investigation cycle of around ten years. "Random sample investigations" account for over 85% of the DPR's annual investigations.

(c) Both the Commission and BaFin are *independent* administrative entities outside of the hierarchy of the respective public administrations. Nevertheless, the Commission can still be instructed by the Minister to launch an investigation, while BaFin cannot be so instructed.

The DPR, on the other hand, is not an administrative entity at all: it is a private body upon which the Federal Ministry of Justice and the Federal Ministry of Finance conferred the power to conduct (non-compulsory) investigations. BaFin, however, retains the right to instruct the DPR to launch investigations in certain circumstances.

(3) As regards the conduct of *investigations*, there are differences between the German and South African procedures:

(a) As regards the DPR's investigations, the involvement of the *Quality Control Member* is an additional safeguard to ensure impartiality and quality. There is no equivalent in the South African Commission's investigations. Neither is there an equivalent in BaFin's investigations. One might argue, therefore, that the Quality Control Member has only been introduced because the DPR – in contrast to BaFin and the Commission – is merely a private body.

(b) *Search and entry powers* during investigations seem wider under German law than under South African law. In contrast to the situation in South Africa, no advance judicial warrant is necessary in Germany prior to entering business premises.

(4) As regards the courses of action resulting from an investigation, German and South African procedures differ significantly:

(a) South African procedure aims at correcting the detected non-compliance (compliance notice). Pressure is maintained on the company up to the point when the Commission issues a compliance certificate. Only this certificate finally gets the investigated company off the hook.

The German system, in contrast, does not enforce correction of the detected non-compliance. BaFin simply notifies the company of the detected error and requires this error to be publicised in the *Elektronischer Bundesanzeiger*. Thus, pressure only exists in the form of adverse publicity from which the company might suffer.

(b) Publication of the error is, thus, the default sanction under the German system. In South Africa, publication of the Commission's report is also possible. However, such publication does not have to be as prominent as it is in Germany.

(5) Under the South African system, there is regrettably no provision in either the PAJA or the new Companies Act for the *withdrawal* by the Commission or by the Tribunal of its own unlawful administrative acts.

In contrast, German statutory general administrative law deals with this issue: BaFin can withdraw its own unlawful administrative action.

(6) No *internal administrative review or appeal* is provided for under the South African enforcement procedure. Review by the Companies Tribunal is not internal: it is a judicial administrative review.
Under the German procedure, there is no judicial administrative review comparable to the one performed by the Companies Tribunal. However, there is an internal administrative appeal against BaFin's administrative action. This appeal has no suspending effect. Moreover, the appeal is to BaFin itself and, thus, to the very administrative entity which issued the original administrative act.
There is no internal review of, or appeal against, the findings of the DPR's investigations. However, these findings are not binding on the company in any event. If the company disagrees with the DPR's findings, BaFin simply starts an investigation of its own.

(7) The new Companies Act grants a *full appeal* to the court with regard to the Companies Tribunal's review decision. The situation is the same under German law. Under the South African system, having the Commission's administrative action reviewed by the Companies Tribunal is not a prerequisite for an appeal to court. Since South Africa does not have specialised administrative courts, all appeals go to the civil courts. Germany, on the other hand, has specialised administrative courts. Nevertheless, appeals against BaFin's administrative acts go to a civil court. This is inconsequential. In addition, in Germany, one particular court – the Frankfurt *Oberlandesgericht* – handles all appeals. There is no such concentration of competence in South Africa.

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NOTES AND COMMENTS

Costs and benefits of renewable energy: The support system for electricity from renewable energy sources in Germany

Andrea Schmeichel*

Introductory note

The White Paper on Energy Policy, issued by Namibia's Ministry of Mines and Energy in 1998, stated the following:*[1]

> Namibia has abundant renewable energy resources. In addition to hydropower potential …, solar radiation in Namibia is the highest measured so far in any country of the world (up to 3100 kWh/m^2/year in certain areas) and excellent wind resources exist in coastal areas (6 to 8 m/s windspeed, measured at 10 m height above flat water surface). Both resources are virtually untapped.

A report for the United Nations Development Programme's Environment and Energy Group, published ten years after the quoted White Paper, informs us that only less than 1% of the energy consumed in Namibia comes from renewable resources.*[2]

It is not the purpose of the following comment to ask why the use of renewable energies has not increased in Namibia despite –

- the Ministry's Programme of the Use of Renewable Energy Sources
- the clear understanding that the use of renewable energy

*1 Ministry of Mines and Energy. 1998. *White Paper on Energy Policy*. Windhoek: Ministry of Mines and Energy, p 43.

*2 Cf. Von Oertzen, D. 2008. *Namibian National Issues Report on the Key Sector of Energy with a Focus on Mitigation*. Windhoek: Dessert Research Foundation of Namibia, p 3.

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would contribute to making Namibia less dependent on imported energy,*[3] and

- the production of renewable energy being the most promising way of providing energy to areas far from points of connection to the national grid.*[4]

Instead, the purpose of Schmeichel's contribution is to argue in favour of translating some of the institutional challenges to the policy on renewable energy as identified in the White Paper. One of the "four key institutional challenges" identified therein is –*[5]

> … the establishment of an adequate institutional and planning framework, which provides for the balanced provision of all forms of energy, including renewable energy, according to economic and social merit; … .

Both off-grid and grid-connected energy production from renewable resources in fact requires a special institutional – including a special legal – framework. The experience of countries with a longer tradition of using renewable energy can be tapped as regards the appropriate design and operation of frameworks suited to Namibia. Germany is a helpful example in this respect because of its world-renowned development of technologies for using renewable resources in energy production, and the policies that accompany its production of renewable energy. The interest of the following comment lies in the legislative measures introduced in Germany in this respect, and the socio-economic context to which these measures are related there.

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*3 About 50% of the total electricity consumed in Namibia is imported (ibid.).

*4 The White Paper considers some factors that contribute to the low input of renewable energy to Namibia's energy budget (ibid.:1998:44).

*5 (ibid.).

Introduction

The renewable energy sources – energy from wave, tidal, salt gradient and current, solar radiation, geothermal and biomass[1] – now provide viable alternatives to conventional sources such as coal, oil, natural gas and nuclear power. However, many renewable energy technologies are still nascent and under development, such as solar panels, offshore wind farms, and second- and third-generation biofuels. In today's market, renewable energy is not able to withstand competition from fossil fuels, making a support system necessary. Overall, feed-in tariffs will be shown to be a cost-effective and particularly future-oriented way to support the development of renewable energy sources.

In Germany, support for electricity from renewable sources[2] was first introduced by the *Stromeinspeisungsgesetz* (StrEG, "Feeding of Renewable Electricity Act"), 1990,[3] and is now implemented by the *Erneuerbare-Energien-Gesetz* (EEG, "Renewable Energy Act"), 2009.[4] The EEG obliges grid operators to pay the producers of renewable electricity certain feed-in tariffs. For each kWh fed into the grid, the operators are obliged to pay producers the amount guaranteed by law, which varies according to the energy source used.[5] Grid operators also have to guarantee grid access to producers of renewable energy, i.e. connection to the grid,[6] feeding into the grid, and distributing electricity via the grid.[7] The feeding in of renewable energy has priority over 'conventional' electricity, i.e. electricity generated by nuclear or fossil fuel.[8]

1 Section 1, 1; section 2, 3 Erneuerbare-Energien-Gesetz/EEG 2009. Besides renewable energy, mine gas – a by-product of mining – usually incinerated benefits from the same financial support mechanism as renewable energy.

2 Different support schemes were introduced for the transport and heating sectors. The 2006 *Biokraftstoffquotengesetz* (BiokrQuG, "Biofuel Quota Act") stipulates a quota regime for retailers as regards biofuels (*Bundesgesetzblatt* [BGBl., "Federal Official Gazette"] 2006, I:3180), while the *Erneuerbare-Energien-Wärme-Gesetz* (EEWärmeG, "Renewable Energy –Heat – Act"; BGBl. 2008, I:1804) obliges consumers to achieve a 14% target of heating and cooling from renewable sources by 2020.

3 BGBl. (1990, I:2633).

4 Section 1(2). The year 2009 is the date of the EEG's entry into force (1 January 2009), not the date it was passed. On the development of the German support system for renewable electricity, see Oschmann, V. 2009. "Erneuerbare Energien: B.1 EEG". In Danner, W & C Theobald (Eds). *Energierecht*. München, Einführung: Beck.

5 Sections 16ff and 23ff.

6 Section 5(1)1.

7 Section 8(1).

8 Sections 5(1) and 8(1)1.

The EEG uses a multistage process to support renewable energy plants and to refinance the feed-in tariffs. Eventually, the cost is at least partly passed down to consumers. The EEG aims to increase the percentage of renewable energy in electricity consumption to at least 30% by 2020.[9] In Germany in 2009, 10.3% of the overall energy use and 16.1% of the total electricity use, respectively, was derived from renewable energy sources.[10]

The cost of feed-in tariffs in 2009 was estimated at €71.7 million. Moreover, the grid has to be expanded and improved to cater for a multitude of small plants with sometimes inconstant supply (e.g. wind, sun). A conglomerate of research institutes has estimated the total additional costs of renewable energy at €4.3 billion.[11] While the *Sachverständigenrat für Umweltfragen*[12] estimates that costs will come down substantially,[13] others have claimed the costs would be so high that the endeavour would be abandoned.[14] With its feed-in tariff scheme, Germany chose not to introduce state subsidies for renewable electricity, but instead stipulated a support system. In the hope of achieving efficiency gains, this system is implemented as legal obligations, i.e. between private parties, relieving the public sector, but also imposing the fulfilment of a public duty on private parties. However, the obligations imposed on private parties cannot be unlimited. Thus, the law which imposes the support mechanism on private parties also has to ensure its cost-effectiveness.

Cost-effectiveness in the EEG

The EEG mainly concentrates on increasing the production of renewable energy by guaranteeing grid access and remuneration to producers.

9 Section 1(2).

10 BMU/Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit ("Federal Ministry for the Environment, Nature Conservation and Nuclear Safety"). 2010. *Erneuerbare Energien in Zahlen – Nationale und internationale Entwicklung*. Berlin: BMU, p 9.

11 DIW, ISI, GWS & IZES/Deutsches Institut für Wirtschaftsforschung, Fraunhofer Institut für System und Innovationsforschung, Gesellschaft für wirtschaftliche Strukturforschung & Institut für Zukunfts Energie Systeme. 2009. *Einzel- und gesamtwirtschaftliche Analyse von Kosten- und Nutzenwirkungen des Ausbaus Erneuerbarer Energien im deutschen Strom- und Wärmemarkt*. Available at http://www.erneuerbare-energien.de/files/pdfs/allgemein/application/pdf/endbericht_ausbau_ee_2009.pdf; last accessed 23 November 2010.

12 "German Advisory Council on the Environment".

13 SRU/Sachverständigenrat für Umweltfragen. 2010. *100% erneuerbare Stromversorgung bis 2050*. Berlin: SRU.

14 RWI/Rheinland-Westfälisches Institut für Wirtschaftsforschung. 2009. *Die Entwicklung der Energiemärkte bis 2030. Energieprognose 2009*. Available at http://www.rwi-essen.de/media/content/pages/publikationen/rwi-projektberichte/PB_Energieprognose-2009.pdf; last accessed 23 November 2010.

Producers of conventional energy have raised strong objections to the rules on increasing grid capacity, maintaining that adherence to them is too costly.[15] For example, if the grid lacks the capacity to feed in renewable electricity, even if there is no conventional electricity in the grid, the producer of renewable electricity can demand that the operator increase the grid's capacity. Although grid expansion is only imposed on the grid operator if it is not economically unreasonable to do so,[16] the focus remains on grid access for renewable electricity: if grid operators fail to meet the obligations imposed on them, it can result in claims for damages.[17] The grid operator is only permitted to reduce the feeding in of renewable energy if the feed priority is incompatible with the safety and reliability of the electricity supply. Moreover, the grid operator is liable for damages.[18] These additional costs for grid adaptation may only be taken into account in the grid operator's system usage charge if all other alternatives to increase grid capacity have been exhausted.[19] Thus, the grid operator has limited planning and budgeting margins when it comes to delivering grid access. Obviously, a balance has to be struck between the expansion of renewable energy and the costs involved. Nonetheless, a modernisation of the grid is necessary for an energy change and, thus, may be unavoidable.

Another cost factor in the German support system in respect of deriving energy from renewable sources relates to the feed-in tariffs. These tariffs vary depending on the technology and on the size of the plant,[20] as bigger plants are considered to produce electricity more cost-effectively. The feed-in tariffs are not intended to favour particular mature and, thus, cheaper technologies, but aim at allowing for the competitive operation of any production plant.[21] If the feed-in tariff or bonus is too high, this may impede innovation and/or leave windfall profits with the producers. On the other hand, a plant's higher efficiency will also increase the producers' margin. Some technologies such as hydro are currently more competitive than their solar counterparts, for example, which consequently receive a substantially higher feed-in tariff. This has been criticised by opponents, and has strongly contributed to a public perception that renewable energy is too costly. In fact, the EEG saw most feed-in tariffs

15 RWI (2009).

16 Section 9.

17 Section 10(1)1.

18 Section 11. For an evaluation of this provision, see Schumacher, H. 2009. "Durchbrechung des Vorrangs für erneuerbare Energien? Das Einspeisemanagement im Erneuerbare-Energien-Gesetz und das Verhältnis zu den Regelungen des Energiewirtschaftsrechts". *Zeitschrift für Umweltrecht*, 20(11):522.

19 Section 12(2).

20 The only exception is wind energy, where remuneration does not depend on the installed power capacity but on the quality of the area. Wind turbines at good wind locations receive a higher feed-in tariff than at less suitable locations.

21 BT-Drs. 16/8148.

rise: those for onshore wind were raised from €0.0787 to €0.092 per kWh,[22] while those for offshore wind rose by 6 cents to €0.15.[23] The feed-in tariff for solar energy was lowered to reflect increased efficiency, with remuneration for big plants dropping from €0.4179 to €0.33.[24] This demonstrates how rapidly solar energy technologies have advanced.

On top of the feed-in tariffs, producers can also benefit from certain bonuses. These include bonuses for using agricultural residues such as manure, or increasing efficiency by using combined heat and power.[25] However, bonuses have been criticised as being the result of lobbying, in particular by the biomass industry. This has led to high payouts to producers – to the detriment of consumers. The fact that manure can now be turned into cash, whereas before it had to be disposed of at a cost, may be down to agricultural lobbyism rather than environmental concerns.[26]

An undifferentiated feed-in tariff would favour the most advanced technologies and bring today's cost down. However, this would slow down research and development of newer technologies which may provide a more cost-effective solution in the future. Nonetheless, the *Monopolkommission*[27] believes that feed-in tariffs primarily support available technologies and, thus, impede new developments. Inefficient cost distributions mean that these funds are not available for other instruments that would mitigate climate change.[28]

However, the EEG does provide for mechanisms to limit the costs of promoting renewable energy. These mechanisms include the following:

- The limitation of feed-in tariffs to 20 years after the plant enters production[29]
- A yearly degression of feed-in tariffs,[30] which takes into account technological progress and economies of scale; feed-in tariffs for solar energy in particular can be adjusted according to a special degression provision as technological progress is very fast for this energy source.[31]
- New rules for direct marketing,[32] which limit the incentive for 'forum-

22 Section 29.
23 Section 31.
24 Section 33.
25 EEG, Annexes I to IV.
26 Oschmann (2009:263).
27 Monopoly Commission.
28 Monopolkommission. 2009. *Sondergutachten 54. Strom und Gas 2009. Energiemärkte im Spannungsfeld von Politik und Wettbewerb*. Available at http://www.monopolkommission.de/sg_54/s54_volltext.pdf; last accessed 23 November 2010.
29 Section 21.
30 Section 20.
31 Section 20(2)1.
32 Section 17.

shopping' between direct marketing and feed-in tariffs at times when energy prices are high for producers,[33] and

- The limitation of so-called power-plant-splitting, where a set of small plants with high feed-in tariffs are erected in close proximity to each other in order to maximise income at the expense of efficiency.[34] The government has since recanted on applying these limitations to existing plants,[35] despite an affirmative judgment from the *Bundesverfassungsgericht* that the limitations are justified.[36]

Clearly, the cost-distribution mechanism in the EEG focuses on cost distribution, with little consideration for what administrative costs the mechanism entails.[37] The mechanism involves numerous actors, with electricity passed from producers to grid operators and then to transmission grid operators.[38] Accordingly, the costs are passed on and then distributed horizontally among transmission grid operators,[39] who are in turn reimbursed by electricity suppliers. Transmission grid operators market the electricity[40] either on an electricity stock market such as the European Energy Exchange (EEX),[41] or bilaterally in over-the-counter sales. In this context, a final measure that could drive cost reduction is market transparency. If the electricity is traded as part of the general portfolio, the EEG allows distribution companies to explicitly state the differential costs).[42]

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33 Ekardt, F. 2010. "Section 17". In Frenz, W & H-J Müggenburg (Eds). *EEG Kommentar*. Berlin: ESV, para. 17.

34 Section 19.

35 *Wachstumsbeschleunigungsgesetz*. BGBl. (2009:3950). Schomerus, T. 2010. "Die Privilegierung von Biogasanlagenparks im Wachstumsbeschleunigungsgesetz". *Neue Zeitschrift für Verwaltungsrecht*, 29(9):549.

36 "Federal Constitutional Court". BVerfG/Bundesverfassungsgericht. 2009. "Penkun" 1 BvR 3076/08.

37 Altrock, M & A Eder. 2009. "Verordnung zur Weiterentwicklung des EEG-Ausgleichsmechanismus (AusglMechV): Eine erste kritische Betrachtung". *Zeitschrift für neues Energierecht*, 13(2):128. On the other hand, the AusglMechV has also been criticised for impeding the expansion of renewable energy; see Jarass, L & W Voigt. 2009. "Neuer EEG-Ausgleichsmechanismus kann den Ausbau der erneuerbaren Energien gefährden!" *Zeitschrift für Europäisches Umwelt- und Planungsrecht*, 9(6):300.

38 Sections 34–35. The transferral is conducted according to the *Stromnetzzugangsverordnung* (StromNZV, "Regulation on Access to the Electricity Grid") BGBl. (2005:2243).

39 Section 36.

40 *Ausgleichsmechanismus-Verordnung* (AusglMechV, "Regulation on the [Evolution of the] Redistribution Mechanism"). BGBl. (2009:2101). Based on section 64(3), EEG. Rostankowksi, A. 2010. "Die Auslgeichsmechanismus-Verordnung und der Ausbau Erneuerbarer Energien". *Zeitschrift für neues Energierecht*, 14(2):125.

41 www.eex.com.

42 Sections 53–54.

In conclusion, the EEG's primary focus is on increasing production. Its efforts in respect of cost reduction do not lead to big price cuts, and some reduction measures are already watered down.

European legal provisions that cap renewable energy support

Another instrument for cost limitation is assuring competition between providers in a free market, be it between renewable and conventional energy or among renewable energy providers. The control of market conditions has a key role in assuring competition. Within the European Union (EU), the control of competition has primarily passed to the European Commission. Even though the EU recognises the environment as an outright value,[43] free trade in the internal market – which lies at the very core of the EU (founded as the European Economic Community in 1957) – is still susceptible to infringement by environmental concerns.[44] Under certain circumstances, European law allows environmental concerns to limit the free movement of goods.[45] Under specific conditions, subsidies associated with environmental concerns are also permissible.[46]

The dispute over the potential distortion of the energy market by the renewable energy support scheme to the detriment of conventional energy producers culminated in a European Court of Justice (ECJ) judgment in the *PreussenElektra* case in 2001.[47] The underlying contention was based on the StrEG and its distribution of the additional costs of renewable energy production among suppliers and upstream network providers. The ECJ held that the feed-in tariffs associated with the German renewable energy support scheme could not be considered subsidies and were, therefore, not regulated by the subsidy controls under European law. Feed-in tariffs are construed as a legal obligation between renewable energy producers and grid operators:[48] the state's only involvement is in drafting the law. However, the definition of *subsidy* in European law relies on the impact of such assistance on public funds.[49] In the German case, feed-in tariffs escape the European Commission's subsidy control system because they transfer a public duty – environmental protection – to private parties. The theory that such a shift in responsibility delivers a reduction in public spending has not yet been

43 Article 191, Treaty on the Functioning of the European Union (TFEU). Despite its role in energy security, renewable energy use is widely perceived as a way to mitigate climate change and is, thus, an environmental concern.

44 See Article 3(3), Treaty on the European Union (TEU); Articles 3–4, TFEU.

45 Article 36, TFEU; jurisprudence by the European Court of Justice (ECJ).

46 Articles 107–108, TFEU.

47 *PreussenElektra v Schleswag*, C–379/98, European Court Reports 2001 I–2099.

48 Section 4, EEG.

49 *PreussenElektra*, para.'s 61, 66.

tested in court, however. Nonetheless, if the debtor of the feed-in tariff – in this case the grid operator – were publicly owned, the support scheme could be considered a subsidy.[50] If the support mechanism, with contributions from conventional electricity suppliers or consumers, were administered by a fund, financial transfers could also amount to a subsidy if the fund were under state control.[51] However, these support mechanisms could be justified as being in the common European interest[52] in that they deepen the pool of renewable energy resources. Directive 2009/28/EC[53] aims for a 20% target of energy from renewable sources, and for a quota of 10% in the transport sector. Accordingly, an EU member state can choose to put itself under scrutiny under state aid provisions by the European Commission or to construe its support scheme so that only the free movement of goods applies.[54]

The renewable energy support system may also infringe the free movement of goods (where these goods are conventional and renewable energy) between member states. With renewable energy's guaranteed grid access, conventional energy from Germany or other countries cannot freely access the national market. Moreover, the EEG only opens its support system to renewable energy produced on German territory or in the German exclusive economic zone, but not to all renewable energy *used* in Germany.[55] While the short-term costs of opening up the national support scheme to energy used in the country would have to be assessed, such an expansion would allow for a race for the most profitable support scheme on the side of suppliers as member states compete to meet targets set by the EU Directive promoting the use of renewables.[56] In the *PreussenElektra* case, the ECJ considered this discrimination on the basis of origin, which is generally banned, but in this case it was justifiable for environmental reasons. These reasons could still be invoked as no comprehensive harmonisation of the internal (renewable) energy market within the EU (which would be bound to a high environmental standard)[57] has taken place as yet.[58]

50 *PreussenElektra*, para. 174ff, 178.

51 ECJ, *Ianelli/Meroni*, Rs. 74/76 ECR 1977, 557:26.

52 Article 107, TFEU.Guidelines of the European Community on Environmental Subsidies, OJ 2008, C–82/1.

53 OJ 2009 L–140/16.

54 For a more detailed description of the law, see Ekardt, F & A Schmeichel. 2009. "Erneuerbare Energien, Warenverkehrsfreiheit und Beihilfenrecht – Nationale Klimaschutzmaßnahmen im EG-Recht". *Zeitschrift für Europäische Studien*, 2:171.

55 Section 1, No. 2.

56 Article 1, Directive 2009/28/EC (OJ [2009] L 140/16).

57 Article 101(3), TFEU.

58 *PreussenElektra* No. 58–62. The EU has recently reformed its regulatory framework on renewable energy by way of Directive 2009/28/EC (OJ [2009] L 140/16). However, these directives do not yet amount to a comprehensive harmonisation of the sector.

Overall, the EU has so far appeared unruffled by claims against renewable energy support schemes, thereby encouraging the further expansion of the use of renewable energy.

Renewable energy costs in perspective

Thus, the costs of renewable energy support schemes seem undisputed, and only limited efforts have been made to reduce them. Accordingly, it has been argued that the promotion of renewable energy distorts the competition with nuclear energy and fossil fuels, namely coal, oil and natural gas, and raises costs for consumers.[59] However, the costs of renewables have to be considered in context.

Even though the costs incurred by the use of renewable energy appear high, the costs avoided by its use have to be considered. For example, the guaranteeing of grid access to producers of renewable energy has led to a merit order effect. This is where, in the electricity market, the most expensive electricity needed to satisfy demand determines the spot price for all sources across the board.[60] The availability of renewable energies has reduced the price overall by displacing some of the least efficient conventional production plants. According to the Ministry for the Environment, the renewable energy available domestically in 2009 saved Germany €5.7 billion by reducing its import of fossil fuels.[61] Finally, a broader risk distribution by the diversification of energy supply also brings about a portfolio effect, which has not yet been quantified.[62]

The diversification of energy sources also increases energy security by ensuring local energy supply. In addition, the dependence on fossil fuels is in many cases entwined with a dependency on imports of the resource from politically unstable countries. Moreover, imported energy is prone to being used as an instrument of political pressure, as demonstrated by Russia and its conditional supply of natural gas to neighbouring countries. All of these factors contribute to increases in the price of conventional energy.

Energy from renewable sources may help to break up the current oligopoly of the electricity market in Germany, where four main energy companies each have their own 'territory' or sphere of influence. A multitude of smaller production plants will increase competition, potentially lowering prices. Besides, renewable energy may even open new markets: renewable energy sources need innovative technologies, which are becoming a strong market

59 RWI. 2009. Energieprognose.
60 Oschmann (2009:para. 22).
61 BMU (2010:24).
62 DIW et al. (2009).

for German small- and medium-scale enterprises, creating jobs and increasing gross domestic product.[63]

If one looks at a consumer's electricity bill, where the cost of renewable energy is transparently listed, nuclear energy seems to be a bargain. However, the bill reflects the through-life costs of renewable energy (calculated with a life cycle assessment), whereas conventional energy costs are for production costs in a running plant only and do not take into account subsidies awarded to coal or nuclear energy. Conventional energy is still being subsidised at €0.04 per kWh. The promotion of nuclear energy is estimated at €204 billion to date between 1950 and 2010, with an additional €100 billion already budgeted.[64] Coal subsidies were estimated to have amounted to €432 billion between 1950 and 2008.[65]

Moreover, the external costs of conventional fuels, such as coal, oil and nuclear energy, must not be neglected.

Fossil fuels such as oil and coal have both local and global environmental impacts. Besides the local environmental impacts of the production of fossil fuels,[66] the consumption of energy from fossil fuels drives the emission of greenhouse gases such as carbon dioxide (CO_2), which in turn is the principal contributor to climate change, fuelling global warming and intertwined natural disasters such as floods and droughts. In Germany, a total of 368 TWh of fossil fuel energy was avoided through the use of renewables in 2009,[67] representing a substantial reduction in greenhouse gas emissions.

In 2010, the use of nuclear energy (which currently makes up 20% of Germany's electricity supply) has been proposed as a way to mitigate climate change. An amendment to the *Atomgesetz*[68] in 2002 was intended to gradually decommission all nuclear power stations by 2021. However, in 2010, the German Government decided to increase the running time of nuclear power stations by 12 years on average, designating it a bridging technology to a

63 BMU (2010:24).

64 FÖS/Forum ökologische Marktwirtschaft. 2010. Staatliche Förderungen der Atomenergie. Available at http://www.greenpeace.de/fileadmin/gpd/user_upload/themen/atomkraft/Atomsubventionsstudie_Update_2010_01.pdf; last accessed 25 January 2011.

65 FÖS/Forum ökologische Marktwirtschaft. 2009. *Staatliche Förderungen der Stein- und Braunkohle im Zeitraum 1950–2008*. Available at http://www.foes.de/pdf/Kohlesubventionen_1950_2008.pdf?PHPSESSID=9bd999389f15cc1e66af6354c530dd4e; last accessed 23 November 2010.

66 For example, the environmental disaster caused by an oil spill in the Gulf of Mexico in 2010.

67 BMU (2010:24).

68 "Nuclear Act"; BGBl. (1985:1565).

greener future.[69] Environmental non-governmental organisations (NGOs) make accusations of lobbyism as nuclear power stations produce cheap energy with already depreciated power stations.[70]

In operation, nuclear power plants do not cause CO_2 emissions. However, the building and running of the plant as well as the disposal of nuclear waste, depending on the source, cause emissions of 16–23 g of CO_2 per kWh – considerably lower than coal, which causes around 1,000 g per kWh.[71] However, even if the global environmental impact may be limited, the local impact may be considerably higher. Besides the threat of nuclear or radiological incidents – and even potential terrorist attacks, recent incidents such as the one that occurred at the Krümmel nuclear power station in July 2009[72] have shaken consumer confidence in the technology. Moreover, the safe disposal of nuclear waste is still not assured. For example, the former salt pit Asse II, which had been used as a repository for low-level radioactive waste, has witnessed stability problems:[73] water breaches threatened the salt barrier and risked contaminating drinking water.[74] Moreover, there are health concerns over increased cancer risks.[75] On the other hand, the consequences of nuclear incidents are not fully understood. For example, a report by major international organisations has found evidence that the consequences of the Chernobyl incident in 1986 where much less severe than predicted.[76]

69 The last word on the extension of nuclear power may not yet have been uttered, since the relevant Act's constitutionality has been disputed for procedural reasons; see Geulen, R & R Klinger. 2010. "Bedarf die Verlängerung der Betriebszeiten der Atomkraftwerke der Zustimmung des Bundesrates?". *Neue Zeitschrift für Verwaltungsrecht*, 18:1118.

70 http://www.jbn.de/fileadmin/download/irrweg_laufzeitverlaengerung.pdf; last accessed 23 November 2010.

71 Wissenschaftlicher Dienst des Deutschen Bundestages. 2007. *CO_2-Bilanzen verschiedener Energieträger im Vergleich*. Available at http://www.bundestag.de/dokumente/analysen/2007/CO2-Bilanzen_verschiedener_Energietraeger_im_Vergleich.pdf; last accessed 23 November 2010.

72 In this incident, management failure led to a potential nuclear incident. See http://www.spiegel.de/international/germany/0,1518,634507,00.html 27 October 2010; last accessed 23 November 2010.

73 Institut für Gebirgsmechanik. 2007. *Gebirgsmechanische Zustandsanalyse des Tragsystems der Schachtanlage Asse II*. Available at http://www.helmholtz-muenchen.de/fileadmin/ASSE/PDF/News/Kurzbericht-Zustandsanalyse-V-4.pdf; last accessed 23 November 2010.

74 Niedersächsisches Ministerium für Umwelt und Klimaschutz. 2008. *Statusbericht über die Schachtanlage Asse II*. Available at http://www.umwelt.niedersachsen.de/download/6776; last accessed 23 November 2010.

75 An increase was noted, but without proof of causality; see Bundesamt für Strahlenschutz. 2007. *Epidemiologische Studie zu Kinderkrebs in der Umgebung von Kernkraftwerken*. Available at http://www.bfs.de/de/bfs/druck/Ufoplan/4334_KIKK.html; last accessed 23 November 2010.

76 http://www.iaea.org/Publications/Booklets/Chernobyl/chernobyl.pdf; last accessed 23 November 2010.

In addition, cleaner, safer technologies have evolved. Nonetheless, public acceptance of nuclear energy is low; for example, a strong anti-nuclear movement has so far resisted the operation of a permanent nuclear storage facility in Gorleben.

Overall, the use of renewable energy was estimated to have inhibited environmental damage of around €8 billion in 2008, three quarters of which was achieved by the electricity sector.[77] According to a study commissioned by Greenpeace, the external costs of nuclear energy – estimated at €2.7 per kWh[78] – could be entirely avoided by using renewable energy. Even if environmental and health impacts turn out to be lower in practice, a balance has to be struck for or against precautionary action, which also has to take into account available options to mitigate climate change.

One could say that the support mechanisms for renewable energy level out the market rather than distort it, as the external costs of conventional and nuclear energy are not included in their prices. Since public perception of renewable energy suffers from the perceived cost, one solution would be to internalise the costs of conventional energy sources without feed-in tariffs for renewable energy.

Besides the cost argument, there may be no alternative to renewable energy: unlike nuclear energy, it is versatile and can be used to provide electricity, heating/cooling and transport fuel. While renewables regenerate in a foreseeable amount of time, conventional energy sources are finite; 'peak oil' (the peak and decline for oil sources) is impending,[79] and uranium deposits will eventually be exhausted (even if current predictions of when that will happen differ).[80]

The expansion of renewable energy may, however, be impeded by the longer lifetimes of nuclear power plants. Inconstant sources such as wind and solar

77 DIW et al. (2009:8).

78 FÖS. 2010. *Staatliche Förderungen der Atomenergie*. Available at http://www.foes.de/pdf/2010_FOES_Foerderungen_Atomenergie_1950-2010.pdf; last accessed 23 November 2010.

79 Aleklett, K, M Höök, K Jakobsson, M Lardelli, S Snowden & B Sönderbergh. 2008. "The peak of the oil age – Analysing the world oil production reference scenario in World Energy Outlook 2008". *Energy Policy*, 38(3):1398; Czucz, B, J Gathman & G McPherson. 2010. "The impending peak and decline of petroleum production: An underestimated challenge for the conservation of ecological integrity". *Conversation Biology*, 24(4):948.

80 In 2050, according to the Energy Watch Group (www.energywatchgroup.org/fileadmin/global/pdf/EWG_Report_Uranium_3-12-2006mf.pdf; last accessed 23 November 2010) or 2070, according to the Organisation for Economic Co-operation (OECD), the OECD Nuclear Energy Agency, and the International Atomic Energy Agency (OECD, OECD NEA & IAEA. 2003. *Uranium 2003. Resources, production and demand*. Paris/Vienna: OECD & IAEA).

in particular need a smart, flexible grid. Nuclear power provides a constant baseload[81] which will slow down the change of infrastructure and, thus, inhibit the expansion of renewable energy.[82]

Alternatives to feed-in tariffs

Even though the costs of renewable sources of energy appear marginal compared to fossil fuels, increasing the production of renewable energy and its cost-effectiveness still have to go hand in hand in the interest of a cheap energy supply. Overall, the EEG has been considered both efficient and effective in promoting the production of electricity from renewable sources,[83] whereas alternative quota schemes have largely proved unsuccessful.[84] Nonetheless, where there is room for improvement, action should be taken.

It has been suggested that climate change could be mitigated by focusing on emission trading and abandoning renewable energy support.[85] It has, however, been shown that the EEG provides a contribution beyond that of emission trading. The allocation of emission certificates already takes into account that fewer certificates will be necessary if renewable energy is used. Technology-specific support cannot be achieved by emission trading alone. While such trading, as an economic instrument, may be efficient on paper, reality dictates otherwise.[86] The current European Emission Trading Scheme has a limited scope of application with numerous exceptions, a generous emission cap, and insufficient monitoring and sanctioning instruments.[87]

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81 The minimum amount of power that is needed to satisfy minimum demand at any time, based on reasonable expectations of consumer requirements.

82 SRU/Sachverständigenrat für Umweltfragen. 2010. *Laufzeitverlängerung gefährdet Erfolg der erneuerbaren Energien*. Available at http://www.umweltrat.de/SharedDocs/Downloads/DE/05_Kommentare/2010_KOM_08_Laufzeitverl%C3%A4ngerung_gefaehrdet_Erfolg.pdf?__blob=publicationFile:3; last accessed 23 November 2010.

83 European Commission, SEC (2008:57, section 8ff); cf. also *Fouquet, D & T Johansson. 2008.* "European renewable energy policy at crossroads – Focus on electricity support mechanisms". *Energy Policy*, 36(11):4079.

84 Winter, G. 2010. "Rationing the use of common resources: Design, effectiveness and constitutional implications of a 'formidable' regulatory tool". In Oliver, D, T Prosser & R Rawlings (Eds). *In the regulatory laboratory: Law, governance and the Constitution*. Oxford: Oxford University Press.

85 Häder, M. 2010. "Klimaschutzpolitik in Deutschland – Eine ökonomische Konsistenzanalyse der Rahmenbedingungen für der Strommarkt". *Zeitschrift für Energiewirtschaft*, 34(1):11.

86 Oschmann, V. 2010. "Zehn Jahre Erneuerbare-Energien-Gesetz – Bilanz und Ausblick". *Zeitschrift für neues Energierecht*, 14(1):117; Winter, G. 2009. "The climate is no commodity: Taking stock of the emission trading system". *Journal of Environmental Law*, 1:1.

87 Beckmann, M & A Fisahn. 2009. "Probleme des Handels mit Verschmutzungsrechten", *Zeitschrift für Umweltrecht*, 20(6):299.

Nonetheless, the renewable energy support scheme can always be improved. A European scheme could increase both the effectiveness of renewable energy support in Europe and the cost-effectiveness of the support schemes. However, a mere expansion of feed-in tariffs would continue to focus on the production side. Administrative costs could be reduced by introducing a fund to which either consumers or distribution companies could contribute and from which feed-in tariffs could be paid – while preserving guaranteed grid access. This option would eliminate the need for the current complex cost distribution mechanism. In order to move the focus to the demand side, a new, premium-based approach has been developed, encouraging system integration and self-marketing, which will also bring down costs. The proposed premium would be awarded to producers marketing directly, and would be calculated ex post, based on the difference between the average market price and the feed-in tariff.[88]

Conclusion

While renewable energy can claim a low environmental and health impact compared with its conventional competitors, claims of renewable energy being (too) costly in comparison have been at least partly rebutted. Today's additional costs for renewable energy are marginal compared with the additional environmental destruction and degradation they avoid, and they forecast lower energy costs in the future. An honest debate on the costs of renewables has to go hand in hand with a debate on the actual costs of conventional energy, be it fossil fuels or nuclear energy, and may substantially alter public perception of renewable energy costs. Even if nuclear energy proves to be more environmentally friendly than expected, it is still a limited resource. This assessment will only change if fast breeder reactors can be developed – a technology under which nuclear fuel becomes dramatically more efficient.[89]

The German feed-in tariffs have succeeded in increasing the production of renewable energy, which has led to an associated interest around Europe. The United Kingdom, for example, is complementing quotas with feed-in tariffs.[90]

88 Fraunhofer ISI. 2009. *Entwicklung eines Fördersystems für die Vermarktung von erneuerbare Stromerzeugung*. Vienna:TU Wien. See also *Wissenschaftliche Begleitung bei der fachlichen Ausarbeitung eines Kombikraftwerksbonus gemäß der Verordnungsermächtigung*, §64, EEG 2009. Available at www.erneuerbare-energien.de/files/pdfs/allgemein/application/pdf/abschlussbericht_kombikraftwerksbonus_bf.pdf; last accessed 23 November 2010. On the proceedings of a BMU workshop in July 2010 on the topic, see www.erneuerbare-energien.de/inhalt/46283/4590; last accessed 23 November 2010.

89 Cohen, B. 1983. "Breeder reactors: A renewable energy source". *American Journal of Physics*, 51(1):75–76.

90 Section 41, Energy Act, 2008.

However, the German discussion has now moved to improving economic efficiency. Even though the fear of renewable energy costs is at least partly unjustified, the support of renewable energy has to be as cost-effective as possible in the transition period, and should eventually be dropped completely in the interest of a cost-effective energy supply. The time may have come to focus on market and system integration in order to bring renewables to the next level. This system integration may be considerably slowed by the new nuclear power policy, casting doubts on the suitability of nuclear power as a bridging technology.

The Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore

Manfred O Hinz*

The protection of traditional knowledge on international and national agendas

> In the late 1980s, ownership of knowledge and artistic creations traceable to the world's indigenous societies emerged, seemingly out of nowhere, as a major social issue. Before then, museum curators, archivists, and anthropologists had rarely worried about whether the information they collected should be treated as someone else's property. Today the situation is radically different. Scarcely a month passes without a conference examining the ethical and economic questions raised by the worldwide circulation of indigenous art, music, and biological knowledge.

So states the preface to a book entitled *Who owns native culture?*.[1]

Legal examinations have added their questions to the debate. While a few countries have enacted statutes to protect traditional knowledge[2] or – to be more precise – access to biodiversity and genetic resources, the main focus of the debate lies in international and regional fora. The international and regional aim is to establish at least a far-reaching, if not worldwide, consensus on legal mechanisms suited to the protection of traditional knowledge.[3] In 1997, when the World Intellectual Property Organisation (WIPO) established its Global Intellectual Property Issues Division, it provided space to voices that until then had been neglected in its first programme. The stated aim for this development was –[4]

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1 Brown, MF. 2003. *Who owns native culture?* Cambridge, MA/London: Harvard University Press, p IX.

2 Cf. World Intellectual Property Organisation/WIPO. 2010. *Legislative texts on the protection of traditional knowledge*. Available at www.wipo.int/tk/en/laws/tk.html; last accessed 19 October 2010.

3 Cf. the WTO Agreement on Trade-related Aspects of Intellectual Property Rights of 1995 and its Article 27(2), which accepts the possibility of sui generis regimes for certain intellectual property rights, albeit within certain limits set by the agreement in general terms.

4 Main Program 11, Program and Budget 1998–1999; WIPO (2001). *Intellectual property needs and expectations of traditional knowledge holders. WIPO report on fact-finding missions on intellectual property and traditional knowledge (1998–1999).* Geneva: WIPO, 16.

> … to identify and explore the intellectual property needs and expectations of new beneficiaries, including holders of indigenous knowledge and innovations, in order to promote the contributions of the IP [intellectual property] system to their social, cultural and economic development.

WIPO conducted a worldwide fact-finding mission in 1998 and 1999, which, inter alia, took note of existing customary rules and practices employed in many communities as instruments to protect cultural assets against misuse and unwanted exploitation.[5] WIPO's fact-finding report is the most comprehensive collection to date of legal anthropological data relating to ongoing efforts to develop legal answers to the challenge posed by the demands to protect traditional knowledge. WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore meets regularly, and is currently occupied with drafting Articles on the Protection of Traditional Cultural Expressions/Expressions of Folklore.[6]

At the regional level, the Harare-based African Regional Intellectual Property Organisation (ARIPO) added to the debate by adopting, in Lesotho in 2007, the Legal Instrument for the Protection of Traditional Knowledge and Expressions of Folklore and, in pursuance of this, in Swakopmund on 9 August 2010, the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore. Currently, 17 African countries are members of ARIPO,[7] nine of whom – including Namibia – have signed the Protocol.[8] In accordance with section 27(3) of the Protocol, the instrument comes into force three months after six ARIPO members have deposited their instruments of ratification or accession.

In order to understand where the Swakopmund Protocol stands in the debate about the protection of traditional knowledge, the questions will be raised as to what *traditional knowledge* is, and why its protection is relevant. Thereafter, the approaches to provide legal protection of traditional knowledge will be investigated, followed by an overview over the most important sections of the Swakopmund Protocol. The argument will be rounded up with some preliminary concluding remarks.

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5 Cf. WIPO (2001:57ff, 207ff).

6 Cf. Document WIPO/GRTKF/IWG/1/3 of July 2010.

7 The 17 countries are Botswana, the Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe.

8 Cf. Saez, C. 2010. "African traditional knowledge and folklore given IP protection despite warning of TK commodification". *Intellectual Property Watch*, 12 September 2010. Available at www.i0-watch.org/weblog/2010/09/12; last accessed 17 October 2010.

What is *traditional knowledge*, why is its protection relevant?

There is not one generally accepted definition of *traditional knowledge*.[9] WIPO's fact-finding report lists examples for what is commonly understood to be part of traditional knowledge, and illustrates the nature of such knowledge:[10]

> Traditional knowledge is not limited to any specific field of technology or the arts. Traditional knowledge systems in the fields of medicine and healing, biodiversity conservation, the environment and food and agriculture are well known. Other key components of traditional knowledge are the music, dance, and 'artisanat' (i.e. designs, textiles, plastic arts, crafts, etc.). Although there are creations which may be done purely to satisfy the aesthetic will of artisans, many such creations are symbolic of a deeper order or belief system. When a traditional singer performs a song, the cadence, melody, and form all follow rules maintained for generations. Thus, a song's performance entertains and educates the current audience, but also unites the current population with the past.

Modern art and modern science are predominantly products of individual accomplishments. Traditional knowledge represents the cooperative efforts of communities. Plants used in accordance with traditional knowledge very often carry symbolic values. When certain traditional sculptures are crafted, the process of crafting may be informed by inherited practices and performance rituals in order to generate religious potential that can be activated when the need arises.[11] As WIPO's fact-finding report states, –[12]

> Traditional knowledge is a multifaceted concept than encompasses several components. Traditional knowledge is, generally, produced in accordance with the individual or collective creator's responses to and interaction with their cultural environment. This may apply to all forms of knowledge, however, whether 'traditional' or 'modern'. In addition, traditional knowledge, as representative of cultural values, is generally held collectively. This results from the fact that what can sometimes be perceived as an isolated piece of literature (a poem, for example) or an isolated invention (the use of a plant resource to heal wounds, for instance) is actually an element that integrates a vast and

9 A reflection of the difficulty to define the concept of *traditional knowledge* is also that local knowledge is sometimes used instead of traditional knowledge. See Hinz, MO. 2002. *Local knowledge and its legal protection*. (Course materials). Windhoek/ Stellenbosch: University of Namibia/Trade Law Centre for Southern Africa, 4f. Cf. also Wekesa, M. 2009. "Traditional knowledge – The need for *sui generis* systems of intellectual property rights protection". In Wekesa, M & B Sihanya (Eds). *Intellectual property rights in Kenya*. Nairobi: Rule of Law Programme for Sub-Saharan Africa, Konrad Adenauer Foundation, p 267.

10 WIPO (2001:211).

11 (ibid.:212).

12 (ibid.).

> mostly coherent complex of beliefs of knowledge, control of which may not vest in the hands of individuals who use isolated pieces of knowledge, but be vested in the community or collective.

The reference to *traditional* in *traditional knowledge* is not to mean that the knowledge so characterised is ancient and static. Traditional knowledge is *traditional* only insofar as the knowledge referred to is part of the usually only orally transmitted cultural tradition of a given community.[13]

While WIPO's fact-finding mission still follows a very broad understanding of traditional knowledge, other discussions (including discussions in WIPO) distinguish between *traditional knowledge* and *expressions of folklore*.[14] One can assume that the reason behind this distinction can be found in the different practical relevance of traditional knowledge in the narrower understanding of *folklore*, and in its expressions.[15] Traditional knowledge about plants, in particular their medicinal facilities, holds extreme societal value and is, moreover, in high demand by industrial manufacturers of pharmaceutical products. More than half of the world's population relies on traditional medicine; in some countries, the figure rises to over 70%. In addition, more than 80% of all medicines used worldwide are of plant origin.

For this reason, ARIPO states that "a significant part of the global economy is based on the appropriation of traditional knowledge".[16] However, the same statement concludes that –[17]

> … [in] spite of the important role traditional knowledge plays in sustainable development, it continues to be largely disregarded in development planning. It currently plays only a marginal role in biodiversity management and its contribution to the society in general is neglected. Furthermore, traditional knowledge is being lost under the impact of modernisation and of ongoing globalisation processes.

How to provide legal protection to traditional knowledge

At the very beginning of the debate about the protection of traditional knowledge (understood to include expressions of folklore) is the statement that intellectual property law, as it stands in international treaties, domestic

13 (ibid.).

14 As does the Swakopmund Protocol.

15 Cf. here Wekesa (2009:269f) and LeBeau, D. 2003. *Dealing with disorder: Traditional and Western medicine in Katutura (Namibia).* Köln: RüdigerKöppeVerlag, pp 26ff.

16 African Regional Intellectual Property Organisation/ARIPO. 2006. *Why traditional knowledge?.* Available at www.aripo.org/index.php?option; last accessed 25 October 2010.

17 (ibid.).

legislation and decided cases, is unable to protect traditional knowledge. Intellectual property law aims at thus far unknown knowledge generated by an individual.[18] The main purpose of intellectual property law is to protect the knowledge of the mentioned individual in particular against the unauthorised trading of the knowledge. The need to create so-called sui generis[19] protection for traditional knowledge was, therefore, seen to be the logical consequence.

Although the arguments about the difficulties with the application of conventional intellectual property law hold truth, they did not exclude efforts to develop intellectual property law further so that it would also offer at least some protection of traditional knowledge. An example for this is the extension of copyright law to protect the singer of a traditional song, who would, without such an extension, not qualify for protection under copyright law and, therefore, not be able to prevent the recording (fixation) of the performance.[20] South Africa, where matters relating to traditional knowledge have been discussed extensively since the change to democracy,[21] suggested a far-reaching Intellectual Property Laws Amendment Bill in 2007.[22] The intention of this Bill is to provide for amendments to a wide range of intellectual property statutes, so that the scope of those statutes would also cover aspects of traditional knowledge. The Bill has met with a variety of comments. While the Congress of Traditional Leaders of South Africa (CONTRALESA) welcomed the Bill in principle as it intended to protect "indigenous knowledge systems in the same way as [W]estern systems of knowledge",[23] others have criticised the Bill for being "ill-conceived" and have suggested it be replaced with a law "dedicated to the protection of indigenous knowledge as a separate and distinct species of intellectual property".[24]

In other words, the manifestation of sui generis approaches is called upon for the more appropriate protection of traditional knowledge. When looking at what was developed as sui generis approaches, one notes attempts to provide protection to traditional knowledge by placing it within a wider framework –

18 Cf. on this Matsushita, M, TJ Schoenbaum & PC Mavroidis (Eds). 2006. *The World Trade Organization* (Second Edition). Oxford: Oxford University Press, pp 695ff; see also in particular Oguanaman, C. 2006. *International law and indigenous knowledge. Intellectual property, plant diversity, and traditional medicine*. Toronto/ Buffalo/London: University of Toronto Press.

19 The meaning of such a sui generis protection will be explained below.

20 See the WIPO Performances and Phonograms Treaty (WPPT) of 20 December 1996. Available at www.wipo.int/treaties; last accessed 13 November 2010.

21 Cf. e.g. Normann, H, I Snyman & M Cohen (Eds). 1996. *Indigenous knowledge and its uses in southern Africa*. Pretoria: Human Sciences Research Council.

22 *Government Gazette*, 5 May 2008.

23 Cf. on the position of CONRALESA at afro-ip.blogspot.com/2010/09/contralesa-on-rsas-traditional.html; last accessed 17 October 2010.

24 *Business Day*, 20 May 2010. Available at Allafrica.com/stories/201005200070/html; last accessed 17 October 2010.

one that seeks the recognition of indigenous communities' rights in terms of relevant parts of international law that distinguishes such communities from other traditional communities.[25] The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples of 1993 illustrates this in a very significant manner.[26] The preamble of the declaration refers to the much debated right of indigenous peoples' to self-determination,[27] and has as its first recommendation to indigenous communities to define for themselves their own intellectual and cultural property.[28] Thomas Cottier relates demands of this nature to claims "for new human rights, especially protecting the habitat and lifestyles of traditional indigenous and local communities and their intellectual property rights".[29] Accordingly, following Cottier, the "holistic concept of Traditional Resource Rights" emerged grounded on ("largely unclear") principles and rights.[30]

The Earth Summit of 1992 and its Agenda 21 – its overarching policy instrument – is the still most prominent internationally agreed document that sets the foundation of the sui generis treatment of all matters related to traditional knowledge. It recognises in this that traditional rule and customary law are grounded in their specific local knowledge and wisdom. Local wisdom governs practice in many instances. If one notes the potential of traditional governance and customary law and the need to acknowledge this in development strategies, the way forward demands specific attention to what Chapter 26 of Agenda 21 states in its first paragraph:

> Indigenous people and their communities have an historical relationship with their lands …. . In the context of this chapter the term 'lands' is understood to include the environment of the areas which the people concerned traditionally occupy. … They have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment.

The Convention on Biological Diversity of 1992, entered into force on 4 June 1993, translated important parts of Agenda 21 into a binding international treaty.

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25 Cf. here United Nations. 2009. *State of the world's indigenous peoples*. New York: United Nations Department of Economic and Social Affairs (Secretariat of the Permanent Forum on Indigenous Issues – ST/ESA328).

26 Reproduced in Hinz (2002:90ff).

27 Cf. the debate about the Declaration on the Rights of Indigenous Peoples of 13 September 2007 (United Nations General Assembly/UNGA Resolution 61/295), which was eventually adopted by the majority of the members of the UNGA after consensus could be reached on the Namibia-promoted reservation clause of Article 46.

28 See Point 1.1 of the Mataatua Declaration.

29 Cottier, T. 1999. "The protection of genetic resources and traditional knowledge: Towards more specific rights and obligations in world trade law". In Abbott, F, T Cottier & F Gurry. *The international intellectual property system. Commentary and materials. Part 2.* The Hague/London/Boston: Kluwer Law International, pp 1828ff.

30 (ibid.).

The Convention contains a variety of obligations for its members to protect the biological diversity found in member countries' territories. Of particular note is that the Convention refers to traditional knowledge several times. Indeed, Article 8(j) of the Convention is a kind of constitutional *Grundnorm* with respect to traditional knowledge. The Article expects that members of the Convention –

> … respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices; … .

Article 10(c) of the Convention demands from Convention signatories that they –

> … [p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements; … .

In the required exchange of information, Article 17(2) of the Convention includes "specialized knowledge and traditional knowledge".

In dealing with access to genetic resources, Article 15 of the Convention contains two principles which have also been acknowledged beyond the field of genetic resources: the need to prior informed consent between the members of the Convention (Article 15(5)), and, in Article 15(7), the need to have measures in place which will allow for the sharing of –

> … benefits arising from the commercial and other utilization of genetic resources with the Contracting Parties providing such resources.

Both principles are closely related to the above-stated *Grundnorm* on traditional knowledge of the Convention although their translation into practice has remained controversial.[31]

The Swakopmund Protocol

The preamble of the Protocol acknowledges the value of traditional knowledge systems and their contribution to local and traditional communities as well as "all humanity". It further expresses the need –

31 Cf. here various contributions in Kamau, EV & G Winter (Eds). 2009. *Genetic resources, traditional knowledge and the law. Solutions for access and benefit sharing*. London: Erathscan.

> … to recognise and reward the contributions made by such communities to the conservation of the environment, to food security and sustainable agriculture, to the improvement in the health of the populations, to the progress of science and technology, to the safeguarding of cultural heritage, to the development of artistic skills, and to enhancing a diversity of cultural contents and artistic expressions; ... .

The Preamble also underscores the need to respect the continuing –

> … customary use, development, exchange and transmission of traditional knowledge and expressions of folklore by traditional and local communities, as well as the customary custodianship of traditional knowledge and expressions of folklore … .

Meeting the needs of the holders and custodians of traditional knowledge and expressions of folklore is an important aim of the Protocol. Contained in this aim is the empowerment of the holders of traditional knowledge and expressions of folklore, in order for them to exercise "due control over their knowledge and expressions".

The Preamble emphasises that the protection of traditional knowledge and expressions of folklore must be 'tailored' to the specific characteristics of such knowledge and expression.

According to section 1 of the Protocol, its purpose is to protect the holders of traditional knowledge against infringements of their rights and to protect expressions of folklore against misappropriation, misuse and "unlawful exploitation beyond their traditional context". Section 3 of the Protocol provides for the establishment of a national competent authority mandated to implement the Protocol. Education, advice and the settlement of disputes are amongst the duties of the national competent authority – as well as the ARIPO office.[32]

The definition section of the Protocol, namely section 2, has definitions of *expressions of folklore* and *traditional knowledge*. The former are defined as being –

> … any forms, whether tangible or intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:
> i. verbal expressions, such as but not limited to stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
> ii. musical expressions, such as but not limited to songs and instrumental music;

32 Cf. section 14 in the part on traditional knowledge; section 22 in the part on expressions of folklore; and section 24 on regional protection in the final part of the Protocol.

iii. expressions by movement, such as but not limited to dances, plays, rituals and other performances; whether or not reduced to a material form; and
iv. tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metal ware, jewelry, basketry, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; … .

Traditional knowledge is defined in section 2 as referring to –

> … any knowledge originating from a local or traditional community that is the result of intellectual activity and insight in a traditional context, including know-how, skills, innovations, practices and learning, where the knowledge is embodied in the traditional lifestyle of a community, or contained in the codified knowledge systems passed on from one generation to another. The term shall not be limited to a specific technical field, and may include agricultural, environmental or medical knowledge, and knowledge associated with genetic resources.

Both parts of the Protocol specify traditional knowledge and expressions of folklore in the two opening sections of Part II on traditional knowledge and Part III on expressions of folklore, which are both prefaced by "Protection criteria". Section 4 under Part II reads as follows:

> Protection shall be extended to traditional knowledge that is:
> (i) generated, preserved and transmitted in a traditional and intergenerational context;
> (ii) distinctively associated with a local or traditional community; and
> (iii) integral to the cultural identity of a local or traditional community that is recognized as holding the knowledge through a form of custodianship, guardianship or collective and cultural ownership or responsibility. Such a relationship may be established formally or informally by customary practices, laws or protocols.

Section 16 says the following:

> Protection shall be extended to expressions of folklore, whatever the mode or form of their expression, which are:
> (a) the products of creative and cumulative intellectual activity, such as collective creativity or individual creativity where the identity of the individual is unknown; and
> (b) characteristic of a community's cultural identity and traditional heritage and maintained, used or developed by such community in accordance with the customary laws and practices of that community.

The protection of traditional knowledge is not bound to any formality (section 5(1)). The beneficiaries of traditional knowledge are the holders of that knowledge, i.e. the local and traditional communities, but also recognised

individuals within the communities who are involved in the creation, preservation and transmission of traditional knowledge (section 6). The right to authorise the exploitation of rights to traditional knowledge vests in the "owners" of the rights. Under the Protocol, owners also have the right to prevent anyone from exploiting their rights (section 7(1) and (2)). Furthermore, the owners of traditional knowledge have the right to assign their rights to it to somebody else, and also to conclude licensing agreements. However, traditional knowledge belonging to a local or traditional community is not permitted to be assigned (section 8). Compulsory licences are possible where traditional knowledge is not sufficiently exploited by the rights holders and the interests of public security or public health are at stake (section 12).

The fair and equitable sharing of benefits generated by the commercial or industrial use of traditional knowledge is to be part of the mutual agreement between the parties (section 9). The use of traditional knowledge "beyond its traditional context" is also required to be acknowledged to the holders (section 10).

A special rule protects genetic resources. To wit, section 15 clarifies that authorised access to traditional knowledge associated with genetic resources does not imply the right to access such resources.

Part III of the Protocol, which is devoted to expressions of folklore, basically follows the same structure of Part II in its treatment of the topic at hand. Thus, the protection of expressions of folklore is also not bound to formalities (section 16).

As regards the beneficiaries of expressions of folklore, the Protocol states the following:

> … owners of the rights in expressions of folklore shall be the local and traditional communities:
> (a) to whom the custody and protection of the expressions of folklore are entrusted in accordance with the customary laws and practices of those communities; and
> (b) who maintain and use the expressions of folklore as a characteristic of their traditional cultural heritage.

Section 19 of the Protocol contains a detailed obligation for Protocol signatories to develop the necessary legal instruments that will ensure that – as stated in section 19(2) of the Protocol – "the relevant community can prevent ... acts from taking place without its free and fair consent".

Section 20 regulates exceptions and limitations that apply to the protection of expressions of folklore. The section in question reads as follows:

> Measures for the protection of expressions of folklore shall:
> (a) be such as not to restrict or hinder the normal use, development, exchange, dissemination and transmission of expressions of folklore

within the traditional or customary context by members of the community concerned, as determined by customary laws and practices;

(b) extend only to uses of expressions of folklore taking place outside their traditional or customary context, whether or not for commercial gain;

(c) be subject to exceptions in order to address the needs of non-commercial use, such as teaching and research, personal or private use, criticism or review, reporting of current events, use in the course of legal proceedings, the making of recordings and reproductions of expressions of folklore for inclusion in an archive or inventory exclusively for the purposes of safeguarding cultural heritage, and incidental uses,

Provided that in each case, such uses are compatible with fair practice, the relevant community is acknowledged as the source of the expressions of folklore where practicable and possible, and such uses would not be offensive to the relevant community.

Conclusion

Some preliminary comments will conclude this note on the Swakopmund Protocol.

Firstly, if one looks back to the development of the debate on the protection of traditional knowledge, the Swakopmund Protocol is an important step forward in conceptualising the sui generis protection for traditional knowledge – and expressions of folklore for that matter – that has been in such high demand.

Secondly, the Protocol gives the Namibian constitutional recognition and confirmation of customary law[33] an additional international blessing. In its orientation to acknowledge and protect traditional knowledge, the Protocol relies on the respective existing customary law. In other words, it binds existing customary law into its international framework and acknowledges in this way that all efforts to protect traditional knowledge will only work when they provide space for the law that is closest to traditional knowledge: customary law.

Thirdly, the Protocol follows the established trend to link the use of traditional knowledge to the two principles that became prominent in the Convention of Biological Diversity: the principle of prior informed consent, and the principle of sharing benefits.

Fourthly, the Protocol offers ways to determine the holders of traditional knowledge and expressions of folklore, which will certainly influence the ongoing debate about the need to both concretise traditional knowledge rights and balance the realm of legally protected interests and public interests in intercultural communication.

Fifthly, the tasks assigned to the national competent authority and the references therein in those tasks to customary law clearly indicate that not

33 See Article 66(1) of the Constitution of the Republic of Namibia.

only will education and the creation of awareness be paramount for the Protocol's success, but also the active engagement of traditional authorities. The latter, inter alia, have the task of ascertaining and even developing their customary law[34] – a task that is a special challenge when it comes to traditional knowledge!

34 Cf. section 3 of the Traditional Authorities Act, 2000 (No. 25 of 2000).

The law of defamation in Namibia: Recent developments

Karin Klazen*

The recent appeal judgment in the case of *Trustco Group International Ltd & Others v Matheus Kristof Shikongo*[1] is a watershed judgment for legal jurisprudence in the Namibian context. The Supreme Court not only confirmed that the principle of strict liability for the media in defamation actions did not form part of Namibia's common law after Independence, but the Court also developed the law of defamation to include a defence of reasonable publication in respect of media defendants.

In a challenge to the High Court's ruling in favour of the respondent in 2009, the fundamental question which arose in the appeal matter was as follows:[2]

> [H]ow … the law of defamation [should] give effect to both the right to freedom of speech as entrenched in article 21(1)(a) of the Namibian Constitution and the constitutional precept that the dignity of all persons shall be inviolable as set out in article 8 of the Constitution.

In response to this question, the appellants argued that a plaintiff in a defamation action should be required to establish the falsity of the defamatory facts in question. Strictly speaking, however, a plaintiff is never tasked with proving the falsehood of a defamatory statement, but is required merely to establish that the defendant published a defamatory statement concerning the plaintiff. A rebuttable presumption then arises that the publication of the statement was both wrongful and intentional. The argument thus proffered by the appellants in this regard called for the burden of proof in defamation actions to rest with the plaintiff.

The respondent, on the other hand, argued for the adoption of a defence of reasonable publication of facts that are in the public interest. The defence of reasonable publication dictates that publication in the press of false defamatory allegations of fact would not necessarily be regarded as unlawful if, upon consideration of all the circumstances of the case, it was found to have been reasonable to have published the facts in a particular way at the time in question. It is this defence, as opined by the respondent, that would strike a careful balance between a plaintiff's right to dignity and a defendant's right to freedom of expression.

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1 Hereafter referred to as the *appellants* and *respondent*, respectively.

2 *Trustco Group International Ltd & Others v Matheus Kristof Shikongo* SA 8/2009 at para. 1.

Ultimately, the Supreme Court rejected the appellants' argument of burdening a plaintiff with the duty to establish falsehood and found, in favour of the respondent, that a defence of reasonable publication "will provide greater protection to the right of freedom of speech … protected in article 21 without placing the constitutional precept of human dignity at risk".[3] The court did not find it necessary to decide whether the reasonable publication defence was available only to media defendants.

Other than awarding costs of suit to the respondent and simultaneously reducing his award for damages from N$175,000 to N$100,000 (and thereby placing this case on par with *Shidute & Another v DDJ Investment Holdings CC & Another*[4] in respect of the highest amount ever awarded for damages in a defamation suit in Namibia), with this judgment the Supreme Court concretised the law of defamation and has, for the time being, settled all challenges to this realm of law.

3 (ibid.:para. 26).
4 (P) I 2275/2006.

JUDGMENT NOTES

Rally for Democracy and Progress & Seventeen Others v Electoral Commission of Namibia & Nine Others; unreported judgment of the Supreme Court of Namibia[1]

Nico Horn*

Cases challenging the results of Namibian elections are nothing new. After the 2004 Presidential and National Assembly elections, the High Court ordered a recount.[2]

The challenge to the November 2009 elections was, however, unique in that the High Court ruled that the case was not properly before court. The applicants – nine of the opposition parties who had taken part in the election – subsequently lodged an appeal to the Supreme Court, contesting the legality of the process.[3] Summarising the grounds for the challenge, the Supreme Court made the following comment:[4]

> … [T]he appellants complain about irregularities which, they allege, were pervasive in the run-up to, during and after the election; a lack of transparency and accountability in the election process; statutory non-compliance in the verification process[;] and resultant undue returns and results. They aver that the principles which should have governed the election as embodied in Part V of the Act were substantially deviated from and contend that, because many

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1 *RDP v EC*, Supreme Court of Namibia. Case No. SA 6/2010, heard on 31 May 2010, judgment delivered on 6 September 2010.

2 *Republican Party of Namibia & Another v Electoral Commission of Namibia & 7 Others*, unreported judgment in Case No. A 387/2005 delivered on 26 April 2005. See also *DTA of Namibia & Another v Swapo Party of Namibia & Others,* 2005 NR 1 (HC).

3 The parties seek the following relief:

"1. An order declaring the election for the National Assembly held on 27 and 28 November 2009 null and void and of no legal force and effect and that the said election be set aside.

2. Alternatively to prayer 1 above –

2.1 An order declaring the announcement of the election results for the National Assembly election … null and void and of no legal force and effect.

2.2 Ordering the first respondent to recount in Windhoek the votes casted [sic] in the said election as provided for in Act 24 of 1992 and to allow the applicants as well as the second to sixth respondents to exercise their rights in regard to such counting as provided for in the said Act."

4 *RDP v EC*, p 2.

of the irregularities tainted the polling process, they cannot be cured by a mere recount of the ballot. Therefore, they insist that both elections should be annulled and, only in the alternative, pray for a recount.

Although the applicants argued the merits of their case extensively,[5] the High Court judgment was based on the applicants' inability to file their papers with the High Court Registrar within the timeline set by the Rules of the High Court. In terms of Rule 3, documents are to be filed before 15:00.[6] The Rule makes provision for late filing if the Registrar finds special circumstances that will allow him/her to do so, or when a court or a judge of the High Court instructs the Registrar to accept the late filing.[7] However, the Electoral Commission Act, 1992[8] only stipulates that an application related to an election has to be filed within 30 days after the results of the election have been declared.[9]

The opposition parties filed their application related to the general elections on 4 January 2010, the last day allowed by the Act, but at least one hour after the prescribed 15:00 of the Rules. They informed the Registrar orally beforehand that they would be late, and gave reasons for their late filing. The Assistant Registrar accepted the papers. At a later stage, that is, when the applicants filed their Heads of Argument, they added an application for the Presidential elections to be nullified.

The first respondent, the Electoral Commission, took up the issue of the late filing of the application in its Heads of Argument. It came as no surprise that both judges who heard the case in the High Court ruled that the application regarding the Presidential election was not properly before court. The court, however, went further and ruled that the application regarding the National Assembly election was also not properly before court due to its late filing. In

5 See the Supreme Court citation in Footnote 3 above.

6 *Rally for Democracy and Progress & Seventeen Others v Electoral Commission of Namibia & Nine Others*; unreported judgment of the High Court of Namibia, Case No. A 01/2010, Coram: Damaseb JP et Parker J; heard on 1–2 March 2010; delivered on 4 March 2010; hereafter *RDP v EC*, High Court.

7 Rule 3, entitled "Registrar's Office Hours", reads as follows:
"Except on Saturdays, Sundays and Public Holidays, the offices of the registrar shall be open from 9 a.m. to 1 p.m. and from 2 p.m. to 4 p.m., save that, for the purpose of issuing any process or filing any document, other than a notice of intention to defend, the offices shall be open from 9 a.m. to 1 p.m. and from 2 p.m. to 3 p.m. and the registrar may in exceptional circumstances issue process and accept documents at any time, and shall do so when directed by the court or a judge."

8 No. 24 of 1992.

9 Section 110 reads as follows:
"(1) An election application shall be represented [sic] within 30 days after the day on which the result of the election in question has been declared as provided in this Act.
(2) Presentation of the application shall be made by lodging it with the registrar of the court."

this respect, Justice Parker saw an absolute prohibition in Rule 3(a): after 15:00, the Registrar had no authority whatsoever to accept papers without the intervention of a High Court judge.

In the High Court, Parker J concluded that 15:00 on 4 January 2010 was the deadline for the filing of the application, both in terms of section 110 of the Act and Rule 3 of the Rules of the High Court. He concluded that "the relevant provisions of s. 110 of the Act and those of rule 3 of the Rules of Court are couched in clear peremptory terms". Failing to comply with either the said section 110 or Rule 3 was fatal, and resulted in the application being a nullity.

Consequently, Parker J is not intimidated by case law[10] acknowledging "a tendency towards flexibility" in the application of time periods. The previous cases differ from this one, where the legislator and rule-maker instead wished to create a nullity when the Rules are disobeyed. The failure is so final that Parker J found it unnecessary to determine if the applicants had properly applied for condonation.

Judge-President Damaseb, the other High Court judge on the Bench, agreed with Parker J that the applicants' papers had been filed too late. If the applicants had believed there were exceptional circumstances which allowed them to hand in the papers after 15:00, they should have alleged so in their papers, in his opinion.[11] Furthermore, the Registrar should have stated that there were exceptional circumstances and should have alerted the court as to the nature of such circumstances. The late filing, Damaseb J maintains, did not necessarily mean the end of the application, however. The applicants could have applied for condonation, setting out in their founding affidavit why they alleged that there were exceptional circumstances, and could have attached an affidavit by the Registrar stating why she agreed there had indeed been such circumstances. Instead, the applicants appealed only against the judgment relating to the National Assembly election, although they initially also included a challenge to the Presidential election on 14 January 2010. Consequently, while the merits of the application were presented to the High Court and argued by the parties, the court never considered them.

Neither the parties in their presentations nor the High Court in its judgment used any specific constitutional arguments. There was hardly any reference to the importance of free and fair elections in a constitutional democracy; there was also no attempt to weigh the importance of the courts dealing with

10 See *DTA of Namibia & Another v SWAPO Party of Namibia & Others*, at 11A–B, following *Volschenk v Volschenk*, 1946 TPD 486 at 490; *Zantsi & Others v Odendaal & Others*; *Motoba & Others v Sebe,* 1974 (4) SA 173 (E); and *Suidwes-Afrikaanse Munisipale Personeel Vereniging v Minister of Labour & Another*, 1978 (1) SA 1027 (SWA) at 1038B.

11 *RDP v EC*, High Court,pp 11ff.

election complaints against the necessity of orderly procedures in the High Court, including strict adherence to the time frames set by the court.

Take the judgment of Parker J. He makes a valid point that the legislator placed strict timelines to election advocacy to ensure that election disputes are dealt with in as short a period of time as is practically possible. However, the speedy disposal of an election dispute should not be seen as the primary principle protected in the Act. A quick disposal of electoral issues is only a means to the bigger goal: the maintenance of a constitutional dispensation where regular free and fair elections ensure the stability of a system where elected members of a National Assembly are sworn in on 21 March every five years. Any time limit set by the legislator should serve this objective.

The arguments before one of the most potent benches of the Supreme Court[12] took the same route. It is possible that the parties were intimidated by the questions the Chief Justice requested them to concentrate on, but the arguments could just as easily have been related to a motor vehicle accident or a case for damages in Timbuktu. It was left to the counsel for the ruling party to remind the court that this was a case dealing with elections and the question of who should govern the Republic of Namibia when he underlined that his client had won a democratic election and were entitled to govern Namibia in terms of the Constitution unless the election was found to be flawed.

Not so the judgment of the Supreme Court. Under the significant heading "The Court", the judgment begins with a long introduction on how important –[13]

> … suffrage and regular, free and fair elections are in Namibian society as a means to constitute representative structures of Government and to influence their policies.

The Namibian people obtained their freedom only 20 years ago, after more than 100 years of colonial and foreign rule. Referring to the Preamble of the Namibian Constitution, the court made the following comment in this respect:[14]

> The cost of victory, measured in human lives, suffering, endurance and endeavour, was incalculable. Determined that the rights which they have gained as individuals and as a people should be preserved and protected for themselves and their children, Namibians resolved that it could be done "most effectively […] in a democratic society, where the government is responsible to freely elected representatives of the people, operating under a sovereign constitution and a free and independent judiciary".

12 Shivute CJ, Maritz JA, Chomba AJA, Mtambanengwe AJA and Langa AJA.

13 *RDP v EC*, Supreme Court, p 6.

14 (ibid.:4).

The highest court in Namibia made it clear that the case before it dealt with much more than the interpretation of timelines in Namibian legislation or the harmonisation of the Electoral Act and the Rules of the High Court. Electoral challenges are an important part of a process to guarantee "the free and fair election of political office[-]bearers in a transparent and accountable manner".[15]

The Supreme Court lists several electoral malpractices which the Act criminalises, including conduct intended to improperly manipulate the casting of votes, undermine the integrity and fairness of the electoral process, and detract from the reliability of the results. These malpractices include corrupt and illegal practices,[16] infringements which compromise the secrecy of the ballot, wilful neglect of duties by election officials, and any conduct which unlawfully interferes with the electoral mechanism, election officials, polling stations, polling equipment, or the voting process in general.[17]

Finally, the Supreme Court refers to the role of the judiciary in the election process. The High Court has the jurisdiction to hear electoral cases and carries the burden to determine if undue returns have been rendered, and if a person has been unduly elected. If the court establishes that malpractices and irregularities or "any other cause whatsoever" have had a substantial effect on the result, it is also obliged to establish who was duly elected. Alternatively, the court may also find the defects in the process are such that "no person was or is entitled" to be declared duly elected.[18] In other words, in cases of severe irregularities, the court is obliged to declare the election a nullity if it impossible to determine the result of the election.[19]

With these words the court addressed two crucial aspects of the case:[20]

15 (ibid.:7).

16 The court refers to sections 103 to 108 of the Act, and mentions several of these malpractices, stating that they "comprise undue influence (inducing or compelling voters by threat, violence, force or any fraudulent device), bribery (whether by gifting, lending, offering, promising or procuring any money or thing and agreeing to do so) and treating (by giving or providing any money or provisions or paying the expense of another person) which, in general, impedes, hinders or prevents the free exercise of the franchise by any voter. It also includes impersonation and the corrupt procurement of a person to become a candidate or to withdraw as such"; (ibid.:8).

17 See sections 101 and 102 of the Act. The court points out that "these sections, amongst others, criminalise the impersonation of another when voting, double voting, ballot stuffing, forging or counterfeiting ballot papers, the destruction or removal of legitimately cast ballots, destroying, opening or otherwise interfering with any ballot box without due authority and the like"; (ibid.).

18 (ibid.).

19 See section 116(7) of the Act. The court alerts one to the fact that infringements of the voting process "in effect, may avoid the result of the election altogether" (ibid.:9).

20 (ibid.:7ff.).

- The importance of a credible electoral process to guarantee that the people's choice of government and elected officials is a precondition to ensure that the victory gained by the liberation struggle is preserved and protected; and
- The independent role of the judiciary as the watchdog of the principles of the sovereign constitution.

The rest of the judgment should be read in the light of the long introduction. The case is not primarily about Rule 3 of the Rules of the High Court or trying to harmonise the said Rule with section 110 of the Electoral Act. Every challenge relating to the electoral process questions the legitimacy of the foundations of Namibia's democracy and has to be taken very seriously. Nothing less than the victory of the nation over colonial oppression is at stake.

While it was not necessary for the Supreme Court to make a finding on the merits of the case, it nevertheless summarises the basis of the appellants' claims in the main section of the judgment, namely the election application, in order to –[21]

> … demonstrate their gravity in the context of the constitutional values and democratic principles we have referred to earlier and to note the width of their sweep and ambit of evidence on affidavit which had to be gathered in support thereof.

Maintaining a neutral position on the merits of the challenge, the court points out that both the Electoral Commission and the SWAPO Party of Namibia – the first and second respondents in the appeal case – filed substantive responses to the appellants' allegations.[22] This neutrality does not mean that the Supreme Court did not take cognisance of the importance of structured judicial procedures and processes. On the contrary: rules and procedures are important – especially in cases like these, where time is of the essence – and the Supreme Court acknowledged it.

The highest judicial authority was not going to take any shortcuts. The court rejected the appellants' main argument that section 110(1) of the Act only referred to a day, i.e. a 24-hour period. Since the Act does not refer to Rule 3, it is clear that Rule 3 does not apply to election challenges and was implicitly amended by the Act. In other words, in terms of the Act, an application can be brought at any time until 24:00 of the last day allowed by the Act, as long as that the Registrar is willing to accept it. Since there is no dispute between the parties related to the fact that the application was filed on 4 January 2010, the application was not late.

21 (ibid.:11).

22 *RDP v EC*, Supreme Court, p 14.

Referring to the general rules of interpretation, as well as the fact that the Act explicitly links section 110(1) to Rule 3, the court concluded that Rule 3 and section 110(1) both applied.

However, the main issue was not so much the harmonisation of Rule 3 and section 110(1) of the Act, but that of exceptional circumstances.

The Supreme Court rejected the Parker J's argument that both section 110 and Rule 3 were peremptory, and contended that even Rule 3 itself gave the Registrar discretionary powers: "… the registrar *may* in exceptional circumstances issue process and accept documents at any time …" [emphasis added]. This alone, the court found, "ought to have alerted him that it might be directory in nature".[23] Consequently, the court also rejected the contention that late filing of any nature could not be condoned – not even by the High Court's inherent powers:[24]

> We must immediately point out that the rule does not absolutely preclude – but rather conditionally facilitates – presentation of an election application "at any time" outside the registrar's ordinary office hours.

Interpreting the role of the Registrar in the process, the Supreme Court relied meticulously on the presumption of regularity. In terms of this presumption, "all official acts are presumed to have been lawfully done (or: duly performed) until proof to the contrary be adduced".[25] By putting the Registrar's stamp on the applicants' documents, one must assume that the Assistant Registrar considered all the "exceptional circumstances" that the applicants mentioned to her when they informed her that the application would be somewhat late, as well as other "exceptional circumstances" that she may have been aware of.

At this point, the court returned to the Constitution and the importance of free and fair elections in a democratic society:[26]

> Finally, the circumstances prevailing at the time of presentation, to say the least, added "some element of probability" that the assistant registrar could have considered them "exceptional". Election applications are important by their nature. They concern the election of representatives of the people to the highest public offices in the democratic institutions of our State. They are one of the most important mechanisms through which to protect our constitutional democracy and the fundamental right of citizens to equally participate in political activity; to preserve the integrity of free and fair elections as a means to ascertain the collective socio-political will and wishes of all enfranchised Namibians; to preclude representation in these high offices by persons who have not been duly elected and to allow for an independent adjudication of

23 (ibid.:44).

24 (ibid.:40).

25 The court borrowed this translation of the Latin dictum from Hiemstra, V & H Gonin. 1992. *Trilingual Legal Dictionary* (Third Edition). Cape Town: Juta & Co, p 249.

26 *RDP v EC,* Supreme Court, pp 54–55.

> election complaints in a peaceful, transparent and accountable manner – to mention a few of the many important considerations we have referred to at the outset of this judgment.

The application, the Supreme Court concluded, was legally before the High Court, and the Assistant Registrar acted within her powers to accept the papers after hours. Consequently, there was no need for the applicants to apply for condonation. The appeal succeeded and the case was referred back to the court a quo to consider the merits.

The judgment is an important landmark in the further development of election jurisprudence in Namibia. In future, election cases will be approached as a sui generis in the light of the importance of the freedom and fairness of voting procedures in the maintenance of a stable democratic society. The Supreme Court took the election challenge out of the realm of static dispute regarding the interpretation of dates and times, and emphasised the importance of clarity in elections in a constitutional dispensation. The courts are obliged to ensure that the voters trust the system and are satisfied that elected members of national and local legislative bodies are indeed the people in whom the voters have placed their trust.

The way in which the Supreme Court handled the possible tension between constitutional principles and the regulatory framework of set times in the Act and the Rules of the High Court is also commendable. The court did not opt for a weighing of interests, which can often create the impression that one set of rules needs to be ignored in order for another to be implemented. In this case, the highest court in Namibia took full cognisance of both the constitutional framework of election challenges and the need to take the time frames of the legal process set out in the rules and statutory law seriously. The result is a constitutional interpretation of procedural issues. This proves again that the Namibian Constitution embraces all aspects of the legal process and all fields of law.

One last comment about the reaction of the public and, especially, the political parties is appropriate here. Immediately after the High Court judgment, senior members of both the Electoral Commission, the first respondent, and the SWAPO Party of Namibia, the second respondent, made public statements to the press that their actions had been vindicated and that the opposition parties' application had no foundation in law. The opposition parties' reaction was even more deplorable. First they accused the High Court bench of political bias. Then the Rally for Democracy staged a demonstration in an apparent attempt to put pressure on the Supreme Court. When the Supreme Court overturned the High Court judgment, it was the opposition parties' turn to tell the media that they had been vindicated.

The fact is that none of the parties have been vindicated by either of the two judgments. The Namibian people are now waiting for the High Court to deliberate on the merits of the case.

BOOK REVIEWS

Constitutional democracy in Namibia: A critical analysis after two decades; Anton Bösl, Nico Horn & André du Pisani (Eds), Windhoek, Macmillan Education Namibia, 2010, 387 pages

Ashimizo Afadameh-Adeyemi*

This book critically evaluates the achievements and lapses of constitutional democracy in Namibia after two decades of independence. It sheds light on the extent to which constitutionality and the rule of law have been embedded in the jurisprudence of Namibian society. The book consists of 20 chapters which are written by highly placed intellectuals. To achieve coherence and consistency, the book is structured into three thematic headings. Section I deals with the concepts of *constitutional democracy* and *good governance*; Section II examines the origin of the Constitution of the Republic of Namibia; while Section III deals with the challenges within the Constitution.

Section I comprises four chapters which examine the concepts of *constitutional democracy* and *good governance* from a historical and definitional perspective. The section lays the foundation for the book by carefully analysing various concepts which form the cornerstones of constitutional democracy. The first chapter is by André du Pisani, who discusses the paradigm of constitutional democracy. The author traces the early origins of democracy and examines its transformation in different societies across the world. Although his genealogy of democracy is quite brief, it gives the reader an insight into the ideological underpinnings and complexities of democracy as applied by pre-20th-century societies. He carefully marries the concepts of *democracy* and *constitutionalism*, and asserts that the key purpose of a constitution in any given society is to bring about stability, predictability and order to the actions of government.[1] In other words, a society's constitution should be seen as a medium through which the conduct of government is regulated and the individual liberty of citizens is guaranteed. This invariably means that the constitution sets the benchmark and parameters through which the rights and duties of the individual and the government are gauged. The author points out that the Namibian Constitution has, to a large extent, been effective and widely accepted by Namibians. However, he suggests that more can be done

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1 Du Pisani, A. 2010. "The paradigm of constitutional democracy: Genesis, implications and limitations". In Bösl, A, N Horn & A du Pisani (Eds). *Constitutional democracy in Namibia: A critical analysis after two decades*. Windhoek: Macmillan Education Namibia, p 8.

to strengthen the efficacy of the Constitution in the area of developing the jurisprudence of the courts, in balancing justifiable limitations of enshrined rights, and in the equality and socio-economic rights of all citizens.[2]

Du Pisani's article is followed by that of Joseph Diescho, who examines the concepts of *rights* and *constitutionalism* in Africa. He works from the premise that, although Africa as we know it today is a creation of European imagination and adventurism, the concept of *human rights* cannot be regarded as alien to Africans because Africans belong to the human family.[3] Based on the universal nature of human rights, he discountenances the notion that international human rights are Western ideologies which do not necessarily fit into the concept of *human rights* in Africa, but acknowledges that Africa should not be held to standards that are culturally incompatible with the African majority.[4] Although this line of reasoning is to a large extent valid, challenges arise in determining the ambits of these 'culturally incompatible standards'. Also, if these 'culturally incompatible standards' are determined by the African majority, it invariably means that the standards of the African minority are deemed irrelevant. This prompts the following question: Are human rights not meant to protect the helpless?

He rightly posits that, to guarantee the human rights of Africans, constitutionalism should be embraced in order to ensure the observance of the rule of law, checks and balances as regards government actions, and an independent judiciary.[5] He views *rights* as –[6]

> … the body of accepted precepts that account for good governance and are necessary conditions for peace, stability and sustainable development … .

He also suggests that Africa may need restorative and social justice to address the unjust experiences in the pre- and postcolonial era. However, he does not fully indicate how social and restorative justice can be used to address these past wrongs.

In discussing constitutional democracy in Namibia, Henning Melber, in his chapter on the impact of the Constitution on state- and nation-building, bases his discussion of the Namibian Constitution on the opinion of Justice Ismael Mahomed. The latter describes the constitution of a nation as "a 'mirror reflecting the national soul', the identification of ideals and aspirations of a nation, the articulation of the values bonding its people and disciplining its

2 (ibid.:14).
3 Diescho, J. 2010. "The concept of *rights* and *constitutionalism* in Africa". In Bösl et al. (2010:16–21).
4 (ibid.:23).
5 (ibid.:28).
6 (ibid.:31).

government".[7] Melber opines that the Namibian Constitution codifies the essential values and norms of the Namibian people and, as such, establishes the applicable standard for conducting state affairs. He suggests that even in situations where a particular political party has the requisite representation in Parliament to amend the Constitution to fit its agenda, such temptation must be resisted. From this standpoint, he criticises political office-bearers who voice their frustration when the judiciary applies constitutional principles which do not go in their favour.[8] He suggests that, in order to guard the achievements obtained at Independence, the rules of the game should not be changed by the majority simply to safeguard their political interest. His view clearly opposes the tyranny of the majority – a phenomenon which is popular among African democracies.

Section I is concluded with Marinus Wiechers' chapter, which reconciles legality and legitimacy in the Namibian Constitution. He suggests that the legality of any legislation in the country is derived from the Constitution. On the concept of *legitimacy*, he adopts Badura's view[9] that, for a constitution to be legitimate, it should assure legality, effectiveness and orderliness; it should also connect political dominance with the individual's social norms and aspirations.[10] From this standpoint he notes that, prior to 1990, the former South West African/ Namibian Administration faced legitimacy challenges. Upon Independence and the drafting of the Constitution, which reflected the social aspiration of Namibians, the legitimacy of the new regime became validated. In reconciling the illegitimate pre-Independence laws in the dispensation of political independence, the Constitution retained all laws enacted by the previous government, but made them subject to the Constitution. The implication was that, if these previously illegitimate laws could stand the litmus test of the Constitution, then they should be deemed legitimate because the laws would be within the ambits of societal norms and aspirations. Wiechers points out that, so far, the Constitution has enjoyed legitimacy; and for it to retain this unquestioned status, the Namibian Government has to ensure that it fulfils its constitutional commitments.

The four chapters which make up Section II give an in-depth analysis of the genesis of the Namibian Constitution. This section brings to light the legal and political manoeuvring that took place prior to Independence and during the drafting of the Constitution. The beauty of this section lies in the fact that most of the chapters were written by those who actively took part both in the struggle for an independent Namibia and in the drafting of the Constitution. This section

7 Melber, H. "The impact of the constitution on state- and nation-building". In Bösl et al. (2010:35).

8 (ibid.:39).

9 Badura (1986); cited in Wiechers, M. "The Namibian Constitution: Reconciling legality and legitimacy". In Bösl et al. (2010:47–48).

10 (ibid.).

starts with a chapter by Nico Horn, who examines some historical documents that not only paved way for independence, but also laid the foundation for discussions as to the nature, form and content of the Constitution. He asserts that constitutional principles formed part of the basic tenets of the South West Africa People's Organisation (SWAPO), and that the participation of the international community in drafting the Constitution did not make it foreign to Namibia. On this note he concludes that, since constitutional principles have always been embraced by Namibians, it cannot be said to be alien to Namibia.

The next chapter is by Hage Geingob, who discusses in detail the drafting of the Constitution. As the Chairperson of the Constituent Assembly that drafted Namibia's Supreme Law, he narrates how they used the art of compromise to strike a balance between vision and various groups' self-interest on issues such as the electoral system, the procedure for amending the Constitution, and the Bill of Rights. The end result was a Constitution that incorporated core constitutional principles protecting the rights of individuals, and curtailing the powers of the state over its citizens. Geingob points out that the Bill of Rights was not necessarily accepted by the political parties on altruistic grounds: it was adopted partly because it fell within the framework of the Universal Declaration of Human Rights. This signifies that parties recognised the universal and inherent nature of rights protected under the Bill of Rights.

This contribution was carefully written. Nonetheless, although the beginning of the chapter indicates that it was lifted verbatim from a previous publication, an effort should have been made to edit parts of the text that made reference to chapters of the book in which it was originally published.

The chapter by Theo-Ben Gurirab also focuses on the genesis of the Namibian Constitution, but he discusses the international and regional landscape within which the Constitution was set. From an insider's perspective, he details the manner in which SWAPO viewed with suspicion the United Nations' interest in the process leading to Namibia's independence. Despite these suspicions, SWAPO and other political parties found a middle ground to agree on the basic tenets of the Constitution that would secure the liberty of the people and enshrine constitutional democracy in the jurisprudence of the nation. In concluding his article, Gurirab points out that, for the Constitution to flourish, it must continually be written in the hearts and minds of the people.

In concluding this section, Dirk Mudge writes on the art of compromise in the drafting of the Constitution by sketching a historical narrative as the background to its adoption. His chapter is quite insightful because he gives an account of the struggle for independence from the perspective of a person who dealt directly with the South African apartheid government. He details various attempts during the struggle to achieve an independent and legitimate government in Namibia. Once the country had gained independence in 1990, he explains from the perspective of an opposition leader the efforts that were

needed and the compromises that had to be reached in order to adopt the Constitution. He concludes by reflecting on the success of the Constitution after 20 years and suggests that, in order to maintain the tempo and success of the Constitution, government has to ensure that the Supreme Law becomes a living document in the heart of the people.[11] He suggests that this can only be done if the people are made aware of the ideals and intentions of those who wrote the Constitution.[12]

Having laid the foundation of constitutional democracy and the genesis of the Namibian Constitution in Sections I and II, respectively, the chapters in Section III highlight some challenges within the Supreme Law. This section comprises 12 chapters. The first is by Manfred Hinz, who deals with the concept of *justice* in relation to the limits of the law in the context of the Namibian Constitution. He uses three cases[13] decided by the post-Independence Namibian judiciary to explain the 'limits of the law' as espoused by Antony Allott.[14] He briefly discusses Allott's notion of *legal pluralism*, which views law as a "complex societal phenomenon to which the state contributes – but so do the people of a society who generate law as an expression of their concepts of *justice*".[15] In this regard, one can posit that the value of the law may be gauged by the amount of justice it affords the society. In other words, a law may be valid in that it passes the legality test, but it may be regarded as unjust. However, this raises the question as to who the law should serve. Should it serve the society or the state? If it is to serve the people, is it possible to have a general standard of justice that will be accepted by every member of the society?

Hinz subtly delves into the question of the efficacy of the law. Drawing examples from the three selected cases, he sheds light on the extent to which a particular type or system of law may not be able to serve the required societal justice as a result of its inherent limitations. He points out that it is important for lawyers to be aware of the limits of the law and proactively accept the role of non-legal principles and rules which, although they affect society, but may be beyond the strict realm of the law.[16] He concludes by suggesting that it is important to acknowledge the limits between legal and non-legal normative systems.[17] This rightly highlights the fact that, although the law is a body of legal rules, its scope of application does not lie in the abstract.

11 Mudge, D. 2010. "The art of compromise: Constitution-making in Namibia". In Bösl et al. (2010:145).
12 (ibid.).
13 *The State v Glaco*, *Immigration Selection Board v Frank*, and *The Ovaherero Claim for Compensation*.
14 Allott (1980, 1983); cited in Hinz, MO. 2010. "Justice: Beyond the limits of law and the Namibian Constitution". In Bösl et al. (2010:149–167).
15 Hinz (2010:149).
16 (ibid.:163).
17 (ibid.:165).

The next chapter is by Stefan Schulz, who discusses the concept of the *general freedom right* and the Namibian Constitution. He points out that the Namibian Constitution does not draw a clear distinction between *rights* and *freedoms*, but suggests that the distinction may lie in the extent to which the Constitution allows for derogation.[18] He posits that a general freedom right gives citizens the prerogative to choose, think and act for themselves – albeit within the ambits of the constitutional order.[19] He points out that the Constitution neither inhibits nor provides for general freedom rights, but suggests that the court's interpretation of the Bill of Rights in the *Frank* case[20] indicates that the Supreme Court has not made space for general freedom rights in the Namibian Constitution. Schulz convincingly examines general freedom rights from a historical and comparative perspective, and argues that general freedom rights can be protected under Article 7 of the Constitution, which guarantees the liberty of an individual.

In Lazarus Hangula's chapter on the constitutionality of Namibia's territorial integrity, he points out that the territorial space of Namibia is anchored on Article 1 of the Namibian Constitution. He points out various international boundary disputes between Namibia and its neighbours. Although the author clearly presents the importance of ascertaining Namibia's international boundaries, the chapter does not highlight any constitutional challenges that may arise from the uncertainty of these boundaries.

In discussing constitutional jurisprudence in Namibia since independence, George Coleman and Esi Schimming-Chase point out that the first Bill of Rights in Namibia was passed in 1985. Using decided cases prior to and after Independence, the authors illustrate that the Namibian judiciary often tried hard to ensure that these rights were protected. However, their decisions were sometimes reversed by the Appellate Courts in South Africa. Upon Namibia's Independence, the judiciary has relentlessly ensured that the Bill of Rights is protected. However, the authors observe that challenges still remain in the criminal justice system, particularly in the lower courts. They note that, for the principles in the Constitution to be complied with, it is important to adequately fund the criminal justice system and address the gaping shortage of skills.[21] They also suggest some challenges lie in the actual administration of justice, which is manifested in occasional difficulty in accessing the courts, unavailability of judges, and extreme delays in delivering judgments.[22]

18 Schulz, S. 2010. "In dubio pro libertate: The general freedom right and the Namibian Constitution". In Bösl et al. (2010:171).

19 (ibid.:172).

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

21 Coleman, G & E Schimming-Chase. 2010. "Constitutional jurisprudence in Namibia since Independence". In Bösl et al. (2010:206).

22 (ibid.:213).

Dianne Hubbard deals thoroughly with the question of equality in the Namibian Constitution. She highlights the existing shortcomings in the manner in which Article 10 has been applied by the judiciary. She notes that any Namibian case law that shows a discriminatory provision that derives its source from statutory law will remain in force until it is repealed, amended or declared unconstitutional by a court of law. On the other hand, discriminatory provisions that emanated from common law were automatically declared invalid from the date on which the Constitution became effective. She opines that legal certainty is breached where the effective invalidation date of a discriminatory provision differs according to the source of law in question. She also suggests that there are two constitutional interpretations to the equality jurisprudence in Namibia. She indicates that the choice of interpretation rests on whether the right in question is absolute or such that it requires a value judgment to give it specific meaning.[23] She questions the manner in which the courts have approached the interpretation of various equality rights that have been in dispute. She concludes by emphasising that Namibia's freedom can only be guaranteed if equality is evenly applied to both the majority and minority.

Francois-Xavier Bangamwabo examines constitutional supremacy in the context of the right of Parliament to contradict the decision of the Supreme Court via the provision of Article 81 of the Constitution. He suggests that, although Article 81 gives Parliament the power to contradict a Supreme Court decision, such contradiction can only be achieved through a constitutional amendment. He justifies his assertion through a purposive reading of the Constitution. This argument is valid in light of the doctrine of constitutional supremacy. If the Supreme Court reaches a decision on the extent to which a piece of legislation complies with the Constitution, such a decision cannot be contradicted by legislation. This is because the validity of any legislation in a constitutional democracy is tested by the Constitution. However, this argument might not suffice when the decision does not entail a constitutional issue.

Yvonne Dausab examines the application of international law in terms of Article 144 of the Constitution. Dausab suggests that, in view of Article 144, the only exception to the automatic application of international law in Namibia is when an international law rule contravenes the Constitution or where an Act of Parliament has expressly excluded the rule. She points out, however, that decided cases show that Namibian courts have not directly applied international law when it comes to human rights: they have instead used international law as an interpretative tool. She suggests that a declaratory order may be needed to offer guidance as regards the meaning and effect of Article 144.

23 Hubbard, D. 2010. "The paradigm of equality in the Namibian Constitution: Concept, contours and concerns". In Bösl et al. (2010:238).

Gerhard Tötemeyer examines democracy and the electoral process. He discusses various impediments that affect the smooth running of the electoral system and suggests that these impediments be rectified to ensure the efficacy of the democratic process. He also points out the uncertainty raised by Articles 29, 57 and 58 of the Constitution and its effect on the democratic and electoral processes.

In the chapter by Sam Amoo and Sidney Harring, Article 16 is examined in the light of intellectual property rights. They argue that Article 16 can be extended to protect intellectual property rights as an 'incorporeal right'. They suggest that a more robust framework is needed, however, in order to protect the intellectual property of poor and indigenous people in Namibia because the existing statutory laws cannot protect black property rights.

In the chapter by Fritz Nghiishililwa, he discusses the concept of *labour hire* in Namibia. He shows that, although labour hire was initially outlawed by the International Labour Organisation (ILO), subsequent events have led the ILO to remove the ban. Presently, the ILO has guidelines which regulate the conduct of those engaged in labour hire. Using the theory of necessity and reasonableness, he calls for the regulation of the practice of labour hire in Namibia.

Oliver Ruppel discusses environmental rights and justice. He points out that environmental rights provided for in the Constitution fall under principles of state policy and are, as such, not justiciable. He argues that environmental rights can instead be tied to some fundamental rights guaranteed in Chapter 3 of the Constitution. He draws a nexus between environmental rights and the right to life, human dignity, equality and freedom, culture, and property, as well as children's rights. He suggests that the Ombudsman could be used as a tool for protecting environmental rights and ensuring environmental justice. In light of Article 144, he suggests that judicial notice should be taken of environmental rights in international instruments which Namibia has ratified. The question that comes to mind in this regard is whether the courts are obliged to accord environmental rights the status of fundamental rights if international law says they should. This question is most likely to be answered in the negative because Article 144 is limited by constitutional and parliamentary authority. Thus, as long as environmental rights remain principles of state policy, they cannot be accorded the status of fundamental rights – irrespective of what international law dictates.

Section III is concluded by Sacky Shanghala, who discusses the objectives, motivations and implications of amendments to the Constitution. The author outlines the procedure for amending the Constitution and discusses the various amendments that have taken place in its 20-year history. In addition, the author raises questions about social issues in society which the Constitution has not addressed.

In general, the book makes for an interesting read. Most of the chapters are written in such a way that any literate person, irrespective of their background, can read and understand the legal principles discussed. Moreover, because the chapters are written in a narrative form, the book can serve as a good historical source for those who wish to dig more deeply into the origins of the Namibian Constitution. I recommend this book to anyone who enjoys reading about the world in general, and I earnestly look forward to the year 2020 when the Namibian Constitution will be 30 years old.

Customary law ascertained. Volume 1. The customary law of the Owambo, Kavango and Caprivi communities of Namibia; Manfred O Hinz (Ed.), assisted by Ndateelela E Namwoonde, Windhoek, Namibia Scientific Society in association with the Human Rights and Documentation Centre, Faculty of Law, University of Namibia, 2010, 566 pages[1]

Nico Horn*

I received the new book by Manfred Hinz with great interest. Not only did I work with the then Minister of Justice, Dr A Kawana, in a training programme for traditional authorities in the mid-2000s in preparation for the enactment of the Community Courts Act,[2], but I was also involved in the Ascertainment Project. As the former Director of the Human Rights and Documentation Centre (HRDC), I wrote the proposal for the donors.[3]

During the first part of the funded Ascertainment Project, a Swedish intern, Ms Linda Engvall, and I combined our efforts with Mr Steve Swartbooi in the south and Traditional Councillor Rudolph Hangoze in central Namibia, and conducted workshops on the Namibian Constitution and the ascertainment of customary law. When I left the HRDC in 2007, I played no further role in the Project.

It is too early to know how our efforts will fit into Hinz's ideological framework, since we did not work with the traditional authorities whose laws were used for the first volume. But I suspect that Prof. Hinz will categorise us as observers believing in the superiority of common law. It is not that we were right-wing ideologists, but we operated from the position of constitutional superiority and we attempted to guide the traditional communities into writing their then

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1 ISBN 978-99916-40-96-9 (Namibia), 978-3-941602-51-9 (Germany).

2 No. 10 of 2003.

3 I am in no way insinuating that I initiated the project. Hinz had already worked on similar projects with his organisation, the Centre for Applied Social Sciences, in the early 1990s and had compiled the self-stated Laws of Ondonga with traditional leader Peter Kalangula in the mid-1990s. The idea of approaching a donor through the HRDC came from Prof. Hinz, at the time a Director of the HRDC and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) Chair for Human Rights and Democracy.

unwritten laws down in a form that was in compliance with the Constitution of the Republic of Namibia.

Ms Engvall, with my consent, even drafted a pro forma indicating to the communities what should generally be included in an ascertained set of Constitution-friendly laws. By the time I left the HRDC, the groups we worked with had just started to file their written laws with us. Many of them followed our pro forma and excluded older laws that were explicitly against the principles of the Constitution. Hinz is at pains to make it clear that he and his colleague, Emilia Namwoonde, are external observers and not participants in the process of ascertaining customary law. The ascertainment is the work of the people who know the laws and they need to work without the interference of academics or bureaucrats. Consequently, the compilers/editors see ascertainment as an exercise by and for the people themselves. Those living under customary law are the ones who should benefit from its ascertainment.[4] Consequently, the laws are published both in the language of the traditional authority of the specific community concerned and in the official language, English.

Ascertainment, Hinz points out, is not *codification*. In his understanding, *codification* has all the elements of interference in the historical law-making process. For him, *codification* ends in an Act of Parliament: the legislator becomes the future arbiter of the development of customary law. If this were to happen, traditional authorities would lose the right to legislate for their communities – a right acknowledged by the Traditional Authorities Act, 2000.[5]

Hinz states that he is not aware of any codification of customary law in Africa. However, if we use a less restrictive definition for *codification* to signify written laws, including non-statutory laws such as the secondary legislation of local governments, then the written laws of traditional authorities may well be seen as codified customary law without parliamentary intervention. I will return to this issue later.

Hinz and Namwwonde collected laws from communities across northern Namibia. These included the Caprivian, Kavango and Owambo communities. All except two of the self-stated law documents are duly signed by an authoritative member of the traditional authority concerned.[6] Such documents serve not only as an authentication of their content, but also as permission

4 See his introduction entitled "The ascertainment of customary law: What is *ascertainment of customary law* and what is it for?", pp 3–11.

5 No. 25 of 2000, section 3(3)(c).

6 The Mafwe Traditional Authority did not cooperate at all. The editors used an old 1989 version of their laws and noted that they did not know if the laws had been updated since (see p 411). The Shambyu Traditional Authority also did not provide the editors with a signed consent to publish their laws (see p 340).

to the editors to publish the laws.[7] The book is, therefore, the first extensive project in Namibia to ascertain the laws of several traditional authorities and publish them in one volume.

There are some indications that the Owambo and Kavango traditional authorities are moving towards harmonising the customary laws of their respective communities. For example, four of the five traditional authorities in the Kavango Region presented a single set of ascertained laws, approved by all four of the authorities concerned.[8] It also seems as if several Owambo authorities came together to resolve the burning issue of inheritance rights of widows in 1993.[9] The fines for different crimes are all more or less the same amongst the Owambo authorities.

In the Caprivi communities, the traditional social and political differences are clearly demonstrated in the publication. Every presentation starts with a Profile of the community written and presented by the traditional authority concerned.[10] Most traditional authorities wrote a short history of their particular community. The *Mashi* Traditional Authority used it to highlight the age-old feud between the *Mafwe* (as the *Mashi* call themselves) and the *Masubia*.[11] They also criticise government policy and the ineffective national reconciliation policies. The *Mayeyi* refer to their 'colonisation' by the *Mafwe* in the 1700s in the same breath as the Western powers' later colonisation of the area that became known as the Caprivi Strip. They also mention 1992 as the time when they finally appointed their own Chief.[12]

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7 The issue of permission emanates from an event in the Caprivi referred to by Hinz (see p 11), where a traditional authority – possibly the Mafwe Traditional Authority – took offence when he quoted from the written laws at a workshop attended by that traditional authority and two others from the Caprivi. The written laws had been given to him by a previous chief. It is interesting, therefore, that the editors decided to publish a version of the Mafwe laws despite not having the community's consent or participation in the Project.

8 The HRDC did not get official approval from the traditional authorities to publish the laws due to a lack of time, but the editors were sufficiently convinced of the status of the laws to use them.

9 See p 42: "In accordance with the Traditional Law passed at the meeting of traditional leaders in Ongwediva on 25–26 May 1993, widows shall not be expelled from the homestead of their late husbands, and they shall not be asked to buy those homesteads". The wording seems to refer to several authorities coming together. While the quotation is part of the Laws of Ombadja, Footnote 2 on the same page notes that the minutes of the meeting were published in Traditional Authority of Ondonga. 1994. *The Laws of Ondonga* (Second Edition). Oniipa: Evangelical Lutheran Church in Namibia/ELCIN, pp 75ff.

10 For some reason, the Ondonga Traditional Authority did not present its own Profile.

11 See under the heading "Traditional conflicts" in the Profile, pp 433ff.

12 Profile, p 491.

The laws published in the book vary from the very sophisticated document of the Mashi Traditional Authority, carefully weighing every traditional practice and customary law against the Namibian Constitution, to a mere list of prices and offences, as delivered by the Mafwe Traditional Authority.

The drafters of the *Mashi* laws constantly measure the traditional laws against the Constitution and modern trends. The writers explain *polygamy* in the light of the needs of migrant workers and the fact that men need women to assist in the house and the field. The Traditional Authority nevertheless recommends monogamous marriages "because many Westernised countries regard this as norm under civil law, and because of the risk of HIV and AIDS".[13]

On the issue of inheritance, the authors are very traditional. "When a woman's husband dies, one of his brothers shall marry or take care of her".[14] The land is, however inherited by the deceased's sons. This traditional law is contradicted a few paragraphs later under the heading "Protection of widows". With reference to the Communal Land Reform Act, 2002,[15] the *Mashi* drafters conclude that the "largest share of the deceased's property shall be given to her [the widow] because she is the custodian of the children".[16]

The drafters of the *Mashi* laws are obviously engaged in their own debate on the development of customary law in the modern world. The struggle of maintaining customary law as a legal system while adhering to the expectations of a constitutional democracy and developments in the modern world reflects another battle: that between an idyllic world where the Seventh Day Adventist Church is the official religion of the Mafwe,[17] where the Bible commands that women are never equal to men (1 Timothy 2:11–12, and Ephesians 5:22–25),[18] and where the ancestors share the wisdom and secrets of the tribe with the 'godlike' chief at night,[19] and the world of the 21st century, where the Constitution commands gender equality and equal treatment of different religious beliefs – and even atheism. The modern world and the attractiveness of Western legal systems exert a strong influence, and the Mashi Traditional Authority seems to have bowed out of polygamy because of these pressures.

Reading the – in a legal sense – more sophisticated laws, it seems as if the Mashi Traditional Authority and most Owambo Traditional Authorities either used a template or had access to a legal practitioner or a law student. Some

13 "Number of wives", p 447.
14 "Inheritance", p 446.
15 No. 5 of 2002.
16 p 447.
17 "Denominations of the *Mafwe* area", p 432.
18 "Gender equality", p 452.
19 Pp 463ff.

Traditional Authorities even quote Article 66 of the Constitution as a justification for measuring their own laws against it.

However, there are also several cases where customary laws contravene the Constitution. The Kavango Traditional Authorities, the Mafwe Traditional Authority and the Masubia Traditional Authority[20] all apply corporal punishment despite the judgment in *Ex Parte Attorney-General, Namibia: In Re Corporal Punishment by Organs of State.*[21] Several authorities have Sabbath laws. In fact, the Mashi Traditional Authority even chose the Seventh Day Adventist Church to be their rightful denomination.[22] Although polygamy in customary law is possibly not against the law, Namibia ratified the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[23] which encourages monogamous marriages. Yet, among both the Kavango and the Caprivi communities, polygamy seems to be the prominent form of marriage for men, while polyandry is generally prohibited. The list goes on.

Hinz hopes that the written laws will be only one of many sources of customary law.[24] However, Hinz and Namwoonde's book can easily become the codified law for those traditional authorities who have allowed the HRDC to publish their customary law. The amended Laws of Ondonga, for example, which date back to 1993, are a good example of how the ascertainment of law takes the form of codified law. Thus, while Hinz and Namwoonde state that the New Laws of Ondonga are not a codification, the New Laws do in fact replace previous laws, i.e. the Old Laws of Ondonga of 1989. The editors also do not tell us how the Old Laws came to be in written form, but publish them as a clarification of where changes can be detected in the New Laws. It clearly points to the importance and significant role of written laws vis-à-vis the living oral tradition, which is not even mentioned. Furthermore, the development of the written version of the Ondonga customary law – with the dates on which the King's Council approved the changes – are reprinted in *Customary law ascertained* from an earlier publication.[25] If *codification* means that the traditional authority hands over its power to the national legislator, this process of writing down the Ondonga laws in 1989, to the changes of 1993 and then the work of Hinz and Namwoonde is not codification. However, the New Laws

20 See pp 380, 418, 420 and 484. Firstly, the *Mafwe* laws predate the Namibian Constitution, and, secondly, their publication was not authorised by the Mafwe Traditional Authority. It is nevertheless interesting to notice that even beating one's wife is only prohibited when the whipping is applied "without [her] being guilty" (p 418).

21 1991 (3) SA 76 (NMS).

22 p 432.

23 Article 6(c): "[M]onogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected".

24 pp 7–8.

25 Traditional Authority of Ondonga (1994).

clearly replaced older written laws, and gained general acceptance. If the New Laws of Ondonga changed old written laws, it seems logical to accept that the New Laws also replaced older unwritten laws. Why make a difference between old and new laws if the differentiation process is not a codification? Even Hinz does not call it "The Written Laws" or "Part of the Laws": in 1993, he and co-compiler Kaulunga called it *The Laws of Ondonga*.

If some of the laws of the traditional authorities whose customary laws were published by the editors were not included in the compilation, it would be interesting to know why. Is it because they form part of the "holy covenant and traditional secrets"?[26] If so, these metaphysical experiences and rules can hardly be seen as 'laws' in the modern sense of the word. And if these secrets are only revealed to a small elite,[27] they can only be construed as binding laws once the chief or his council or another authoritative body representing the traditional community makes them known to the people. Thus, if the living unwritten laws are anything else, one can ask why the traditional authorities might have wanted to keep them out of the ascertained laws.

We already know that unconstitutional customary law is not part of the Namibian legal structure.[28] It is doubtful that the unwritten customary laws will pass the constitutionality test in future. And if we are going to live with both written and unwritten laws, can the written laws be changed by unwritten laws? The process described by Hinz in respect of the changes in the 1989 laws of Ondonga indicate that written laws can only be changed by new written laws approved by the King and/or the King's Council. Will the same rules apply to oral laws?

We have learned from Derrida[29] and the deconstructionists that words are not self-sufficiently meaningful, but only meaningful within the contexts that they are used. As part of the development of customary law in Namibia, there does not seem to be a difference between *ascertainment* and *codification*: both will eventually lead to a fixed written customary law.

If the ascertained laws are going to play a role in the new Community Courts under the Community Courts Act, 2003,[30] the process of ascertaining

26 See pp 463ff on the secrets of the Mashi Traditional Authority.

27 See p 463.

28 See Article 66 of the Constitution. See also *Myburgh v Commercial Bank of Namibia* 1999 NR 287 (HC) 1999 and *Myburgh v Commercial Bank of Namibia*, unreported case of the Supreme Court of Namibia, Coram Strydom CJ, O'Linn AJA and Manyarara AJA; CA, SA 2/00 of 2000, delivered on 8 December 2000.

29 See Derrida, J. 1973. *Speech and phenomena*. Translation by DB Allison. Evanston: Northwestern University Press. Originally published in French in 1967 under the title *La Voix et le Phénomène,* Paris: Presses Universitaires de France.

30 No. 10 of 2003. The Act has been passed, and is only now in the process of being effected.

customary law is unavoidable. A new set of laws at least codifies law of the aspects dealt with in such courts. In our stare decisis common law system, the Magistrates' Courts, the High Court and eventually the Supreme Court will, in all possibility, use this published volume as the primary source of customary law in Namibia – especially since the appeals from the Community Courts lie with the Magistrate's Court. Most of the magistrates are not experts in customary law; and, in terms of the general rules of interpretation, the courts will always give preference to written laws where there is a conflict between written and unwritten versions of legislation – particularly since some traditional authorities still see the unwritten laws as mystical secrets.

The *Mashi* laws determine that the Chief is "simultaneously legislator, ruler, judge, preserver of welfare, distribution of gifts, war leader and priest to his people. He has been elevated to an almost godlike status".[31] The Chief shares the secrets of the tribe with his confidants is secret meetings. One can expect that magistrates with little knowledge of customary law will use the ascertained laws of the book as a primary source, rather to go into the unwritten secrets of the tribe.

If customary law is going to become part of the mainstream as envisaged by the Community Courts Act, the Traditional Authorities will also have to deal with the fact that only those customary laws that are in harmony with the Namibian Constitution will survive under the new constitutional dispensation. The Mashi Traditional Authority and the Owambo Traditional Authorities began by amending their inheritance laws, for example, and this process will go on. If the Traditional Authorities resist bringing their laws in line with the Constitution, the courts will take the lead, as Hinz suggests.[32]

Customary law ascertained will undoubtedly open the debate on the desirability of ascertainment if it leads to a 'playing for the pavilion' approach, where the living customary law has to bow before formal constitutional principles. Those who believe that customary law is a spontaneous, organic process that is best left as an oral tradition will never be happy with any ascertainment project. However, despite the hopes of the editors that the book will neither be seen as codification nor as the only source of customary law, my guess is that the book will contribute to the inevitable route to written, codified customary law – albeit not necessarily codified by an Act of Parliament. Even if Hinz gets his wish and the courts and legal fraternity do not treat this source as the only source of traditional law or as a codified law book, it will nevertheless become a major and important source of customary law.

As a last word, there is also the old autrefois issue. It is clear that many traditional authorities, while having no problem in referring murder, assault and other violent crimes to the police and common law courts, are reluctant

31 "Holy covenant and traditional secrets", p 463.

32 See p 9.

to abandon their jurisdiction in rape cases. Until the promulgation of the Community Courts Act, customary law was a fringe set of rules policed by fringe communities outside the official legal system. Under that dispensation, the jurisdiction of both systems in rape cases could easily be maintained.

Today, traditional authorities try to gain some jurisdiction in the new Community Court dispensation by stating in their written laws what they will do if a magistrate refers a rape case back to them – which will possibly never happen. The real question is this: what will a common law court do if an accused has already been fined seven cows and has paid the fine under customary law in a Community Court, and then pleads autrefois convict when he appears in a Magistrate's Court or High Court? If one consults *Customary law ascertained* one thing is clear: the line between the jurisdictions of common law and customary law still needs to be drawn.

None of my comments above should be seen as criticism of a worthy project and an excellent book. It is meant to start the public discourse that Hinz himself envisaged.[33] *Customary law ascertained* is an invaluable contribution to the development of customary law in Namibia. It may well become the most quoted and debated of all Hinz's thought-provoking books in the development of a customary law jurisprudence.

33 See p 9.

APPENDIX 1

Legal firms in Namibia*

* Content reproduced from the website of the Law Society of Namibia at http://www.lawsocietynamibia.org/images/documents/firmlists/firm-list-2010-10.pdf; last accessed 4 January 2011.

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Tel 230263 • Fax 230223 • PO Box 714 • Windhoek

Firm Name	Postal Address	Legal Practitioner	Position at Firm	Physical Address	Work Phone	Work Fax
A Davids & Co.	PO Box 11 Otjiwarongo	Mr CJ De Koning	Partner	1 Dr Libertina Amathila Avenue	067-302720/304593	067-303687
		Mrs M Dreyer	Professional Assistant			
Agenbach Legal Practitioners & Notaries	PO Box 23370 Windhoek	Ms I Agenbach (vd Westhuizen)	Partner	1st Floor, Eluwa Building Independence Avenue	061-239341	061-239340
Ahrens & Associates	PO Box 1856 Swakopmund	Mr WP Ahrens	Partner	Shop No.1 An Der Waterkant Building, No.15 Tobias Hainyeko Street	064-404062	064-405540
Andreas Vaatz & Partners	PO Box 23019 Windhoek	Mr A Vaatz	Partner	66 Bismarck Street	061-225575	061-234758
		Ms S Cagnetta	Professional Assistant			
		Ms C Williams	Professional Assistant			
André Louw & Co.	PO Box 21707 Windhoek	Mr AP Louw	Partner	3 Liszt Street	061-224616/7	061-235058
Bazuin Inc.	PO Box 11488 Klein Windhoek	Mrs J Bazuin	Partner	No.7 Hugo Hahn Street, Klein Windhoek	061-210902	061-210673
BD Basson Inc.	PO Box 50088 Bachbrecht Windhoek	Mr BD Basson	Director	No.4 Johan Albrecht street	061-386600/1	061-307866
		Mr TN Davies	Professional Assistant			

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Firm Name	Postal Address	Legal Practitioner	Position at Firm	Physical Address	Work Phone	Work Fax
BD Kauta Attorneys Inc.	PO Box 32096 Windhoek	Mr BD Kauta	Director	No.2 Courtyard, Arno Henker Haus, 65-73, Independence Avenue	061-402402	061-402403
Behrens & Pfeiffer	PO Box 97121 Windhoek	Mr RP Behrens	Partner	Suite 203, 2nd Floor, South Wing, Maerua Park, Centaurus Road	061-222050	061-220968
		Mr WH Pfeiffer	Partner			
Biermann Legal Practitioners	PO Box 40796 Windhoek	Mr T Biermann	Partner	1st Floor, 18 Independence Avenue, Paradigm Building	061-245005/6	061-245007
BN Venter Legal Practitioners	PO Box 1265 Gobabis	Mr BN Venter	Partner	23 Cuito Cuanavale Avenue	062-565226/7	062-565228
Charmaine Schultz & Co.	PO Box 23823 Windhoek	Ms CK Schultz	Partner	No. 9 Adler Street, Windhoek West	061-226652	061-226663
Chris Brandt Attorneys	PO Box 11292 Windhoek	Mr FC Brandt	Partner	29 Heinitzburg Street	061-225242	061-225188
		Mr H Stolze	Professional Assistant			
Chris Roets Attorneys	PO Box 109 Grootfontein	Mr C Roets	Partner	Erf 9, Hage Geingob Avenue	067-242137	088610011
		Mr W Janse Van Rensburg	Professional Assistant			

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Chris van Sittert	PO Box 52 Tsumeb	Mr WC Van Sittert	Partner	Cnr. Dr Sam Nujoma Drive & Reinhold Shilongo Street	067-221145	067-221471
CJ Le Roux & Associates	PO Box 632 Keetmanshoop	Mr CJ Le Roux	Partner	5th Avenue	063-224858	063-223853
CL de Jager & Van Rooyen	PO Box 224 Walvis Bay	Mr GT Van Rooyen Mr HJ Steyn	Partner Professional Assistant	192 Sam Nujoma Avenue	064-205831/2/3	064-205657
Conradie & Damaseb	PO Box 2607 Windhoek	Mr DH Conradie Ms L du Plessis Ms LT Van den Berg	Partner Professional Assistant Professional Assistant	1191 Nelson Mandela Avenue	061-224415	061-225720/ 222396
Conradie & Damaseb (branch office) xx	PO Box 275 Swakopmund	Mrs M Ovis	Professional Assistant	3 Dr Libertina Amathila Street	064-403943	064-403944
Cox & De Kock	PO Box 8 Karasburg	Ms T De Kock-Scheepers	Partner	Main Street	063-270010	063-270084
Cronjé & Co. Legal Practitioners	PO Box 18 Mariental	Mr CJ Cronjé Mr SC Garbers	Partner Consultant	No. 777, River Street	063-241182/3	063-241184
Danie Kock	PO Box 21528 Windhoek	Mr DR Kock	Partner	Atlas House Officio 20, c/o Sam Nujoma and Mandume Ndemufayo	061-240648	061-306744

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Firm Name	Postal Address	Legal Practitioner	Position at Firm	Physical Address	Work Phone	Work Fax
Danie Kotzé & Associates	PO Box 1232 Tsumeb	Mr D Kotzé	Partner	Erf 35, Maria Nehoya Street	067-221666/7	067-222713
DF Malherbe & Partners	PO Box 985 Walvis Bay	Mr DF Malherbe	Partner	171 Sam Nujoma Avenue	064-206708	064-206706
		Mr GL Van Wijk	Partner			
		Mr JP Van Zyl	Partner			
		Mr GN September	Partner			
DF Malherbe & Partners (Branch office) xx	PO Box 75 Swakopmund	Ms L Martins (Viviers)	Partner	2nd Floor, Stadtmitte Building Sam Nujoma Avenue	064-400100	064-400111
		Mr JG Van der Merwe	Partner			
		Ms M Robberts	Professional Assistant			
Diekmann Associates	PO Box 24217 Windhoek	Mr H Diekmann	Partner	162 Robert Mugabe Avenue	061-240607	061-240609
Dr Weder, Kauta & Hoveka Inc.	PO Box 864 Windhoek	Mr P Kauta	Director	WKH House, Ausspannplatz	061-275550	061-238802
		Mr T Kamuhanga	Director			
		Mr GJ Ligthelm	Director			
		Mr SF Maritz	Director			
		Mr AAJ Naude	Director			
		Mr CPJ Potgieter	Director			
		Mr A Slabber	Director			
		Mr A Swanepoel	Director			
		Mr EH Yssel	Director			
		Mrs V Hanongo-Haikali	Professional Assistant			
		Ms N Tjipitua	Professional Assistant			

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Du Toit Associates	PO Box 2004 Windhoek	Mr FV Du Toit	Partner	House Legis Officio, 15 Robert Mugabe Avenue	061-256252	061-256253
		Mrs M Du Toit	Professional Assistant			
		Ms C Spies	Professional Assistant			
Du Pisani Legal Practitioners	PO Box 23990 Windhoek	Mr LH du Pisani	Partner	Mellaw House, 67 John Meinert Street	061-381400	061-249366
		Mr W Bergh	Professional Assistant			
		Mrs Y Campbell	Professional Assistant			
		Mr L Mokhatu	Professional Assistant			
		Ms J Nghishekwa	Professional Assistant			
		Ms S Prollius	Professional Assistant			
Du Plessis Inc.	PO Box 81289 Olympia	Mr JNS Du Plessis	Director	C/o Merensky & Nachtigal streets	061-222771	061-222826
In association with Kirsten & Co. Inc.						
EK Kasuto Legal Practitioner	PO Box 30825 Windhoek	Mr EK Kasuto	Partner	10 Smit Street Pioneerspark	061-247184	061-241167
Ellis & Partners	PO Box 3300 Windhoek	Mr JJ Badenhorst	Partner	No. 8, Sinclair Street	061-242224	061-242226
		Mr AI Dos Santos	Partner			
		Mr P Johns	Professional Assistant			

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		Ms RAP Shilengudwa	Professional Assistant			
		Mr MG Erasmus	Consultant			
		Adv MD Strydom	Consultant			
Elmarie Thompson Inc.	PO Box 40387 Windhoek	Ms E Thompson	Director	3rd Floor, City Centre Building, Dr Frans Indongo Street	061-371580	061-371581
Engling, Stritter & Partners	PO Box 43 Windhoek	Mr C Bezuidenhout	Partner	12 Love Street	061-383300	061-233672
		Mr H-B Gerdes	Partner			
		Mr M Kutzner	Partner			
		Mr AM Stritter	Partner			
		Mr HW Stritter	Partner			
		Ms E Yssel	Partner			
		Mr C-H Scriba	Consultant			
Erasmus & Associates	PO Box 86477 Eros/Windhoek	Ms L Erasmus	Partner	362 Sam Nujoma Drive	061-244570	061-244972
		Mr P Erasmus	Partner			
Etzold - Duvenhage	PO Box 320 Windhoek	Mrs H Duvenhage	Partner	33 Feld Street	061-229337/8	061-229343
		Mr UM Etzold	Partner			
		Ms C Schickerling	Partner			
		Ms S !Nowases	Professional Assistant			
FA Pretorius & Co.	PO Box 31 Tsumeb	Mr FA Pretorius	Partner	Erf 4, Pretco Building, Suite 5, Jordaan Street	067-222008/9	067-222010

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Fisher, Quarmby & Pfeifer	PO Box 37 Windhoek	Mrs L Agnew-Clayton	Partner	1st Floor, Swabou Building Post Street Mall	061-233171/4	061-228286
		Mr FP Coetzee	Partner			
		Mr CJ Gouws	Partner			
		Mr AA Harmse	Partner			
		Mr GS McCulloch	Partner			
		Ms AJ van der Merwe	Partner			
		Mr EHW Pfeifer	Consultant			
Francois Erasmus & Partners	PO Box 6202 Windhoek	Mr FG Erasmus	Partner	No. 5 Conradie Street	061-388850	061-388888
		Mr P Botha	Professional Assistant			
		Ms M Opperman	Professional Assistant			
		Ms M Wessels	Professional Assistant			
Frieda Schultz Attorneys	PO Box 40167 Ausspannplatz	Mrs F Schulz	Partner	Survey Warehouse, suite 2, Seitz Street	061-308730	061-308743
Fouché - Van Vuuren Legal Practitioners	PO Box 2549 Walvis Bay	Ms L Fouché	Partner	11th Road, 5A	064-205552	064-220551
		Mrs N Van Vuuren (Lourens)	Partner			
GF Köpplinger Legal Practitioners	PO Box 40349 Windhoek	Mr GF Köpplinger	Partner	No.10 Jakaranda Street, Suiderhof	061-301149	061-301148
		Mr J Boltman	Partner			
		Mrs A Delport	Professional Assistant			

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		Mr M Nederlof	Professional Assistant			
Grobler & Co.	PO Box 23142 Windhoek	Adv ZJ Grobler	Partner	3 Liszt Street	061-230887	061-230582
Grové Legal Practitioners	PO Box 195 Walvis Bay	Mr P Grové	Partner	144 Hage Geingob Street	064-220886	088620831
Hansmann Legal Practitioners	PO Box 20368 Windhoek	Mr PJ Hansmann	Partner	97 Daan Bekker Street Olympia	0811273675	061-251144
Harmse Attorneys	PO Box 20149 Windhoek	Mr MD Harmse	Partner	No.3 Liszt Street	061-379200	061-379201
		Ms E Visser	Professional Assistant			
Harmse Legal Practitioners	PO Box 1478 Okahandja	Adv PJ Harmse	Partner	Erf 969 Martin Neib Avenue	062-501835	062-501855
HC Kinghorn	PO Box 2823 Swakopmund	Mr HC Kinghorn	Partner	The Court Yard Daniel Tjongarero Avenue	064-416160	064-416166
HD Bossau & Co.	PO Box 1975 Windhoek	Mr HD Bossau	Partner	15th Floor, Frans Indongo Gardens Dr Frans Indongo Street	061-370850	061-370855
		Ms B Blume	Partner			
		Ms S Neumbo	Professional Assistant			
		Mr P Swanepoel	Professional Assistant			

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Hengari, Kangueehi & Kavendjii Inc.	PO Box 98511 Windhoek	Mr UA Hengari	Director	9th floor, Channel Life Building, Post Street Mall	061-257351	061-257397
		Mr KNG Kangueehi	Director			
Branch office in Otjiwarongo xx		Mr LC Kavendjii	Director			
		Mr M Tjituri	Professional Assistant			
Hennie Barnard & Partners	PO Box 456 Windhoek	Mr H Barnard	Partner	29 Heinitzburg Street	061-250000	061-250001
Hohne & Co.	PO Box 90631 Klein Windhoek	Mr IvT Hohne	Partner	Unit 2, Sinclair Park, Sinclair Street, Klein Windhoek	061-308421	061-308422
Isaacks & Benz Inc.	PO Box 5420 Ausspannplatz Windhoek	Mr B Isaacks	Partner	Atlas House, Office No. 11 C/o Mandume Ndemufayo & Sam Nujoma Avenue	061-309087	061-309088
Isaacks & Benz Inc. (branch office) xx	PO Box 4953 Rehoboth	Mrs VT Benz	Partner	Rehoboth Properties, Office No.4	062-523337	062-523337
James Radloff	PO Box 6693 Windhoek	Mr JM Radloff	Partner	Unit 9, 32 Schanzen Road	061-224326	061-226563
Jan Greyling & Associates	Private Bag 5552 Oshakati	Mr JH Greyling	Partner	Erf 849 Robert Mugabe Street	065-221617	065-221619
Jan Olivier & Co.	PO Box 597 Walvis Bay	Mr JH Olivier	Partner	Lund Building 131 Sam Nujoma Avenue	064-207871/2	064-207873
		Mr P Strauss	Professional Assistant			

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Jan Olivier & Co. (branch office) xx	PO Box 2303 Swakopmund	Mr R Pohl	Professional Assistant	Office No.1, 1st floor, Café Treff Plaza, Sam Nujoma Avenue	064-400942	064-400960
JC van Wyk	PO Box 3273 Windhoek	Mr JC Van Wyk	Partner	18 Love Street	061-225184/ 225438	061-220435
Karuaihe Legal Practitioners	PO Box 25382	Mr MR Karuaihe	Partner	No. 67 Plato Street, Academia	061-306185	061-306186
Kempen & Maske	PO Box 55 Gobabis	Mr WH Kempen	Partner	40 Cuito Cuanavale Ave	062-562602	062-564401
		Mr W Maske	Partner			
Kinghorn Associates	PO Box 1455 Swakopmund	Mrs HE Ahrens	Partner	The Court Yard Daniel Tjongarero Avenue	064-405051	064-402683
		Mr PJ Burger	Partner			
		Mr PF Harriman	Partner			
		Ms J Vermaak	Professional Assistant			
Kinghorn Associates (branch office) xx	PO Box 1914 Walvisbay			122 Theo Ben Gurirab Street	064-203905	064-207585
Kirsten & Co. Inc.	PO Box 4189 Windhoek	Ms H Garbers-Kirsten	Partner	c/o Merensky & Nachtigal Street Snyman Circle	061-230691	061-232801
		Ms M Paschke	Partner			
Kishi Legal Practitioners	Private Bag 3725 Ongwediva	Ms F Kishi	Partner	Erf 912, Extension 2 Sam Nujoma Road Oshakati	065-220637	065-220638
		Ms II Mainga	Professional Assistant			

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Koep & Partners	PO Box 3516 Windhoek	Mr JA Agenbach	Partner	33 Schanzen Road	061-382300	061-382388
		Mr PF Koep	Partner			
		Ms B Loch	Partner			
		Mr RTD Mueller	Partner			
		Mr ID Titus	Partner			
		Ms B de Silva	Professional Assistant			
		Mr H Van den Berg	Professional Assistant			
		Mr S Vlieghe	Professional Assistant			
Koep & Partners (branch office) xx	PO Box 322 Swakopmund	Mr WC Kotze	Partner	6 Antonius Garten, c/o Hendrik Witbooi str & Theo-Ben Gurirab avenue	064-406320	064-406323
Krüger, Van Vuuren & Co.	PO Box 4326 Windhoek	Mr H Krüger	Partner	27 Van Rhyn Street	061-257047	061-257194
		Mr CJ Jansen van Vuuren	Partner			
		Ms T Pearson	Professional Assistant			
Branch Office in Katima Mulilo xx						
Kwala & Co.	PO Box 24350 Windhoek	Mr FM Kwala	Director	No.9, Cnr of Beethoven & Strauss Streets	061-385180	061-385181
Lentin, Botma & Van den Heever	PO Box 38 Keetmanshoop	Mr GSG Van den Heever	Partner	J&G Building Hample Plichta Street	063-223281/2	063-223793
		Mr P McNally	Partner			

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Louis La Grange Legal Practitioners	PO Box 1828 Keetmanshoop	Mr LF La Grange	Partner	Narubis, B Road	063-250724	063-250724
LorentzAngula Inc.	Private Bag 12007 Windhoek/ Ausspannplatz	Mr EHT Angula	Director	LA Chambers, Unit 4, Ausspannplaza Dr Agostinho Neto Street	061-379700	061-379701
		Ms EM Angula	Director			
		Mr M Böttger	Director			
		Ms S Hoffmann	Director			
		Mr R Philander	Director			
		Ms NPS Nambinga	Director			
		Mr AH Potgieter	Director			
		Mr HFE Ruppel	Director			
		Mr CHJ Visser	Director			
		Mr WD Wohlers	Director			
		Mr W Bodenstein	Professional Assistant			
		Ms R Chun	Professional Assistant			
		Ms K Klazen	Professional Assistant			
		Mr W Rossouw	Professional Assistant			
		Mr RM Rukoro	Professional Assistant			
		Ms E Tomas	Professional Assistant			
LorentzAngula Inc. (branch office)xx	PO Box 15638 Oshakati	Ms ETN Ndalulilwa	Professional Assistant	The Palm Complex, Suite 103 Cnr Main Road & Robert Mugabe street, Metropolitan Building	065-224242	065-220226
LorentzAngula Inc. (branch office) xx	PO Box 2934 Swakopmund	Ms B Greyvenstein	Director	Zi Wu Building, 10 Libertina Amadhila Avenue	064-415380	064-415381

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MB De Klerk & Associates	PO Box 90181 Windhoek	Mr MB De Klerk	Partner	Room 209, South Block C and Units 12 & 13 North block Centaurus Road, Maerua Park	061-271813	061-247020
		Mr S Horn	Partner			
Mbaeva & Associates	PO Box 866 Windhoek	Mr T Mbaeva	Partner	Suite 201, 2nd floor, Continental Building, Independence Avenue	061-254814	061-306382
Metcalfe Attorneys	PO Box 846 Walvis Bay	Mr R Metcalfe	Partner	127 Theo-Ben Gurirab Street	064-217150	064-217160
		Ms C Schroeder	Professional Assistant			
		Mr GH Olivier	Consultant			
Mugaviri Attorneys	Private Bag 5599 Oshakati	Ms G Mugaviri	Partner	Erf 1068 Oshakati East	065-224579	065-224581
Muluti & Partners	PO Box 98380 Windhoek	Mr PS Muluti	Partner	1st floor, Continental Building, 290 Independence Avenue	061-302118	061 - 302119
		Mr M Nyambe	Professional Assistant			
Murorua & Associates	PO Box 3920 Windhoek	Mr LH Murorua	Partner	Room 201, 2nd floor, Continental building, Independence Avenue	061-238286	061-238272
Nakamhela Attorneys	PO Box 5691 Windhoek	Mr U Nakamhela		Kessler Flats 6, Teinert Street	061-232155	061-232210
		Mr EL Haifidi	Partner			
		Mr T Nakamhela	Professional Assistant			

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Nambahu & Uanivi Attorneys	PO Box 98780 Pelican Square Windhoek	Mr CG Nambahu Mr V Uanivi	Partner Partner	Unit No.27 I, Old Power Station Cnr of Nobel & Armstrong Street, Southern Industrial	061-402455	061-221555 088633512
Neves Legal Practitioners	PO Box 23126 Windhoek	Mr JMB Neves Ms T Mbome	Partner Professional Assistant	89 Dr Frans Indongo Street	061-242842/3	061-242845
Nixon Marcus Public Law Office		Mr NN Marcus	Partner	15 Floor, Frans Indongo Gardens	061-220160	061-227654
Norman Tjombe Law Firm	PO Box 1148	Mr N Tjombe	Partner	The Village, 18 Lilliencron Street	061-308841	0886136789
Olivier's Law Office	PO Box 2606 Windhoek	Mr VMA Olivier	Partner	Office No M83,2nd floor, Maerua Mall	061-245130	061-245129
Patterson Petherbridge & Associates	PO Box 359 Rosh Pinah	Mr I Petherbridge	Partner	557 Yellow Fish Street Rosh Pinah	063-274017	063-274022

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Firm Name	Postal Address	Legal Practitioner	Position at Firm	Physical Address	Work Phone	Work Fax
PD Theron & Associates	PO Box 25077 Windhoek	Mr PD Theron	Partner	Bahnhof Investment Building 45 Bahnhof Street	061-254669	061-254672
		Mr H Von Wielligh	Professional Assistant			
		Mr D Bugan	Professional Assistant			
Petherbridge Law Chambers	PO Box 1991 Windhoek	Mrs M Petherbridge	Partner	No. 13 Feld Street	061-303490	061-303492
Pieter J de Beer Legal Practitioners	PO Box 6798 Windhoek	Mr PJ de Beer	Partner	25 Trift Street	061-305650	061-305651
		Mrs A Keulder	Professional Assistant			
R Olivier & Company	PO Box 2198 Windhoek	Mr A Olivier	Partner	Realmar Building 122 Robert Mugabe Avenue	061-225757/8/9	061-223934
		Mr R Olivier	Partner			
Rissik, Cox & Probart	PO Box 90 Keetmanshoop	Mr TW Probart	Partner	34 5th Avenue	063-222326 / 223277	063-223989
Rix & Company Legal Practitioners	PO Box 90316 Windhoek	Ms MD Rix	Partner	32 B Jan Brand Street, Avis	061-220826	061-257699
Sauls Metcalfe Attorneys	PO Box 90495 Windhoek	Adv D Sauls	Partner	Unit 1, Robert Mugabe Avenue	061-387100	061-387101
		Ms S Blaauw	Professional Assistant			
Shakumu & Associates	PO Box 3786 Ongwediva	Mr S-K Shakumu	Partner	812 Kwame Nkrumah Road, Oshakati East	065-222207	065-220337

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Firm Name	Postal Address	Legal Practitioner	Position at Firm	Physical Address	Work Phone	Work Fax
Shikongo Law Chambers	PO Box 96350 Windhoek	Mr EN Shikongo	Partner	4 Banting Street Windhoek West	061-254644	061-230448
Branch Office Ongwediva xx		Mr B Usiku	Partner			
		Ms JM Brown	Professional Assistant			
		Mr PS Elago	Professional Assistant			
		Ms P Kangueehi	Professional Assistant			
Shikongo Law Chambers (Branch office) xx		Mr A Thambapilai	Professional Assistant			
Shilunga Attorneys	PO Box 1023 Windhoek	Mr WD Shilunga	Partner	8th floor, Levinson Arcade, Capital Centre	061-308985	061-308987
Sisa Namandje & Co. Inc.	PO Box 4240 Windhoek	Mr S Namandje	Director	13 Pasteur Street	061-259848	061-259849
		Ms M Jankie-Shakwa	Director			
		Mr AEJ Kamanja	Director			
		Mr TM Nekongo	Director			
		Ms H Shilongo	Director			
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		Mr B Viljoen	Professional Assistant			

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		Ms S Bock	Partner			
Theunissen, Louw & Partners	PO Box 3110 Windhoek	Mr EPF Gous	Partner	Schützenhaus, 1 Schützenstrasse Cnr Schützen and Sinclair Streets	061-237856	061-228335
		Mr TJA Louw	Partner			
		Mr A Theunissen	Partner			
		Mr CJ Verwey	Partner			
		Ms KN Angula	Professional Assistant			
		Mr JJ Jacobs	Professional Assistant			
Titus Ipumbu Legal Practitioners	PO Box 25095 Windhoek	Mr T Ipumbu	Partner	194 Bahnhof Street	061-305692	061-305693
		Mr D Maree	Professional Assistant			
Tjitemisa & Associates	PO Box 848 Windhoek	Mr JN Tjitemisa	Partner	5 Webb Street, Windhoek North	061-224844	061-224850
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		Mr D Liswaniso	Professional Assistant			
Ugéne Thomas Legal Practitioners	PO Box 3110 Walvisbay	Mr U Thomas	Partner	Unit 13, 2nd floor, CLA Building, 84 Theo Ben Gurirab Street	064-205219	064-204498
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		Mr CJW van der Merwe	Partner			
Van der Merwe-Greeff Inc.	PO Box 2356 Windhoek			20 Bismarck Street	061-225497	061-228089
		Mr CW Rali	Director			
		Mr BJ Van der Merwe	Managing Director			
		Mr JS Steyn	Director			
		Ms INN Ashipala	Professional Assistant			
		Mr J Kaumbi	Professional Assistant			
		Ms M Hanekom	Professional Assistant			
		Mrs S Möller	Professional Assistant			
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Van der Westhuizen & Greeff	PO Box 47 Otjiwarongo	Mr CPD Bodenstein	Partner	20 A Hage Geingob Street	067-304156	067-302068
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Institution Name	Postal Address	Legal Practitioner	Physical Address	Work Phone	Work Fax
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Legal Aid	Private Bag 13370 Windhoek	Mrs P Daringo Mr H Ujaha	Justitia Building	061-2805281	061-230204
Office of the Attorney-General		Ms ME Visagie		061-2819111	061-229788
Office of the Government-Attorney	Private Bag 13189 Windhoek	Mrs C Machaka Ms V Halwoodi (Augustinus) Ms DV Brinkman Mr T Chibwana Mr MC Khupe Ms TMW Koita Mr LT Mayumbelo Mr J Ncube Mr M Ndlovu Mr WP Oosthuizen Ms C Potgieter			
Office of the Prosecutor-General	Private Bag 13191	Adv OM Imalwa Adv RL Gertze Adv HC January Adv TT July Adv A Lategan Mr OS Sibeya		061-374200	061-221127

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APPENDIX 2

Advocates in Namibia*

* Reproduced from the website of the Society of Advocates of Namibia at Namibia at http://www.namibianbar.org/members.htm; last accessed 4 January 2011.

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